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**(2019) 11 BOM CK 0007**

**In the Bombay High Court**

**Case No :** Commercial Arbitration Petition (L) No. 238 Of 2019

Maharashtra State Electricity Distribution Company Limited (Msedcl) APPELLANT

Vs

Godrej And Boyce Manufacturing Company RESPONDENT

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**Date of Decision :** 06-11-2019

**Acts Referred:**

Arbitration And Conciliation Act, 1996 — Section 2(1)(h), 4, 7, 11, 11(6), 31(6), 34  
Indian Partnership Act, 1932 — Section 1(6)(5)(b), 18, 19, 19(2), 19(2)(a), 22

**Citation :** (2019) 11 BOM CK 0007

**Hon'ble Judges :** R.D. Dhanuka, J

**Bench :** Single Bench

**Advocate :** Shiraz Rustomjee, Anoshak Daver, Zubin Morris, Kiran Gandhi, Aakash Kothari, Darius J. Khambata, Rohan Cama, Ankoosh Mehta, Dhvani Shah, Sanika Gokhale

**Final Decision :** Allowed

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**Judgement**

1. By this petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short "the Arbitration Act"), the petitioner has impugned the arbitral award dated 15th February 2019 and Minutes of Meeting dated 9th February 2019 thereby rejecting an interim application filed by the petitioner for an interim award under Section 31(6) of the Arbitration Act praying for rejection of reference filed by the respondent herein (original claimant). Some of the relevant facts for the purpose of deciding this petition are as under :-

2. On or about 10th September 2008, the petitioner had invited bids for various tenders on zone wise/circle wise basis for various works. Pursuant to the said invitation of the bid, the respondent as a lead partner in Joint Venture (JV) with Electropath Services (India) Private Limited submitted its offer along with the requisite supporting documentation on 20th October 2008. On 11th October 2008 and 4th July 2009, the respondent and the said Electropath Services (India) Private Limited entered into a Joint Venture Agreement on the terms and

conditions recorded therein. On 13th October 2008 and 19th July 2009, the respondent and the said Electropath Services (India) Private Limited executed Memorandum of Understandings (MOUs). The petitioner issued a Letter of Award in favour of the said JV in respect of various works. On 8th June 2009, the petitioner executed a Contract with the JV of the respondent and Electropath Services (India) Private Limited.

3. The dispute arose between the parties on 25th July 2017. The respondent invoked arbitration agreement. The respondent thereafter filed an arbitration application bearing No.13 of 2018 in this Court under Section 11(6) of the Arbitration Act inter alia praying for the appointment of an arbitrator. The said Electropath Services (India) Private Limited was not a party to the said arbitration application filed by the respondent on 28th December 2017. On 8th February 2018 and 23rd February 2018, the petitioner responded to the said notice invoking arbitration agreement by the respondent.

4. On 21st March 2018, the petitioner and the respondent executed a Joint Memo in 8 arbitration applications which were filed by the respondent for appointment of arbitrator. In the said Joint Memo, there was a reference to the notice invoking arbitration dated 21st September 2017 under those 8 tenders by the respondent. It was recorded that the said agreement shall be treated as an arbitration agreement under Section 7 of the Arbitration Act. The parties jointly agreed and consented to refer those disputes under 8 agreements to the arbitrator to be appointed. It is agreed that neither of the parties shall challenge the jurisdiction of the learned Tribunal on that ground at any future stage.

5. The said Joint Memo dated 21st March 2018 was tendered before this Court on 23rd March 2018 in the said Arbitration Application No.13 of 2018 and 7 other arbitration applications. This Court, by consent of the parties, appointed a Senior Advocate of this Court as a sole arbitrator to decide the dispute between the parties arising out of the contract dated 8th June 2009. This Court made it clear that all the contentions of the parties were kept open.

6. Pursuant to the appointment of the learned arbitrator by this Court, the respondent herein filed a Statement of Claim on 19th May 2018. The said statement of claim was filed only by the respondent without impleading the said Electropath Services (India) Private Limited. On 30th July 2018, the petitioner herein filed its Statement of Defence and counter claim before the learned arbitrator. On 16th October 2018, the respondent filed an application for amendment to the statement of claim. The said amendment was permitted by the learned arbitrator. On 26th November 2018, the petitioner filed an Additional Statement of Defence to the amended statement of claim. In paragraph 5 of the said Additional Statement of Defence, the petitioner raised an issue that except the contract no.T09 projects, rest of the contract agreements were issued to the JV of the respondent with the Electropath Services (India) Private Limited as a joint partner. The Letter of Award was allotted to the JV partners and the contract was also executed with the JV of the respondent and as a lead partner

with Electropath Services (India) Private Limited.

7. It was contended by the petitioner in the said paragraph that the claim was admittedly filed by the lead partner i.e. M/s.Godrej & Boyce Manufacturing Co. Ltd. and thus the said claim was liable to be dismissed with costs on the sole ground for non-joinder of parties i.e. Electropath Services (India) Private Limited. It was contended in the said paragraph that the reliefs claimed in the said statement of claim and amended statement of claim were not maintainable as the claims were not filed by the JV Company with whom the Letter of Award and the contract had been executed.

8. On 27th November 2018, the learned arbitrator in the Minutes of Meeting referred to the said issue of maintainability of the claim by the respondent raised in paragraph 5 of the Additional Statement of Defence and recorded that issue regarding the presence of the said Electropath Services (India) Private Limited will be considered after the respondent files replication to the Additional Statement of Defence. On 22nd December 2018, the respondent filed replication to the Additional Statement of Defence filed by the petitioner. On 2nd January 2019, the petitioner filed an application before the learned arbitrator under Section 31 (6) of the Arbitration Act inter alia praying for rejection of reference filed by the respondent on the ground that there was no privity of contract between the petitioner and the respondent and the respondent had no direct, legal interest to form the basis of any claim on the petitioner. The contract was awarded to the JV Electropath Services (India) Private Limited and thus only the said JV ought to have filed the claim, if any.

9. The said application was opposed by the respondent by filing a reply dated 14th January 2019. On 9th February 2019, the learned arbitrator in the Minutes of Meeting declared that the said application dated 2nd January 2019 filed by the petitioner under Section 31(6) of the Arbitration Act was dismissed for the reasons to be recorded separately. On 15th February 2019, the learned arbitrator recorded the reasons for rejection of the said application under Section 31(6) filed by the petitioner. Learned arbitrator held that he had jurisdiction to decide the dispute between the parties. Being aggrieved by the said order, the petitioner filed this petition under Section 34 of the Arbitration and Conciliation Act, 1996.

10. Mr.Rustomjee, learned senior counsel for the petitioner invited my attention to clauses 6.5 (b), 6.5 (h) and 6.5 (i) of Section 1 - Instructions to Bidders of the Maharashtra Infrastructure Plan, Phase-IIA which provided that the bids were to be submitted by a JV shall comply with the requirements mentioned therein. Learned senior counsel placed reliance on clause 1.1.2.3 of the General Conditions of Contract (GCC) which defines "Contractor" and would submit that the definition of Contractor clearly indicates that the joint venture of the respondent i.e. Electropath Services (India) Private Limited was the contractor within the meaning of clause 1.1.2.3 of the GCC.

11. Learned senior counsel placed reliance on clause 1.14 of Section 6 of the

GCC and would submit that even under the said clause, since the contractor was a joint venture of two persons, all such persons shall be jointly and severally liable to the employer for the fulfillment of the terms of the contract. It is provided under the said clause that such persons shall designate one of them to act as lead member with authority to bind the joint venture and each of its members. In any case, the composition or the constitution of the joint venture shall not be altered. He submits that though the respondent was appointed to act as a lead member with authority to bind the joint venture, the respondent alone could not have filed any statement of claim before the learned arbitrator. The respondent who claimed to act as a lead member under the said provision, could act as a joint venture and not act in individual capacity.

12. Learned senior counsel invited my attention to clause 20.4.1 of the GCC which provided for referring the dispute and differences to arbitration. He submits that even the said clause clearly refers to the contractor and not a lead member of the joint venture. The arbitration agreement could be invoked only by the contractor and not a lead member of the joint venture. It is submitted that the respondent along with the said Electropath Services (India) Private Limited had submitted a joint venture agreement in the format prescribed along with the agreement entered into between the parties duly signed by the respondent and also the said Electropath Services (India) Private Limited.

13. In the said joint venture agreement duly signed by the respondent and Electropath Services (India) Private Limited, it was provided that the respondent had submitted a joint venture proposal to the petitioner on behalf of the joint venture member as per enclosed power of attorney. The Member-in-charge was authorized to incur liabilities and receive instructions for and on behalf of the member. Payment shall be made exclusively to the Member-in-charge.

14. Learned senior counsel invited my attention to the Memorandum of Understanding dated 13th October 2008 between the respondent and the said Electropath Services (India) Private Limited. He submits that the said MOU was signed by the respondent as well as the Electropath Services (India) Private Limited. He also invited my attention to the Memorandum of Understanding dated 19th July 2009 between the the respondent and the said Electropath Services (India) Private Limited and more particularly clause 6 thereof which recorded the terms of payment agreed by and between the respondent and the said Electropath Services (India) Private Limited. He relied upon clause 3(a) of the MOU which provided for the scope of work of Electropath Services (India) Private Limited in respect of the work awarded to the JV by the petitioner.

15. It is submitted that the respondent and the said Electropath Services (India) Private Limited were the vital components of JV. The petitioner had not awarded any particular portion of the said contract to lead member or to the said Electropath Services (India) Private Limited but had awarded 'A' composite contract to the JV of the respondent and the said Electropath Services (India) Private Limited.

16. Learned senior counsel for the petitioner relied upon the terms and conditions of one of the contracts out of those 8 contracts awarded to the said JV including clause 9.2 thereof which provided the terms of payment to the Contractor. He also relied upon clause 14 which provided the terms of reference of dispute to arbitration. Parties to the said contract would mean the contractor and the employer i.e. the petitioner and the said JV of the respondent i.e. Electropath Services (India) Private Limited. The said contract was signed by both the partners of JV and the petitioner.

17. Learned senior counsel for the petitioner invited my attention to the correspondence exchanged between the respondent and the petitioner in respect of the appointment of an arbitrator. He submits that in the arbitration agreement forming part of the contract entered into between the parties, the dispute was to be referred to a named arbitrator. A separate arbitration agreement, however, was arrived at between the petitioner and the respondent under Section 7 of the Arbitration Act in the said Joint Memo. In the said joint memo which was in respect of appointment of arbitrator in respect of all 8 contracts, it was, however, provided that such joint reference would not be challenged by either party. It is submitted that all contentions of parties were kept open while appointing the learned arbitrator in those applications under Section 11(6) of the Arbitration Act. Learned senior counsel submitted that it was agreed by and between the parties that appointment of the learned arbitrator in replacement of designated arbitrator would not be challenged by either party.

18. Learned senior counsel submits that the petitioner has come to know that the said Electropath Services (India) Private Limited had already filed a suit against the respondent for various reliefs arising out of the same contract awarded to the said JV by the petitioner. He invited my attention to the averments made by the respondent in paragraphs 5, 8 and 259 of the statement of claim and would submit that the Joint Venture Agreement signed by the respondent and the Electropath Services (India) Private Limited does not prove that the claim on behalf of the JV could be filed by the respondent alone.

19. Learned senior counsel invited my attention to the affidavit-in-reply in this petition filed by the respondent and in particular paragraph 10 and would submit that the respondent has admitted in the affidavit-in-reply that in the present case, the respondent had sought reliefs in its individual capacity. The respondent was the lead partner of the JV and in any event two parties were operating together. It is further contended in the affidavit-in-reply that since the respondent was a party to the contracts, it was even otherwise entitled to maintain its independent claim against the petitioner. It is contended in the reply that the arbitration was only between the parties to the Joint Memorandum and those parties are the petitioner and the respondent alone, therefore, there was no question of any other party including Electropath Services (India) Private Limited being joined as a party to the arbitration. It is contended by the respondent that the claim made by the respondent is maintainable and cannot be

rejected on the ground of non-joinder of Electropath Services (India) Private Limited.

20. Learned senior counsel for the petitioner placed reliance on the following judgments:-

(i) Judgment of the Supreme Court in the case of New Horizons Limited & Anr. Vs. Union of India & Ors., (1995) 1 SCC 478 (paragraphs 24 to 26);

(ii) Judgment of the Supreme Court in the case of Gammon India Limited Vs. Commissioner of Customs, Mumbai, (2011) 12 SCC 499 (paragraphs 23 to 26 and 28 to 30);

(iii) Judgment of the Andhra Pradesh at Hyderabad in the case of GVPREL-MEE (J.V.), Hyderabad Vs. Government of A.P. & Anr., 2005 SCC OnLine AP 531 (Paragraphs 20, 22, 23 & 24);

(iv) Judgment of the Bombay High Court in the case of Larsen & Toubro Ltd. & Anr. Vs. Mumbai Metropolitan Regional, 2016 SCC OnLine Bom 13348 (Paragraphs 2, 3, 6, 7 to 10);

(v) Judgment of the Delhi High Court in the case of Automation Technologies (I) P. Ltd. Vs. Unitech Ltd. & Ors., 2008 SCC OnLine Del 315 (Paragraphs 6, 15 and 18);

(vi) Judgment of the Delhi High Court in the case of Geo Miller & Co. Pvt. Ltd. & Ors. Vs. Bihar Urban Infrastructure Development Corporation Limited & Ors., 2017 (1) ARBLR 245 (Delhi) - (paragraphs 5, 11, 15 to 19 and 21 to 25);

(vii) Judgment of the Supreme Court in the case of Associate Builders Vs. Delhi Development Authority, AIR 2015 SCC 620 (Paragraphs 27 to 34 and 36 to 38);

(viii) Judgment of Delhi High Court in the case of National Small Industries Corporation Limited Vs. Punjab Tin Printing & Metal Industries & Ors. decided on 12th September 1978 in I.A. No.152 of 1975 in Suit No.278 of 1973.

21. Learned senior counsel also invited my attention to the issues framed by this Court on 23rd October 2015 in Suit No.611 of 2013 filed by the respondent herein against the Electropath Services (India) Private Limited and issues framed by this Court against the respondent herein in the Counter Claim No.2 of 2015. He invited my attention to Issue No.7 in the counter claim which refers to the delay in completion of work amended to JV under Tender Nos.33,35, 91 and 92.

22. It is submitted by the learned senior counsel that under the Joint Venture Agreement, one party to such JV has to be identified who would deal with the petitioner for correspondence and few other purposes. It was not the case of the respondent that it was the case of a sub-contract between the partners of the JV. The bid was submitted by JV and not by the respondent alone. The JV itself was jointly and severally liable to the petitioner for the works performed by the JV. The said Electropath Services (India) Private Limited had to play substantial role

as is reflected in the MOU signed by and between the respondent and the said Electropath Services (India) Private Limited. The profit sharing of the Electropath Services (India) Private Limited was about 30% under the said MOU. The respondent had made claim not on behalf of the JV but had made in its individual capacity. He submits that in view of there being two partners of the JV who were the contractors, it is not open to any partner to make claim as an independent entity or in individual capacity.

23. It is submitted by the learned senior counsel that the learned arbitrator has ignored several judgments relied upon by the petitioner in the impugned order. The impugned order rendered by the learned arbitrator shows patent illegality. The view taken by the learned arbitrator is an impossible view. The claim made by the respondent in its individual capacity is not maintainable and this issue goes to the root of the matter. The claims made by the respondent are outside the contract awarded to the JV. There was no privity of contract between the petitioner and the respondent in its individual capacity.

24. The eight references were consolidated by the parties with a view not to have conflicting findings and to save cost by referring the entire dispute to a sole arbitrator. The arbitration agreement entered into between the parties before this Court cannot be mixed up with the contract between the petitioner and the JV. It is submitted by the learned senior counsel that though the petitioner had also made a counter claim before the learned arbitrator against the respondent arising out of the same contract, the petitioner has now withdrawn the said counter claim.

25. It is submitted by the learned senior counsel that if the petitioner does not succeed in the arbitral proceedings against the respondent, whether the liabilities towards the JV, if any, can be discharged by the petitioner only by making payment to the respondent and in the event of the petitioner succeeding in the arbitral proceedings, whether such award would be binding on the said Electropath Services (India) Private Limited, these issues were required to be considered by this Court before passing any order in this petition.

26. Mr.Khambatta, learned senior counsel for the respondent with Mr.Cama, learned counsel invited my attention to the Joint Memo signed by the petitioner and the respondent and the order passed by this Court appointing the learned arbitrator by consent of parties recorded in the joint memo. The petitioner was fully aware of claims of the respondent. The petitioner also filed a counter claim against the respondent arising out of the same contract before the learned arbitrator. After filing of the arbitration petition filed by the petitioner, the petitioner has now withdrawn the counter claim filed before the learned arbitrator. It is no longer open to the petitioner to now claim that the claims made by the respondent were not maintainable before the learned arbitrator. Under the tender documents, the petitioner had given a format in which the contract documents as well as the Joint Venture Agreement were to be entered into.

27. It is submitted that the petitioner had agreed to deal only with the respondent under the contract awarded to the JV and was not concerned with the Electropath Services (India) Private Limited. The respondent thus invoked the arbitration agreement exclusively. The claims were made on behalf of the JV for the dues payable to the consortium. The dispute between the parties was identified in the notice invoking Arbitration Agreement dated 21st September 2017. He submits that in the notice invoking arbitration agreement issued by the respondent, there was reference to the contract between the petitioner and the JV. The said notice was issued on behalf of the JV but individually by one of the members of JV.

28. It is submitted that joint memo was also signed by the JV. This Court by an order dated 23rd March 2018 while appointing an arbitrator had made it clear that the appointment was made to decide the disputes between the parties arising out of the Contract dated 8th June 2009 which was a contract executed between the petitioner and the said JV. All contentions of the parties were left to be kept open. The Electropath Services (India) Private Limited was not individually involved at that stage when the arbitration agreement was invoked by the respondent to the knowledge of the petitioner.

29. On 3rd October 2019, when the matter was on board, Mr.Cama, learned counsel for the respondent had tendered an additional affidavit on behalf of the respondent and served a copy thereof upon the petitioner. In the said affidavit, the respondent contended that the claims made by the respondent in the arbitral proceedings before the learned arbitrator have been made on behalf of the JV between the respondent and Electropath Services (India) Private Limited. In paragraph 13 of the said affidavit, it is contended that the claim had been filed in the arbitration proceedings by the respondent alone was maintainable.

30. Mr.Cama, learned counsel for the respondent submits that the petitioner has not disputed that the petitioner had signed a Joint Memo with the respondent for referring the entire dispute under the contract awarded to the JV. No such plea was raised by the petitioner in the said application filed by the respondent under Section 11(6) of the Arbitration Act. The respondent had made the said claim before the learned arbitrator on behalf of the JV. No such plea was raised by the petitioner even in the statement of defence filed by the petitioner before the learned arbitrator. The petitioner itself had filed a counter claim against the respondent. In these circumstances, joinder of the said Electropath Services (India) Private Limited as a claimant jointly with the respondent herein before the learned arbitrator was not necessary.

31. Learned counsel for the respondent submits that it was not the case of the petitioner that the respondent is stranger to the contract. The contract entered into between the petitioner and the respondent would clearly indicate that payments were to be made by the petitioner to the respondent only. All RA bills were admittedly made and submitted by the respondent only and were paid by the petitioner only to the respondent. Under the Joint Venture Agreement, the

respondent alone was entitled to receive payment on behalf of the JV.

32. Learned counsel invited my attention to the reply of the petitioner to the notice invoking arbitration agreement and would submit that no such plea was raised by the petitioner that the said notice invoking arbitration agreement could not have been issued only by the respondent. It is submitted that the petitioner had also authorised one of the officers to execute the arbitration agreement/joint memo with the respondent and based on such authority, the said joint memo was executed on 18th March 2019 between the parties. In the said joint memo, it was clearly admitted that no party would challenge the jurisdiction of the learned arbitrator. He submits that the said arbitration agreement was entered into under Section 7 of the Arbitration Act.

33. It is submitted that only in the additional written statement filed by the petitioner, for the first time, the petitioner raised an issue of non-joinder of Electropath Services (India) Private Limited and that claim was not maintainable on the ground that the same was not made by the joint venture. The petitioner was fully aware as to who were the parties to the arbitration agreement and knew who would be the claimant in the arbitral proceedings and accordingly agreed to refer the dispute under the Joint Venture Agreement to arbitration. There was thus waiver on the part of the petitioner.

34. Mr.Cama, learned counsel for the respondent placed reliance on the averments made by his client in the statement of claim and more particularly paragraphs 8, 15, 41, 52, 52, 61 to 63, 68, 112, 117 139, 141 & 248 to 250 and would submit that these paragraphs would clearly indicate that the respondent had filed claim on behalf of JV and that the respondent alone was entitled to receive payment in respect of the Joint Venture Agreement from the petitioner as a lead partner on behalf of JV. All claims were to be realised by the respondent from the petitioner as a lead member of JV. He relied upon the definition of "Contractor" under clause 1.1.2.3 of the GCC and would submit that the said definition would include joint venture of the respondent with the Electropath Services (India) Private Limited. He invited my attention to the prayers made in the statement of claim and would submit that the entire claim was in the nature of monetary relief made by the respondent.

35. Learned counsel for the respondent invited my attention to the Letter of Award issued by the petitioner and would submit that the Letter of Award was admittedly issued by the petitioner in the name of the respondent. The petitioner has considered the respondent herein as the contractor for all the purposes. No plea has been raised by the petitioner in the statement of defence as well as in the counter claim that the claims made by the respondent were not maintainable on behalf of JV.

36. It is submitted by the learned counsel that the respondent filed a replication to the additional written statement filed by the petitioner to the amended statement of claim. He submits that even in the said replication filed by the

respondent, the respondent after referring to paragraphs 12 to 23 thereof, had contended that the claims made by the respondent was on behalf of the JV and not in individual capacity. In paragraphs 24 and 25 of the said replication, the stand taken by the respondent that Electropath Services (India) Private Limited was not a necessary party to the statement of claim was to be read with the averments made in the statement of claim and not in isolation.

37. It is submitted that the assertion made by the respondent in the said replication to the amended statement of defence has to be understood in that context. He submits that it was not the case of the respondent that the claims were made by the respondent on individual basis. Learned counsel submits that it is an admitted position that till date, the said Electropath Services (India) Private Limited has not made any separate claims against the petitioner.

38. In so far as the issue whether the respondent could file any claim on behalf of JV at all, learned counsel placed reliance on paragraph 4 of the additional affidavit dated 1st October 2019 filed by the respondent and would submit that the said averments made in paragraph 4 was made in the same context as made in paragraph 11 of the affidavit-in-reply dated 15th June 2019 filed by the respondent.

39. At this stage, Mr.Khambatta, learned senior counsel for the respondent was permitted to continue the arguments on behalf of the respondent. Learned senior counsel invited my attention to the Joint Venture Agreement dated 11th October 2008 between the respondent and Electropath Services (India) Private Limited and in particular clauses 1, 4 and 5 and would submit that even in the said Joint Venture Agreement which was executed in the format provided by the petitioner, it was clearly provided that the respondent was a Member-in-charge of the JV. The respondent had been authorised to incur liabilities and receive instructions for and on behalf of the member. He submits that under the said Joint Venture Agreement, the respondent was liable to make payment to the said Electropath Services (India) Private Limited only upon receipt of the payment under the said Joint Venture Agreement to the petitioner in the ratio agreed upon by and between the respondent and the said Electropath Services (India) Private Limited. The said Electropath Services (India) Private Limited was not entitled to receive any payment directly from the petitioner under the said Joint Venture Agreement or Agreement entered into between the petitioner and the said JV. He submits that all correspondence between the petitioner and JV were addressed by the respondent on behalf of the JV. The dispute resolution proceedings between the petitioner and the JV are also thus rightly filed by the respondent.

40. Learned senior counsel placed reliance on the judgment of this Court in the case of Judgment of this Court in the case of Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd., (2002) 6 Bom CR 657 and in particular paragraphs 8 to 12 and would submit that the facts before this Court in the said judgment were identical to the facts of this case. In that case also, the entire payment under the Joint Venture Agreement was to be made to the respondent only by the

petitioner. This Court in the said judgment had rightly not interfered with the arbitral award.

41. Learned senior counsel for the respondent has strongly placed reliance on Judgment of the Delhi High Court in the case of Power Grid Corporation of India Ltd. Vs. Siemens Limited, 2013 (134) DRJ 606 and in particular paragraphs 2, 23, 29, 32 to 37 and would submit that in the similar facts at hand, the Delhi High Court considered that though the contract was executed with the JV, the lead partner had all throughout represented the JV and thus once the power to receive payments and to "execute the contract for and on behalf of the JV" was given to the lead partner, those words must be held to be wide enough to include the power to bring forth an action on behalf of the JV to recover amounts due to the JV.

42. Learned senior counsel strongly placed reliance on the power of attorney executed by the said Electropath Services (India) Private Limited in favour of the respondent and would submit that the right to receive payment and to receive all instructions and to represent the JV as a lead partner under the said contract entered into between the petitioner and the JV would include the right to recover amount due to the JV and to initiate any proceedings including the arbitral proceedings for effecting the recovery of the amount payable to the JV.

43. Learned senior counsel for the respondent relied upon Exhibits 'A' and 'B' to the affidavit-in-reply filed by the respondent and would submit that most of the completion certificates had been issued by the petitioner in the name of the respondent under the said contract executed by the petitioner in favour of the JV. All correspondence relating to the formation of dispute resolution committee were also exchanged by the respondent on behalf of the JV.

44. Learned senior counsel for the respondent also invited my attention to Sections 18 and 19 of the Indian Partnership Act, 1932. He submits that the respondent does not dispute that the provisions of Indian Partnership Act, 1932 would apply even in the case of JV or at least principle of Section 19 of the said Act would apply. He submits that in this case, the respondent has been relying upon the expressed authority given to the respondent by the said Electropath Services (India) Private Limited to receive all payments and to receive instructions which would include the power and authority to refer the dispute to arbitration.

45. Learned senior counsel distinguishes the judgment of the Delhi High Court in the case of National Small Industries Corporation Limited (supra) on the ground that the facts before the Delhi High Court were totally different. He relied upon paragraph 8 of the said judgment in support of this submission.

46. Learned senior counsel distinguishes the judgment of this Court in the case of Larsen & Toubro Ltd. & Anr. (supra) on the ground that in that case, the contract considered by this Court did not have any clause that the payments were to be made to a lead member of the JV exclusively. He submits that in the

matter before this Court, both the members had filed claim. In this case, no separate claim has been filed by the said Electropath Services (India) Private Limited arising out of the said contract. Learned senior counsel, on instructions, states that his client is ready and willing to file an indemnity thereby indemnifying the petitioner if any claim is made by the said Electropath Services (India) Private Limited against the petitioner in respect of the claims or dispute arising under the said contracts entered into between the petitioner and the JV.

47. Learned senior counsel distinguishes the judgment of the Delhi High Court in the case of Geo Miller & Co. Pvt. Ltd. & Ors. (supra). He invited my attention to paragraph 5 of the said judgment and would submit that the Delhi High Court had considered a Special Purpose Vehicle (SPV) constituted by the joint venture. He invited my attention to paragraph 19 and 20 of the said judgment and submits that those paragraphs would clearly support the case of the respondent and not the petitioner.

48. Learned senior counsel submits that in so far as the judgment of the Andhra Pradesh at Hyderabad in the case of GVPREL-MEE (J.V.), Hyderabad (supra) is concerned, proposition of law laid down in the said judgment are not disputed. However, the facts before the Andhra Pradesh High Court in the said judgment being different would not advance the case of the petitioner.

49. Mr. Rustomjee, learned senior counsel for the petitioner in rejoinder invited my attention to the joint memo signed by the parties which was tendered before this Court in the arbitration application filed under section 11 of the Arbitration Act for seeking appointment of the learned arbitrator and would submit that the purpose of the said joint memo was to consolidate the references which were to be referred to arbitration by a common order. The intention of the parties was not to replace or substitute the arbitration agreement which was forming part of the agreement entered into between the petitioner and the joint venture of the respondent and Electropath Services (India) Private Limited. He submits that in the statement of claim filed by the respondent it was nowhere pleaded by the respondent that the said statement of claim was made on behalf of the joint venture of the respondent with Electropath Services (India) Private Limited.

50. Insofar as the reference to those eight contracts referred in the statement of claim filed by the respondent is concerned, learned senior counsel for the petitioner submits that the claim made by the respondent in its individual capacity could not be made outside of the contract entered into between the petitioner and the said joint venture. He submits that admittedly the suit between the said partner of the joint venture i.e. Electropath Services (India) Private Limited and the respondent arising out of the same contracts is pending in this Court. He submits that though a specific objection was raised by the petitioner that the claim was not made by the respondent on behalf of the joint venture, even at that stage the respondent did not plead that the statement of claim was filed on behalf of the joint venture but on the contrary it was pleaded that the said Electropath Services (India) Private Limited was not at all

concerned with the said statement of claim and that the said statement of claim was filed by the respondent in its individual capacity. He submits that this Court has to decide the matter on the basis of pleas raised by the parties before the Arbitral Tribunal. The said Electropath Services (India) Private Limited may dispute the authority of the respondent to represent the joint venture in the arbitral proceedings and even before this Court.

51. It is submitted by the learned senior counsel that though this Court had granted an opportunity to the respondent to obtain an affidavit from the said Electropath Services (India) Private Limited clarifying its stand that the said statement of claim was made on behalf of the joint venture and the said Electropath Services (India) Private Limited shall be bound by the out come of the arbitral proceedings filed by the respondent allegedly on behalf of the joint venture, no such affidavit was obtained by the respondent from the said Electropath Services (India) Private Limited before this Court.

52. Without prejudice to the submissions of the petitioner that the claim was not filed by the respondent on behalf of the joint venture, it is submitted by the learned senior counsel for the petitioner that under section 19(2) of the Indian Partnership Act, 1932, for filing the arbitration proceedings, an express authority from the other partners is mandatory. No such express authority has been obtained by the respondent from its partner Electropath Services (India) Private Limited before filing the statement of claim before the learned arbitrator or even before invoking the arbitration agreement. The statement of claim filed by the respondent does not refer to any pending litigation. He submits that there is difference between "receiving payment on behalf of some one" and "litigation filed on behalf of the joint venture". The consequences of both these expressions are different. He submits that since for filing the arbitration proceedings, an express authority of the other partner was required under section 19(2) of the Indian Partnership Act, 1932, the respondent cannot rely upon any implied authority to file the said statement of claim. Though it is the case of the respondent across the bar that there was express authority given by its partner Electropath Services (India) Private Limited to file the statement of claim on behalf of the joint venture, no such express authority has been produced before this Court.

53. Learned senior counsel placed reliance on Section 19(2)(a) of the Indian Partnership Act, 1932 and would submit that the implied authority of a partner, in the absence of any usage or custom of trade to the contrary, does not empower him to submit a dispute relating to the business of the firm to arbitration. There is no consent placed on record on behalf of other partner by the respondent before filing statement of claim. The litigation between the respondent and the said Electropath Services (India) Private Limited is pending today. There is no consent given by the Electropath Services (India) Private Limited allowing the respondent to invoke arbitration agreement or even today to prosecute the claim already filed by the respondent on behalf of the Electropath

Services (India) Private Limited.

54. It is submitted by the learned senior counsel that the objection was admittedly raised by the petitioner in the statement of defence filed to the amended statement of claim in respect of the maintainability of the claim on the ground that the claim was not filed on behalf of the joint venture. There was non-joinder of said Electropath Services (India) Private Limited as a party to the statement of claim. Learned senior counsel for the petitioner distinguished the judgment of this Court in case of Larsen & Toubro Limited (supra) and would submit that the claim in that matter was not an independent claim made by the claimant. The facts before this Court in the said judgment were different. He also invited my attention to paragraphs 29 and 32 of the said judgment and would submit that in that matter the claim was made on behalf of the joint venture. The facts before Delhi High Court in the said judgment were different. The Delhi High Court had not considered section 19(2) of the Indian Partnership Act, 1932 in the said judgment.

55. Learned senior counsel distinguished the judgment of the Delhi High Court in case of Pawan Grid Corporation of India Ltd. (supra) and would submit that the facts before the Delhi High Court in the said judgment were totally different.

56. Insofar as the submission of the learned senior counsel for the respondent that his client is ready and willing to file an indemnity to the effect that if any claims are received by the petitioner from the said Electropath Services (India) Private Limited in respect of the said contracts awarded by the petitioner in favour of the joint venture the respondent would indemnify the petitioner is concerned, it submitted that if the claim of the respondent is found to be filed on behalf of the joint venture and if the said claim is dismissed on merit, there are possibilities of the said Electropath Services (India) Private Limited making the claim against the petitioner separately. The petitioner is not expected to file a separate suit against the respondent in the event of the petitioner facing claim from the said Electropath Services (India) Private Limited arising out of the contract awarded by the petitioner in favour of the joint venture comprising of the respondent and the said Electropath Services (India) Private Limited for enforcement of the Indemnity bond.

57. In so far as the additional affidavit tendered across the bar by the respondent is concerned, Mr. Rustomjee, learned senior counsel for the petitioner submits that there was no authority granted to the respondent to make any claim on behalf of the JV under the Agreement entered into between the petitioner and the JV of the respondent and Electropath Services (India) Private Limited though the respondent could receive payment as a lead member of the JV on behalf of the JV. There is no provision either under the contract entered into between the parties or under the Joint Venture Agreement allowing the respondent to even file arbitral proceedings. He submits that joint venture is in nature of partnership and thus provisions of the Partnership Act, 1932 applies to the JV.

58. It is submitted that the respondent having contended that the said Electropath Services (India) Private Limited was not at all concerned with the claims made by the respondent and the claims were made in the individual capacity by the respondent, the respondent cannot be now allowed to resile from such plea in the additional affidavit affirmed on 1st October 2019 and to contend that the claims were made on behalf of the JV. He submits that admittedly the said application under Section 11 of the Arbitration Act was filed by the respondent only. The statement of claim was filed by the respondent alone without impleading the said Electropath Services (India) Private Limited. In the statement of claim, it was not pleaded by the respondent that the claim was made by the respondent on behalf of the JV. There was only a reference made to JV in paragraph 8 of the statement of claim. The respondent had also made a prayer for payment to be made to the respondent.

59. It is submitted that even in the replication filed by the respondent herein to the additional statement of defence filed by the petitioner, it was not the case of the respondent that the claim was made on behalf of the JV. On the contrary, in paragraphs 23 and 24 of the replication, it was specifically pleaded by the respondent that the issue in dispute in the present arbitration are solely in relation to the rights and obligations of the claimant and the respondent and do not concern with the Electropath Services (India) Private Limited. It is also contended that the claims of the respondent purely pertain to the petitioner's obligation under the contract which only relate to the respondent and did not concern with the Electropath Services (India) Private Limited and thus such claims were perfectly maintainable and could be effectually and completely adjudicated by the learned arbitrator without participation of the Electropath Services (India) Private Limited.

60. It is submitted that the stand now taken by the respondent in the additional affidavit dated 1st October 2019 is totally contrary to the pleadings before the learned arbitrator and in reply to this arbitration petition filed earlier.

#### REASONS AND CONCLUSION :

61. I shall first consider whether the petitioner had made out a case for passing an interim award under section 31(6) of the Arbitration Act in the application filed by the petitioner before the learned arbitrator or not. The question that arises for consideration of this Court is whether (i) the arbitration agreement was invoked by the respondent under the provisions of the agreement entered into between the petitioner and the joint venture or was a separate arbitration agreement individually between the petitioner and the respondent by virtue of executing the joint memo and (ii) Whether the statement of claim filed by the respondent in the arbitral proceedings was on behalf of the joint venture of the respondent with Electropath Services (India) Private Limited or was made by the respondent for itself and if it is held that it was made individually and not on behalf of the joint venture, whether such claim was maintainable or not.

62. It is not in dispute that the petitioner had invited bids in the month of July, 2009. Clause 3 of the Invitation of Bids provided that the bidding was open to individual bidders as well as for the joint ventures with maximum two partners (including the leading partner). Under the said document pre-qualification criteria was separately provided for individual bidders and for the joint venture. Clause 6.5(b) of Section 1 (Instructions to Bidders) provided that one of the partners shall be authorized to be in-charge (lead partner) and the said authorization shall be evidenced by submitting a power of authority signed by legally authorized signatories of both the partners. Clause 6.5(h) provided that if the bidder is successful, Form of Contract Agreement shall be signed so as to legally binding on both the partners. Clause 6.5(i) provided that the Lead Partners shall be authorized to incur liabilities, receive payments, and receive instructions for and on behalf of both partners of the joint venture and for the entire execution of the Contract. Clause 6.5(j) provided that both partners of the joint venture shall be jointly and severally liable for the execution of the Contract in accordance with the Contract terms. Clause 6.5(k) provided that a copy of the agreement entered into by the joint venture partners shall be submitted with the bid. The joint venture agreement should indicate precisely the responsibility of each partner of JV in respect of planning, design, supply of materials and equipment, key personnel, work execution and financing of the project.

63. Clause 1.1.2.3 of the General Conditions of Contract (Part - 1) defines "Contractor" which means the person whose Tender has been accepted by the Employer and the legal successors in title to such person, but not (except with the consent of the Employer) any assignee of such person. Clause 1.14 of the General Conditions of Contract provided that if the Contractor is a joint venture (consortium) of two persons, all such persons shall be jointly and severally liable to the Employer for fulfillment of the terms of the contract. Such persons shall designate one of them to act as leader with authority to bind the joint venture (or consortium) and each of its members. In any case the composition or the constitution of the joint venture (or consortium) shall not be altered. Clause 20.4.1 of the General Conditions of Contract recorded the arbitration agreement. Under clause 20.4.1(i) all disputes and differences between the parties described therein has to be referred to arbitration i.e. between the petitioner and the contractor within the time prescribed.

64. It is thus clear that the bids invited by the petitioner could be either by individuals or by joint venture. There was a separate criteria prescribed under the bid document for individuals and the joint venture. A separate joint venture was required to be entered into between the partners of the joint venture which was to be accompanied to the agreement to be entered into between the petitioner and the joint venture in the prescribed format. The contractor defined under the contract in reference to the joint venture reference was whose tender has been accepted by the employer. It is also clear that if the contract was joint venture of two persons, all such persons shall be jointly and severally liable to the petitioner for fulfillment of the terms of the contract.

65. The petitioner and the said joint venture of the respondent with the Electropath Services (India) Private Limited had entered into the contract agreement on 8th June, 2009. A perusal of the said Form of Contract Agreement clearly indicates that the respondent as well as Electropath Services (India) Private Limited jointly were described as the contractor in the said agreement entered into between the petitioner and the joint venture. No separate agreements between the petitioner on one hand with the respondent herein and the petitioner on the other hand with the said Electropath Services (India) Private Limited were entered into. Clause 9.1 of the said contract provided the terms of the payment required to be made on the basis of the progress of the work specifically set out in the said provision. Clause 9.2 provided that the rates payable by the contractor shall be calculated on the basis of post data given in bid document and quoted percentage 13.47 for estimated tender cost.

66. Clause 14 of the said contract provided for any dispute or claim arising of the said agreement shall be dealt with as per clause 20 of Volume - of the bidding document. Clause 17 of the said contract provided that all the disputes and differences between the parties under or in connection with the said contract or any breach thereof shall be sought to be referred to the Chief Engineer (Infrastructure Plan). If any such differences and disputes as between the parties cannot be settled through the Chief Engineer (Infrastructure Plan) within 180 days from such disputes, they shall be settled by arbitration which shall be conducted in accordance with the provisions of the Arbitration & Conciliation Act, 1996 and any statutory modification thereof from time to time. It is thus clear beyond reasonable doubt that the parties who could refer the dispute under such contract were the petitioner herein as the employer of one part and the respondent herein and Electropath Services (India) Private Limited jointly as the contractor of the other part. Letter of award issued by the petitioner indicates that the same was addressed to the respondent (lead partner) of JV with Electropath Services (India) Private Limited as joint partner.

67. On 11th October, 2008, the respondent and the said Electropath Services (India) Private Limited had entered into a joint venture agreement. The respondent was described as "member in-charge" under the said joint venture agreement. It was agreed by and between the respondent and the said Electropath Services (India) Private Limited that the respondent as member in-charge had undertaken to declare and affirm that it would be fully responsible for the successful performance of the contract and undertake to carry out all obligations of the member in-charge stipulated in the contract. If the employer suffers any loss or damages on account of any breach of the contract, the member and the member in-charge jointly and severally undertake to the consortium to indemnify or pay such loss or damages to such employer on its written demand without any demur, reservation or contention or prejudice in any manner whatsoever. It is further provided that it shall not be necessary or obligatory for the employer to proceed against the member before the proceedings against the member in-charge nor shall any extension of time or any

relaxation by the employer to the member in-charge prejudices any rights of the employer under the Deed of Joint Venture agreement against the member / member-charge.

68. Clause 4 of the joint venture agreement provided that the final liability of the members to the employer with respect to any of the claims arising out of the performance or non-performance of the obligations set out in the said joint venture agreement read in conjunction with the relevant provision of contract , shall however be limited to the extent of 115% value of the entire scope of work of the member as identified in the contract. This was however without prejudice to various financial liabilities and obligations of the member in-charge in terms of the contract and the said joint venture agreement. Clause 5 thereof provided that member in-charge has been authorized to incur the liabilities and receive instructions for and on behalf of the member. The payment shall be made exclusively to the member in-charge. Clause 8 of the said JV provided that the member and the member in-charge would be fully responsible for quality of all the equipment / component / manufactured / supplied and erected and if necessary, their repairs or replacement for successful completion / performance of " The Works" in terms of the contract. A full description of the respective roles, duties and responsibilities of each of the Members of the joint venture was annexed as Annexure "A" to the said JV agreement.

69. It is thus clear that in the said joint venture agreement also a member and the member in-charge i.e. the said Electropath Services (India) Private Limited and the member in-charge i.e. the respondent herein were fully responsible for the quality of all the equipments / components / manufactured / supplied and erected etc to the petitioner. The said joint venture agreement does not provide that the respondent alone was entitled to invoke arbitration agreement on behalf of the joint venture or to make any other claim on behalf of the joint venture upon the petitioner in any Court of law.

70. On 13th October, 2008 the respondent entered into a Memorandum of Understanding with Electropath Services (India) Private Limited and the respondent. Clause 5 of the said Memorandum of Understanding provided that as per the tender terms of the contract, the respondent will get 90% payment against commissioning (section wise) and remaining 10% against handing over the site and getting final completion certificate by the petitioner. Clause 6 of the said Memorandum of Understanding provided that the respondent will receive all payments from the petitioner as per the terms of the tender and would be given 75% of payment to the said Electropath Services (India) Private Limited for the bills raised by them as they completed the job section wise and getting measurement book recording done subject to the joint scrutiny of the work and verification of the bills. Remaining 25% of the bill would be released to the said Electropath Services (India) Private Limited by the respondent after getting the entire completion certificate from the petitioner for the said complete job work. The said payment would be released within one week time after receiving the

payment from the petitioner to the respondent for the said job.

71. On 19th July, 2009, the Memorandum of Understanding was executed between the respondent and the said Electropath Services (India) Private Limited. Under the said Memorandum of Understanding, the scope of work of the said Electropath Services (India) Private Limited was specific along with terms of the payment.

72. I shall now consider as to whether the arbitration agreement that was invoked by the respondent was invoked on behalf of the joint venture or individually. A perusal of the notices issued by the respondent invoking the arbitration agreement indicates that in the said notices addressed by the respondent for appointment of the arbitrator was issued by the respondent by referring to various contracts entered into between the petitioner and the joint venture. The petitioner contended that according to clause 20.4 of the contract relating to the arbitration, the respondent was required to demand in writing the reference to the arbitration within 180 days of their making claim before the Chief Engineer. Since the said condition itself was not complied with by the respondent, the petitioner refused to appoint any arbitrator. The respondent thereafter filed application for appointment of the arbitrator under section 11(6) of the Arbitration Act before this Court.

73. The petitioner and the respondent executed a joint memo on 21st March, 2018. A perusal of the said joint memo indicates that there was a reference to eight arbitration invocation notices dated 21st September, 2017 under eight tenders awarded to the joint venture. Paragraph 3 of the joint memo provided that in view of the identity of issues under those eight arbitration agreements, to save costs and to avoid possibility of contrary findings/views on identical issues, the petitioner and the respondent in the said application under Section 11 of the Arbitration Act agreed and mutually consented to have all the disputes forming the subject matter of eight agreements, be treated as single composite reference. The said agreement shall be treated as arbitration agreement under Section 7 of the Arbitration and Conciliation Act, 1996.

74. The parties also agreed and consented to refer those eight arbitration agreements to arbitrator so appointed by this court. It was further provided that neither party shall challenge the jurisdiction of the arbitral tribunal on that ground at any stage. The said joint memo was tendered before this court on 23rd March, 2018. This court took the said joint memo on record. By consent of parties, this court appointed a senior counsel of this court as a sole arbitrator to decide the disputes and differences between the parties arising out of the contract dated 8th June, 2009. It was made clear in the said order that all the contentions of the parties are kept open.

75. Pursuant to the said order dated 23rd March, 2018, the respondent filed statement of claim before the learned arbitrator. A perusal of the cause title of the said statement of claim indicates that the said statement of claim was not

filed as lead member on behalf of the joint venture. The said statement of claim also does not indicate that the respondent was authorized by the said Electropath Services (India) Private Limited to file the said statement of claim before the learned arbitrator on behalf of the joint venture comprising of the respondent and said Electropath Services (India) Private Limited. The said statement of claim also does not refer to any power of attorney granted to the respondent by the said Electropath Services (India) Private Limited for representing the said party as a partner of the joint venture and to file the said statement of claim on behalf of the joint venture comprising of the respondent and the said party.

76. In the said statement of claim however the respondent referred to various contracts awarded by the petitioner to the joint venture. In paragraph 255 of the statement of claim, it is averred by the respondent that upon the alleged failure of the petitioner to constitute any committee and resolve the dispute, the respondent referred the disputes to arbitration in respect of the contract under clause 17(b) of the Contract vide their arbitration notices on 21st September, 2017. It is thus clear that the notices for arbitration even according to the respondent were issued under clause 17(b) of the Contract individually for all tenders. It is not the case of the respondent in the said statement of claim that arbitration agreement recorded under clause 17(b) of the contract was substituted by a separate arbitration agreement allegedly recorded in the joint memo executed between the petitioner and the respondent.

77. Be that as it may, the said joint memo does not state that the respondent was granted any express authority by its partner Electropath Services (India) Private Limited to refer the disputes to arbitration under the said joint venture agreement or under the agreement entered into between the petitioner with the joint venture. Various claims made by the respondent under the said statement of claim were not relating to the payment allegedly due only to the respondent but it pertains to the joint venture of the respondent with Electropath Services (India) Private Limited and allegedly payable by the petitioner.

78. There is no dispute that the petitioner did not raise any objection in the statement of defence initially filed by the petitioner regarding the said statement of claim filed by the respondent without impleading the said Electropath Services (India) Private Limited. The respondent had applied for amendment to the said statement of claim thereafter. In the additional statement of defence dated 26th November, 2018 and more particularly in paragraph 5, it was contended by the petitioner that except contract no.T09 project, rest of the contract agreements were issued to the respondent with the joint venture, Electropath Services (India) Private Limited as joint partner. The letter of award was allotted to the joint venture parties. The contract agreement was also executed with the joint venture with the respondent as a lead partner.

79. It was contended by the petitioner that the claim had been admittedly filed by lead partner i.e. the respondent herein the same had not been signed and affirmed. The claim was bad for non joinder of parties i.e. Electropath Services

(India) Private Limited. It was contended that the reliefs claimed by the respondent herein in the statement of claim and the amended statement of claim was not maintainable as the claims have not been filed by the joint venture to whom letter of award was issued and contract had been awarded but has been filed by the lead partner i.e. M/s. Godrej & Boyee Mfg. Co. Ltd., Mumbai. It was also contended that the claims raised by the claimant at these belated stage was not maintainable as the claimants themselves have waived/modified terms of the contract by conduct.

80. In the arbitral meetings held on 27th November, 2018, the learned arbitrator noted in the minutes of meeting that in the additional statement of defence the petitioner herein had raised a plea in paragraph 5 thereof, that the Electropath Services (India) Private Limited was a joint partner with the respondent herein under all contracts except contract no.T09. The learned arbitrator recorded the contention of the learned counsel appearing for the petitioner that the said plea of the petitioner goes to the root of the matter and in the absence of Electropath Services (India) Private Limited, the claims made by the respondent herein could not be decided. The learned counsel requested to frame additional issue as regards the presence of said Electropath Services (India) Private Limited. The said contention of the petitioner was opposed by the learned counsel for the respondent herein. He submitted that the respondent would deal with the point by filing Replication and sought opportunity to file additional affidavit in lieu of examination-in-chief to explain his defence. The learned arbitrator accordingly directed that the additional issue which the petitioner wishes to raise regarding the presence of Electropath Services (India) Private Limited will be considered after the respondent herein would file Replication to the additional statement of defence.

81. The respondent thereafter filed Replication to the additional statement of defence filed by the petitioner on 22nd December, 2018. In paragraph 6 of the said Replication, it was submitted by the respondent that it had initiated arbitration in relation to each of the contracts vide its notices dated 21st September, 2017 to the petitioner. The respondent had specifically mentioned that the contract in relation to which the disputes had been awarded to the joint venture of the respondent and Electropath Services (India) Private Limited. The petitioner had never raised any objection at the stage of invoking arbitration agreement by the respondent or even by filing any reply to the arbitration application filed under Section 11 of the Arbitration Act by the respondent. In paragraph 7, the respondent referred to the joint memo and contended that even at that stage, the petitioner did not raise any such objection.

82. In paragraph 16 of the said replication, it was contended that the presence of Electropath Services (India) Private Limited was not necessary for the learned arbitrator to effectively and completely adjudicate upon settle all disputes between the parties. It was contended that the claims made by the respondent were maintainable and the objection of the petitioner on account of non joinder

of Electropath Services (India) Private Limited was liable to be dismissed in entirety. It was further contended that the petitioner had exclusively dealt with the respondent apropos all issues under the said contracts. The respondent was the lead partner and thus the petitioner had exclusively dealt with the respondent regarding all issues under the contracts.

83. It was contended by the respondent that the petitioner was required to make payments under the contracts directly and exclusively to the respondent only. The respondent as lead partner was exclusively entitled to receive payments and thereafter to make the said payments to Electropath Services (India) Private Limited. In paragraph 23 of the said Replication, it was submitted that the issues in dispute in the present arbitration are solely in relation to the rights and obligations of the respondent herein. The petitioner was remotely concerned with Electropath Services (India) Private Limited. The petitioner thereafter filed an application under Section 31(6) of the Arbitration Act on 2nd January, 2019 inter-alia praying for rejection of reference filed by the respondent on the ground that there was no privity of contract between the petitioner and the respondent and that the respondent has no locus and not a legal entity to base any claim against the petitioner. There was no legally recognizable claim of the respondent. It was also urged in the said application that the only joint venture member was entitled to file claim if any and not by the respondent exclusively.

84. In the response dated 14th January, 2019 filed by the respondent to the said application under section 31(6) of the Arbitration Act filed by the petitioner, it was urged by the respondent that to make a composite reference under eight contracts, the petitioner and the respondent jointly had filed memorandum before this Court which was signed by the petitioner and the respondent. Both the parties made a joint composite reference to the High Court of Bombay to appoint the learned arbitrator. The respondent also raised a plea of waiver against the petitioner under section 4 of the Arbitration Act. It was contended that the petitioner had waived those right to object on account of non-joinder of Electropath Services (India) Private Limited.

85. In paragraph 16 of the said affidavit filed by the respondent to the said application under section 31(6) of the Arbitration Act, without prejudice to the contention of the respondent, it was urged that the issue of non-joinder of any party was mix question of law and fact and the respondent ought not to be entitled to lead evidence on the same before adjudication of the issue as was rightly directed by the learned arbitrator by its order dated 14th December, 2018. It was further urged that to properly assess whether the claim could be raised solely by the respondent therein, the facts and circumstances surrounding the execution of the contracts as well as the division of the works between the respondent herein and the said Electropath Services (India) Private Limited to be analyzed.

86. In paragraph 18 of the said affidavit, the respondent contended that in absence of the respondent herein having led evidence on the said subject, the

said application under section 31(6) filed by the petitioner was not maintainable. It was urged that the respondent herein ought to be given an opportunity to examine the witnesses of the petitioner to prove the relationship between the parties pre-execution of the contract which would be crucial to determine the issue of non-joinder. It was also contended that the petitioner itself had filed its counter claim solely against the respondent. In paragraph 28, it was contended by the respondent herein that the petitioner had dealt with the respondent exclusively regarding all the issues under the contracts. The said Electropath Services (India) Private Limited was to be paid only after the respondent received the corresponding payment from the petitioner in relation with the section of work. The RA bills were raised by the respondent upon the petitioner. In the meeting held on 9th February, 2019, the learned arbitrator passed an order dismissing the said application under section 31(6) of the Arbitration Act for the reasons to be recorded separately. On 15th February, 2019, the learned arbitrator rejected the said application filed by the petitioner under section 31(6) of the Arbitration Act.

87. A perusal of the said impugned order dated 15th February, 2019 indicates that the learned arbitrator has held that the petitioner herein has not brought on record any document to show as to how the said Electropath Services (India) Private Limited had any claim or as to whether the claims of the said Electropath Services (India) Private Limited and the respondent herein did not satisfy through the said Electropath Services (India) Private Limited and that the respondent would not have any claim against the petitioner. It is not in dispute that the inter-se dispute between the respondent and the said Electropath Services (India) Private Limited are pending before this court in the suit and the counter claim filed by the respondent against the said Electropath Services (India) Private Limited and the counter claim filed by the said Electropath Services (India) Private Limited against the respondent herein arising out of the said contract.

88. The said suit was filed in the year 2013 much prior to the respondent even invoking arbitration agreement. The respondent did not disclose about pending dispute between the respondent and the said Electropath Services (India) Private Limited in the notice invoking arbitration agreement, in the application filed under section 11(6) of the Arbitration Act, in the statement of claim filed by the respondent before the learned arbitrator or in the subsequent proceedings. When these facts were brought on record by the petitioner herein, Mr.Khambata, learned senior counsel for the respondent did not dispute about the pendency of the suit filed by his client and the counter claim filed by the said Electropath Services (India) Private Limited pending in this Court which were filed much prior to the date of invocation of the arbitration agreement by the respondent. The said Electropath Services (India) Private Limited has not been impleaded as a party claimant along with the respondent or even as a proforma respondent in the arbitral proceedings. The petitioner was thus not required to prove whether there was a separate claim made by the said Electropath Services (India) Private

Limited upon the petitioner arising out of the same contract. Learned Senior Counsel for the respondent relied upon few documents from the said proceedings.

89. Learned arbitrator did not deal with most of the submissions made by the petitioner in the said impugned interim award dated 15th February, 2019. Learned arbitrator also referred to clause 3 of the joint memo which recorded that the said agreement shall be treated as an arbitration agreement under section 7 of the Arbitration Act. The respondent itself in the statement of claim had referred to arbitration agreement recorded in clause 17 of the agreement entered into between the petitioner and the joint venture. It was not the case of the respondent that the said agreement recorded in the said agreement between the petitioner and the joint venture was substituted by the agreement referred to in the joint memo. In my view, the reasons recorded by the learned arbitrator in paragraph 14 of the impugned award is contrary to the case pleaded by the respondent itself.

90. Learned arbitrator distinguished the judgment of the Delhi High Court relied upon by the learned senior counsel for the petitioner in case of Geo Miller & Co. Pvt. Ltd. (supra) on the ground that reliance placed on the said judgment was totally misplaced since the facts and circumstances of the case before the Delhi High Court in the said judgment were different. Similarly, the learned arbitrator also distinguished the judgment of this Court in case of Larsen & Toubro Ltd. & Anr. (supra) on the similar ground. Learned arbitrator in the impugned award has held that the present arbitration clause would be governed by the decision of Delhi High Court in case of Automation Technologies (I) Pvt. Ltd. (supra) and Oil & Natural Gas Corporation (supra) relied upon by the learned senior counsel for the respondent. I shall now deal with these four judgments which were relied upon by the parties respectively.

91. This Court in case of Larsen & Toubro & Anr. (supra) considered the arbitral award made by the learned arbitral tribunal holding that the claimant had to file claims before it in the name of consortium of L & T and Scmi Engg. Bhd., Malaysia and not as two separate claimants. In the said matter, an objection was raised by the opposite party that the statement of claim not having been filed by the consortium but independent statement of claims having been filed were not maintainable. On raising such objection by the respondent, finally statement of claim by the consortium came to be filed. Under the terms of the contract, the contractors were defined as consortium of L & T and Scmi Engg. Bhd. Malaysia. This Court also considered the fact that the terms and conditions of the contract between the consortium of the petitioner and the respondent therein did not provide for any independent claims to be made by the petitioner no.1 and the petitioner no.2 and thus there was no scope for the petitioner to contend that they have to be treated separate from the consortium.

92. In this case also the definition of the 'contractor' provided in the contract entered into between the petitioner and the joint venture clearly provided that the joint venture of the respondent and the said Electropath Services (India)

Private Limited were the 'contractor'. The contract did not permit any partner of the said joint venture to make any claim individually against the petitioner. Though the said judgment was clearly applicable to the facts of this case and was binding upon the learned arbitrator, he distinguished the judgment similicitor on the ground that the facts before this Court in the said judgment were different.

93. The Delhi High Court in case of Geo Miller & Co. Pvt . Ltd. (supra) relied upon by the learned senior counsel for the petitioner held that the arbitration clause which was the subject matter of the said matter envisaged the dispute only between the parties defined under section 2(1) (h) of the Arbitration Act i.e. the consortium and the employer. The Delhi High Court in the said judgment held that though the agreement was clear that the consortium would be represented by M/s.Gammon India Limited, through lead member of the consortium through its authorized signatory, the parties never intended that one of the members of the consortium could separately invoke the arbitration agreement. The Delhi High court distinguished its earlier judgment in case of Automation Technologies (I) Ltd. and held that the arbitration petition filed at the instance of Geo Miller alone was not maintainable. The said writ petition was accordingly dismissed. In my view, the judgment of the Delhi High Court in case of Geo Miller & Co. Pvt. Ltd. (supra) was clearly applicable to the facts of this case. Learned arbitrator could not have distinguished the said judgment similicitor on the ground that the facts and circumstances before the Delhi High Court in the said judgment were different.

94. Insofar as the judgment delivered by the Delhi High Court in case of Automation Technologies (I) Ltd. (supra) relied upon by the learned arbitrator while rejecting the application for interim award made by the petitioner is concerned, the petitioner and the respondent nos.3 to 8 in the said matter were collectively referred to as R.G. Group. The arbitration clause therein showed that there was no reference to any party at all. Instead reference was made therein only to "any dispute or difference arising out of or in connection with the agreement or interpretation thereof" that the judgment of the Delhi High Court held that neither the agreement nor the statute had placed any such embargo on the petitioner barring it from invoking the arbitration clause, without the prior consent from respondent nos.3 to 8. The said judgment in my view has been rightly distinguished in the later judgment of the Delhi High Court in case of Geo Miller & Co. Pvt. Ltd. (supra). The said judgment in my view was not even remotely applicable to the facts of this case and thus the learned arbitrator could not have rejected the application for interim award made by the petitioner by relying upon the said judgment. Reliance placed on the said judgment by the respondent and the learned arbitrator is totally misplaced.

95. Insofar as the judgment of this Court in case of Oil & Natural Gas Corporation (supra) relied upon by the learned senior counsel for the respondent and followed by the learned arbitrator is concerned, a perusal of the said judgment indicates that in the said judgment this Court considered the provisions of the

contract entered into between the employer and the joint venture therein providing that separate payments were required to be made by the employer to the partners of the joint venture. Learned arbitrator recorded the finding that there was no claim relating to any amount that was due and payable to one of the partner to the joint venture. The claim in other words was of the amount receivable exclusively by the respondent in respect of the supplies which were made solely by the respondent. The expression "supplier" in the said contract was to include the respondent as well as other partner of the joint venture individually or collectively. In these circumstances, the learned arbitrator in that matter held that the obligations of the two contracting members of the consortium were separate and identified separately.

96. In this case the learned arbitrator did not deal with in the impugned award any such issue. Even during the course of argument before this Court, the respondent did not urge in its submission that the respondent had made claim in the arbitral proceedings only to the extent, the respondent was entitled to recover under the contract entered into between the petitioner and the joint venture of the respondent and the said Electropath Services (India) Private Limited. On the contrary, it was the case of the respondent that the entire payment was to be recovered under the contract by the respondent alone and thereafter upon receipt of such payment, the respondent was to disburse part of the payment in accordance with the terms of the joint venture and the Memorandum of Understanding to the said Electropath Services (India) Private Limited.

97. In my view even otherwise this Court in the said judgment did not consider the effect of section 19(2)(a) of the Indian Partnership Act, 1932 and more particularly that in absence of any usage or custom of trade to the contrary, implied authority of a partner does not empower him to submit a dispute relating to the business of firm to arbitration. The judgment of this Court in case of Oil and Natural Gas Corporation (supra) is thus clearly distinguishable in the facts and circumstances of this case. Reliance placed by the respondent as well as by the learned arbitrator on the said judgment is totally misplaced.

98. Mr.Khambata, learned senior counsel for the respondent did not dispute that the provisions of the Indian Partnership Act, 1932 would apply to the joint venture agreement between the respondent and the said Electropath Services (India) Private Limited. The only argument advanced by the learned senior counsel is that the respondent had express authority from the said Electropath Services (India) Private Limited recorded in the joint venture agreement and the power of attorney executed by the said Electropath Services (India) Private Limited in favour of the respondent to file claim on behalf of joint venture. The emphasis is led on clause of the joint venture that the respondent alone would be entitled to incur the liability and to recover the dues of the joint venture from the petitioner which according to the learned senior counsel would include the right to invoke arbitration agreement and to file recovery proceedings for recovery of

the claims on behalf of the joint venture. The judgments of the Supreme Court in case of New Horizons Limited & Anr. (supra), in case of Gammon India Limited (supra) and the judgment of the Andhra Pradesh High Court in case of GVPREL-MEE (J.V.), Hyderabad (supra) would assist the case of the petitioner on the concept of the joint venture.

99. In my view there is no merit in the submission of Mr.Khambata, learned senior counsel for the respondent that the said Electropath Services (India) Private Limited was not a necessary party to the statement of claim on the ground that the said Electropath Services (India) Private Limited had allegedly given an express authority to the respondent to recover dues of the joint venture from the petitioner in the said agreement. Section 19 of the Indian Partnership Act, 1932 deals with the implied authority of the partner as an agent of the firm subject to the provisions of section 22. Section 19(2) of the Indian Partnership Act, 1932 provides that in absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to submit a dispute relating to the business of the firm to arbitration.

100. It is thus clear that the express authority of a partner is mandatory for submitting a dispute relating to the business of firm to arbitration. The respondent has not placed reliance on any authority given by the said Electropath Services (India) Private Limited authorizing the respondent to submit the dispute relating to the business of the joint venture against the petitioner to arbitration as contemplated under section 19(2)(a) of the Indian Partnership Act, 1932. The respondent could not invoke any alleged implied authority to sue the petitioner and submit the dispute relating to the joint venture to arbitration. The so called express authority relied upon by the respondent in the joint venture agreement as well as the power of attorney does not empower the respondent to refer the dispute relating to the joint venture to arbitration.

101. During the course of argument, this Court suggested to the learned senior counsel for the respondent whether any express authority or by way of NOC can be obtained from the said Electropath Services (India) Private Limited to permit the respondent to continue the arbitral proceedings filed by the respondent as if filed on behalf of the joint venture and the said Electropath Services (India) Private Limited would be bound by the out come of the arbitral proceedings as a partner of the joint venture. The respondent though filed an affidavit before this Court on 1st October, 2019, it did not rely upon any express authority from the said Electropath Services (India) Private Limited authorizing the respondent to submit the dispute relating to the business of joint venture against the petitioner to arbitration as contemplated under section 19(2) (a) of the Indian Partnership Act, 1932.

102. On the contrary, the respondent in the said additional affidavit relied upon the provisions of the said Power of Attorney as executed by the said Electropath Services (India) Private Limited and more particularly clause 11 thereof which provide that the respondent shall be entitled to receive payment from the

petitioner against the tenders specified in the said Power of Attorney and to carry out correspondence with the petitioner with regard to those tenders till completion of work. In my view, clauses 11 and 12 of the said Power of Attorney do not authorize the respondent to invoke arbitration agreement or to refer the dispute arising out of the business of the joint venture against the petitioner to arbitration. The clause of the Memorandum of Understanding between the respondent and the said Electropath Services (India) Private Limited stating that the respondent will receive all payments from the petitioner as per the terms of the tender does not authorize the respondent to refer the disputes, if any, arising out of the business of the joint venture against the petitioner to arbitration.

103. In the said additional affidavit, the respondent has asserted that the statement of claim was filed on behalf of the joint venture and that the petitioner will get full discharge as regards the joint venture in respect of the amounts awarded by the learned arbitrator. During the course of argument, learned senior counsel for the respondent made a statement that his client was ready and willing to give an indemnity in favour of the petitioner to the effect that if any claims are received by the petitioner from the said Electropath Services (India) Private Limited arising out of the said contract, the respondent would indemnify the petitioner in respect of the said claim.

104. A perusal of the additional affidavit filed by the respondent clearly indicates that no such express authority was issued by the said Electropath Services (India) Private Limited in favour of the respondent for invoking the arbitration agreement or to refer the dispute against the petitioner arising out of the said joint venture agreement between the petitioner and the joint venture to arbitration. In my view, the stand now taken by the respondent in the additional affidavit is contrary to the pleadings filed before the learned arbitrator and also in the preliminary affidavit in reply filed by the respondent in this arbitration petition and more particularly paragraph 10 asserting that the respondent has sought reliefs in its individual capacity and being a party to the contract, it is even otherwise entitled to maintain its independent claim against the petitioner. This Court cannot allow the respondent to take a different stand now by filing additional affidavit than the stand already taken before the learned arbitrator in the pleadings filed by the respondent and also in the affidavit in reply already filed in this arbitration petition clearly asserting that the claim made by the respondent was in its individual capacity.

105. Insofar as the statement now made by the learned senior counsel for the respondent that his client is ready and willing to issue an indemnity bond in favour of the petitioner is concerned, in my view since it is an admitted position that the suit filed by the respondent against the said Electropath Services (India) Private Limited and the counter claim filed by the said Electropath Services (India) Private Limited against the respondent arising out of the said contract is pending before this Court since prior to the date of invocation of the arbitration agreement by the respondent, I am inclined to accept the submission of

Mr. Rustomjee, learned senior counsel for the petitioner that even if any such indemnity bond is issued by the respondent at this stage, the petitioner would not be relieved of its liabilities, if any. In my view, if the claims made by the respondent in the arbitral proceedings without the consent of the said Electropath Services (India) Private Limited are rejected on its own merit, the said Electropath Services (India) Private Limited may make a claim against the petitioner arising under the same contract. In that event, the petitioner will have to file a civil suit for enforcement of such indemnity bond against the respondent.

106. Mr. Khambata, learned senior counsel for the respondent pointed out that in view of the on going litigation between the respondent and the said Electropath Services (India) Private Limited, it is not possible to obtain any such specific no objection in writing to authorize the respondent to pursue the arbitral proceedings or that the said Electropath Services (India) Private Limited could not make any separate claim against the petitioner arising out of the same contract. Learned Senior Counsel also could not produce any order from this Court in those pending proceedings between respondent and the said Electropath Services (India) Private Limited permitting the respondent to file claim on behalf of the joint venture.

107. In my view since the said Electropath Services (India) Private Limited did not give any express authority in favour of the respondent as contemplated under section 19(2)(a) of the Indian Partnership Act, 1932 to refer the dispute to arbitration arising out of the business relating to the joint venture, the respondent cannot legally represent the said Electropath Services (India) Private Limited even as lead member of the said joint venture in absence of any express authority on behalf of the said Electropath Services (India) Private Limited. In my view, the arbitration agreement invoked by the respondent exclusively without any authority from the said Electropath Services (India) Private Limited or to file statement of claim in respect of dispute relating to the joint venture business pertaining to represent the joint venture is not maintainable. Learned arbitrator thus ought to have held that the statement of claim filed by the respondent in its individual capacity was not maintainable and ought to have allowed the said application filed by the petitioner under section 31(6) of the Arbitration Act and ought to have dismissed the claims made by the respondent.

108. Insofar as the submission of the learned senior counsel for the respondent that no objection was raised by the petitioner about misjoinder of the said Electropath Services (India) Private Limited at any stage prior to the date of filing additional statement of defence and thus could not have been allowed to raise that issue in the additional statement of defence for the first time is concerned, a perusal of the impugned award rendered by the learned arbitrator clearly indicates that the learned arbitrator has not rejected the said application filed under section 31(6) of the Arbitration Act on that ground. There is thus no merit in this submission of the learned senior counsel for the respondent.

109. Insofar as the judgment of the Delhi High Court in case of Power Grid

Corporation of India Ltd. (supra) relied upon by Mr.Khambata, learned senior counsel for the respondent is concerned, the Delhi High Court did not consider the fact that there was on going dispute between the parties to the joint venture relating to the same contract. The Delhi High Court held that the provision in the contract authorizing the lead partner to receive payment and to execute the contract for and on behalf of the joint venture was given to the partner. It is held that those words must be held to be wide enough to include the power to bring forth an action on behalf of the joint venture to recover amounts due to the joint venture. In my view the said judgment delivered by the Delhi High Court is without considering the provisions of section 19(2)(a) of the Indian Partnership Act, 1932 and without considering the situation where both the parties to the joint venture are litigating against each other arising out of the same contract. The said judgment of the Delhi High Court is clearly distinguishable in the facts of this case and would not assist the case of the respondent.

110. I am not inclined to accept the submission of Mr.Khambata, learned senior for the respondent that there was express authority in favour of the respondent to represent the joint venture even in arbitration since the respondent was having express authority to recover all payment and to incur liability on behalf of the joint venture. This Court cannot accept the submission that though the parties to the joint venture are separately litigating against each other arising out of the same contract awarded to the joint venture by the petitioner and at the same time one of the party to such litigation who was a partner in the joint venture would simultaneously give express authority to the other party to represent him in the litigation with the petitioner. In my view, the right to receive money and to correspond on behalf of the joint venture as a lead member does not include power to invoke arbitration agreement or to refer the dispute arising out of or relating to the business of the said joint venture to arbitration. Such dispute can be referred to arbitration only if an express authority is issued by the other partners in favour of one or other partner of the joint venture as contemplated under section 19(2)(a) of the Indian Partnership Act, 1932 and not otherwise.

111. In my view, merely because the petitioner had also made a counter claim against the respondent under the contracts awarded to the joint venture would not make the claims made by the respondent in its individual capacity as maintainable. The fact remains that the petitioner has now withdrawn the said counter claim. In my view, the impugned award rendered by the learned arbitrator shows patent illegality, contrary to section 19(2)(a) of the Indian Partnership Act, 1932 and section 31(6) of the Arbitration Act and thus deserves to be set aside.

112. I therefore, pass the following order :-

a). Arbitral award dated 15th February, 2019 and the minutes of meeting dated 9th February, 2019 are set aside.

- b). Application dated 2nd January, 2019 filed by the petitioner under section 31(6) of the Arbitration Act is allowed.
- c). Commercial Arbitration Petition (Lodging) No.238 of 2019 is allowed on aforesaid terms.
- d). There shall be no order as to costs.