

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Order delivered on: 9th October, 2014

+ **I.A. No.12391/2013 in CS(OS) 2349/2010**

M/S CAMCO MULTI METAL LTD. Plaintiff
Through Mr.Vipin Singhania, Adv. with
Mr.Jyant Patel, Adv.

versus

M/S INTAMEX S.A. & ANR. Defendants
Through Mr.Chetan Sharma, Sr.Adv. with
Ms.Madhu Sweta & Mr.Saurabh
Bindal, Advs.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The present suit has been filed by the plaintiff for recovery of an amount of Rs.74,32,700/- against the defendants. Defendant No.1 is a company incorporated in Switzerland that is carrying on business in India through defendant No.2.

2. Brief facts of the case as per the plaint are that defendants made a sales offer to the plaintiff bearing No.S-6097-08 dated 15th January, 2009 for the sale of 200 MT of Secondary Aluminium Alloy ADC 12 ingots. The said sales offer was accepted by the plaintiff as per the terms and conditions as contained in the purchase contract dated 16th January, 2009 bearing No.CMML/08-09/136. In pursuance

of the said contract, the defendants supplied the goods, however, there were certain objections with regard to the quality specification which were conveyed to the defendants vide complaints dated 13th March, 2009 and 23rd March, 2009.

3. Subsequently, the defendants sent another sale offer bearing No.6429-09 dated 20th January, 2009 to the plaintiff for the supply of 200 MT of Secondary Aluminium Alloy ADC 12 ingots of a particular specification. The said sales offer was accepted by the plaintiff as per the terms and conditions of the purchase contract bearing No. CMMML/08-09/146 dated 22nd January, 2009. Again the goods were supplied to the plaintiff who had certain objections with regard to the quality specification. The same were conveyed to the defendants vide complaint dated 6th March, 2009 along with a test report.

4. It has been stated by the plaintiff that pursuant to the said complaint, defendants appointed an independent surveying agency for inspecting the goods. On inspection, sample of the goods were sent to a testing laboratory wherein it was found out that material did not meet the quality specifications as per the contracts. Thereafter plaintiff lodged a claim of \$ 168,925 in respect of the entire material supplied by the defendants.

5. It is the case of the plaintiff that despite lodging the claims and making repeated reminders and requests, the defendants did not take any action and failed to make any payment thereof. The plaintiff sent a legal notice dated 8th June, 2010 to the defendants for

recovering the said amount, while defendants vide notice dated 12th July, 2010 also raised certain pleas.

6. This led to filing of the present suit by the plaintiff. The suit was contested by the defendants by filing an application under Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the Act”) which was contested by the plaintiff stating that Part I of the Act is not applicable to the cases of International Commercial Arbitration while the said application ought to have been filed under Section 45 of the Act.

7. During the course of proceedings, defendants filed an application bearing I.A. No.12391/2013 under Section 45 of the Act stating that under the contracts entered into by the parties, there was an arbitration clause which provided that all the disputes between the parties were to be referred to the London Metal Exchange in London. Accordingly, the present Court has no jurisdiction to entertain the present suit and the matter be referred for arbitration under the London Metal Exchange Rules at London. The arbitration clause under the contracts read as under:

“J) Arbitration-

All disputes and differences which may arise out of this contract are to be submitted to the Rules and Regulations of the LONDON METAL EXCHANGE in London.”

8. In reply to the said application the plaintiff contended that while one sales confirmation bearing No.S-6097-08 dated 15th January,

2009 is not signed by the plaintiff, the other sales confirmation bearing No.6429-09 dated 20th January, 2009 has been signed and accepted by the plaintiff as per the terms and conditions of the purchase contract bearing No.CMML/08-09/146. The relevant terms of the purchase contract is reproduced herein below:

“The contract is to be duly signed and faxed to us within three working days from the date hereof, failing which contract terms & conditions will be deemed binding both buyers & Sellers.

Claims, if any, relating to quality/quantity shall be made by us within 15 days after delivery of goods at final destination and the same shall be settled by seller within one month of receipt of claim. All disputes relating to this contract will be subject to the jurisdiction of Courts at New Delhi, India.”

It is averred by the plaintiff that from the above it is clear that though the offer of the defendants contained arbitration clause but the same was not accepted by the plaintiff and as per the purchase contract all the disputes relating to the contract were subject to the jurisdiction of the Courts at New Delhi. It was mentioned that if the duly signed contract was not sent the terms and conditions of the purchase contract would be deemed to be binding totally on the buyers and the sellers.

9. In the rejoinder, contentions of the plaintiff are denied and the averments made in the application are reiterated by the defendants.

10. By this order I propose to decide the said application bearing I.A. No. 12391/2013 of the defendants. When the matter came up for

hearing, Mr.Vipin Singhania, learned counsel appeared on behalf of the plaintiff and Mr.Chetan Sharma, learned Senior counsel appeared on behalf of the defendants.

11. Mr.Chetan Sharma, learned Senior counsel appearing on behalf of the defendants made his submissions in support of the application and the same are outlined in the following manner :

- a) Firstly, learned Senior counsel argued that there were two contracts which were entered into between the parties towards the sale and supply of 200 MT of Secondary Aluminium Alloy ADC 12 ingots. It has been argued that the plaintiff has consciously not filed the sales confirmation which contained the dispute resolution clause that refers the disputes to London Metal Exchange, London. It is stated that plaintiff has filed the amended sales confirmation which was subsequently issued by the defendants with backdate as the plaintiff had subsequently requested for inclusion of the detailed product specification in the sales confirmation dated 15th January, 2009 later in the communication dated 19th January, 2009. Likewise, it has been argued that there was another sales confirmation in the form of second contract dated 20th January, 2009 which was signed by both the parties containing the similar clause 'J' which is an arbitration clause referring the dispute to London Metal Exchange, London. The plaintiff unilaterally issued a subsequent purchase contract attempting to alter the terms of the concluded contract by conferring the jurisdiction upon the Courts in Delhi

which was neither acceded to nor signed by the defendants. It is thus argued that this Court should refer the disputes, if any, between the plaintiff and defendants before the Arbitral Tribunal in London in view of the arbitration clause contained in the form of clause 'J' and should not proceed with the present suit.

- b) Secondly, learned Senior counsel argued that the plaintiff's basis of filing the suit that there is no valid arbitration agreement between the parties and therefore, this Court can interfere on the basis of the invalidity of the agreement under the provisions of Section 45 of the Act, is misplaced and frivolous in nature. It has been argued that there exists the sales confirmation which has been signed by both the parties wherein the arbitration clause is explicitly mentioned. The said sales confirmation which is signed by the parties are not denied by the plaintiff. The plaintiff merely disputes the position by stating that signature has been affixed by him on the sales confirmation subject to the terms and conditions contained in the purchase contract issued by him containing the clause conferring jurisdiction to Delhi Court which is the point required to be determined by the Court. But that apart, there exists an agreement by virtue of the written communication in the form of sales confirmation signed by both the parties and thus it cannot be said that there is no valid contract between the parties. It is argued that the arbitration agreement is in writing in the nature of documents provided under Section 7 (4) of the Act. The original of the arbitration agreement is not required to be proved when the plaintiff himself

signed the sales confirmation and does not deny his signatures on the sales confirmation but merely states that the same were signed under the protest.

- c) Learned Senior counsel argued that though the agreement in the form of the sales confirmation has been signed by both the parties, still, the plaintiff relies upon the judgments stating that the communication exchanged through emails do not constitute the valid arbitration agreement. Learned Senior counsel for the defendants has argued that the said submission of the plaintiff runs counter to the scheme of the Section 7 (4) of the Act and the well settled position of law on the subject and as such should not be readily accepted by this Court. Learned Senior counsel for the defendants relied upon the judgment passed by the Supreme Court in the case of ***Great Offshore Limited v. Iranian Offshore Engineering & Construction Company***, (2008) 14 SCC 240 wherein it was observed that the intention of the Act is to minimize the role of the Courts and the same can be done only when the Courts will not insist upon the originals of the documents, stamps, seals and even signatures in cases wherein there is a clear intention to arbitrate which is emerging from the intention of the parties through the negotiations between them. As per the learned Senior counsel for the defendants, the requirement to insist the original of the agreement as well as unilaterally amending the terms of the contract does not aid the case of the plaintiff at all.

- d) Learned Senior counsel further stated that there is no ambiguity in the arbitration clause contained in the sales confirmation in the manner contended by the plaintiff. The arbitration clause as per the learned Senior counsel for the defendants is clear enough to include all future disputes between the parties. Therefore, the said plea of the plaintiff to come out of the arbitration clause is also frivolous in nature and as such liable to be rejected.
- e) Learned Senior counsel has argued that the challenge to the arbitration to be conducted in London by the plaintiff on the ground that there is no cause of action which has occurred in UK is also misplaced in as much as the concept of the occurrence of the cause of action with respect of the jurisdiction of the Civil Court is altogether distinct from that of fixation of the seat of the arbitration in foreign place. The learned Senior counsel relied upon the judgment of **Gopal Singh v. Ashok Leyland Finance and Anr.**, 164 (2009) DLT 471 in this respect.
- f) It has been argued that the plaintiff's plea that the arbitration agreement referring the dispute to the London Metal Exchange is violative of the public policy in India, is devoid of any merit in as much as the rules and regulations of London Metal Exchange merely regulate the procedural aspects of the arbitral proceedings and the proper law shall be applied whichever is applicable. Further, it has been argued that the institutional arbitration is a widely recognized concept in the field of the arbitration and approved by the Courts. Therefore, it cannot be said that the reference of the dispute to the institution located

overseas would be against the public policy solely due to the fact that there are certain variation in the appointment process and procedural aspects relating to the conducting of the arbitral proceedings.

12. In order to support this contention, learned Senior counsel for the defendants has relied upon the following judgments passed by Supreme Court of India :

- (a) ***Bhatia International v. Bulk Trading S.A.***, (2002) 4 SCC 105 at para 25.
- (b) ***National Thermal Power Corporation v. Singer Company***, AIR 1993 SC 998 at para 29, 30, 31, 34, 47 and 58.

13. By making the aforementioned submissions, learned Senior counsel prayed that the plaintiff has failed to satisfy the Court as to how there exists no valid arbitration agreement between the parties and the pleas as to invalidity of the agreement are all frivolous in nature and ought to be rejected and this Court should thus consider allowing the application filed by the defendants under Section 45 of the Act.

14. Per contra, Mr.Vipin Singhania, learned counsel appearing on behalf of the plaintiff has made his submissions in opposition to the said application under Section 45 of the Act filed by the defendants and the same are enumerated as under:

- a) Learned counsel for the plaintiff has argued that the provisions of the Section 8 of the Act are distinct from that of provisions of Section 45 of the Act. This distinction as per the learned counsel for the plaintiff is necessary as the Civil Court can while deciding

as to whether to refer the case to the arbitration can also look into the validity or otherwise of the agreement in view of the express language of Section 45 of the Act which is impermissible under the provisions of Section 8 of the Act. This distinction as per the learned counsel for the plaintiff makes the present case different from the cases seeking the references under the provisions of Section 8 of the Act as Section 8 is not completely analogous to Section 45 of the Act in every respect. In order to substantiate his submission, learned counsel for the plaintiff has relied upon the judgment of ***Shin – Etsu Chemical Co. Vs. Aksh Optifibre Ltd. and Anr.*** (2005) 7 SCC 234 which lays down the similar proposition.

- b) Learned counsel for the plaintiff argued that the plaintiff has signed the sales confirmation document under the protest that the same is subject to the terms and conditions contained in the purchase contract. In the said purchase contract, there existed a clause wherein it has been stated that all the disputes relating to the contract will be subject to the jurisdiction of the Courts at New Delhi. As per the learned counsel for the plaintiff, the defendants never objected to the existence of the said clause under the purchase contract and it was also mentioned in the said purchase contract that if the duly signed contract is not sent, the terms and conditions of the purchase contract will be deemed to be totally binding upon the buyers and the sellers. On similar lines, the subsequent sale has been effected where there was similar purchase order. The defendants thus have agreed to

abide by the terms and conditions of the two purchase contracts including the arbitration clause. Under these circumstances, the arbitration clause contained in the sales confirmation cannot be pressed into service.

- c) Learned counsel for the plaintiff argued that the arbitration clause in the sales offers is contrary to the purchase contract wherein the jurisdiction of Delhi court has been conferred. It has been argued that the offer sent by the defendants was accepted by the plaintiff subject to the terms and conditions of the purchase contract. Therefore, the arbitration clause contained in the offer of the defendant is not applicable and is overridden by the clause of the purchase contract. Learned counsel for the plaintiff further argued that the arbitration clause contained in the sales confirmation is null and void and incapable of being performed in as much as the said agreement is not signed by the plaintiff and the same is also not in writing. For all these reasons stated by the learned counsel for the plaintiff, it has been argued that neither there exists any valid arbitration agreement between the parties nor the arbitration clause can be performed by the parties and thus, the Court can infer the invalidity of the arbitration agreement or incapability of the performance within the meaning of the provisions of Section 45 of the Act and reject the reference. Learned counsel in support of his submission relied upon the judgment passed in the case of **Shivnath Rai Har Narain v. Italgrani SPA**, 93(2001) DLT 222.

Learned counsel has further relied upon the following judgments in order to support the proposition that the agreement exchanged by way of the emails, fax do not constitute a valid arbitration agreement and there are certain attributes which may be present in the agreement :

- i) This Court in the case of ***Global Marketing Direct Ltd. v. GTL Limited and Anr.***, 2004 (3) ArbLR 56 (Bom) has held as under :

“An analysis, therefore, of the law would be that in a proceeding pending before a judicial authority, Section 45 can be resorted to if there are disputes between the parties as to the validity of the arbitration agreement. Unlike Section 8 which provides that the application shall be moved not later than when submitting the first statement of the substance of the dispute under Section 45 there is no such limitation. All that Section 45 says is that when a judicial authority is seized of an action in a matter in respect of which parties had made an agreement for arbitration the judicial authority at the request of one of the parties or any person claiming through them or under him refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. Prima facie, therefore, there seems to be no time limit within which such an application can be made. A further aspect of the matter is that even if Section 45 is invoked, the Civil Court would continue to have jurisdiction until it decides whether the arbitration agreement is void, inoperative or unlawful. It is only after recording such a finding with the issue of jurisdiction be answered.”

- ii) This Court in the case of ***Sara International Ltd. vs. Golden Agri International PTE Ltd. and Anr.***, (2010) ILR

6 Delhi 318 has held as under :

“39. The contention of the plaintiff is that the arbitration clause is vague and unenforceable and the suit cannot be held as barred unless this Court, under Section 45 which falls within Part II of the Act, adjudicates upon the validity and existence of the arbitration agreement. The vagueness in the clause has been attributed to the use of the words 'Arbitration, if any' in the clause of the sale contract dated 24.7.2008.

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42. Coming to the discussion on Section 45, under this section learned Senior Counsel for the plaintiff has contended that this Court has the jurisdiction to adjudicate upon the validity and existence of the arbitration agreement. Relying on this logic, learned Senior counsel Mr. Sanjay Jain has referred to the following judgments in the following cases, all of which are pertaining to Section 45 of the Arbitration Act :

I. Shivnath Rai Har Narain v. Italgranispa 2001(3) Arb. LR 246 (Delhi)

“12. First and foremost condition rather one most, condition for invoking Section 45 is existence of "agreement in writing" between the parties. However, if any of the parties feels or deems that such an agreement is null and void or inoperative or, incapable of being performed that party has right of approach the judicial authority which may entertain the matter.

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43. No doubt Section 45 of the Act provides that the judicial authority concerned has to refer the parties to arbitration if it is satisfied that the arbitration agreement is valid and enforceable.

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52. It is a settled proposition of law that merely because an agreement speaks of reference of dispute, it does not automatically become an Arbitration Agreement and the same must be determined according to the circumstances and intention of the parties in each particular instance. Further, in *State of U.P. v. Tipper Chand* (1980) 2 SCC 341 the Court held that the clause in the said matter was not an arbitration clause as it contained no mention of any dispute, much less of a reference thereof. In the case at hand also, nowhere has any present or future dispute or reference thereof been mentioned. In view of the aforesaid observation, prima facie, it appears that there is no binding or enforceable agreement between the parties and the same is inoperative. This Court is of the view that the validity of the clause as referred may be decided on framing of preliminary issue(s).

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55. In view of the finding that the impugned clause in the sales contract is inoperative and the agreement is not binding upon the parties, it is not necessary to discuss the other pleas and decisions referred by the parties.”

- iii) This Court in the case of ***Airport Authority of India vs. Hindustan Steel Works Construction Ltd.*** in FAO(OS)

No.21/2008 and CM Nos.606-607/2008 decided on 15th October, 2009 has held as under :

“When the defendant to an action before a judicial authority raises the plea that there is an arbitration agreement and the subject-matter of the claim is covered by the agreement and the plaintiff or the person who has approached the judicial authority for relief, disputes the same, the judicial authority, in the absence of any restriction in the Act, has necessarily to decide whether, in fact, there is in existence a valid arbitration agreement and whether the dispute that is sought to be raised before it, is covered by the arbitration clause. It is difficult to contemplate that the judicial authority has also to act mechanically or has merely to see the original arbitration agreement produced before it, and mechanically refer the parties to an arbitration.”

iv) The Supreme Court in the case of ***K.K. Modi vs. K.N. Modi***, (1998) 3 SCC 573 has held as under :

“16. Among the attributes which must be present for an agreement to be considered as an arbitration agreement are :

(1) The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement,

(2) That the jurisdiction of the tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the Court or from a statute, the terms of which make it clear that the process is to be an arbitration,

(3) The agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal,

(4) That the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides,

(5) That the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law and lastly,

(6) The agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal.

17. The other factors which are relevant include, whether the agreement contemplates that the tribunal will receive evidence from both sides and hear their contentions or at least give the parties an opportunity to put them forward; Whether the wording of the agreement is consistent or inconsistent with the view that the process was intended to be an arbitration, and whether the agreement requires the tribunal to decide the dispute according to law.”

- v) The Supreme Court in the case of **Jagdish Chander v. Ramesh Chander & Ors.**, (2007) 5 SCC 719 has held as under :

“(ii) Even if the words 'arbitration' and 'arbitral tribunal (or arbitrator)' are not used with reference to the process of settlement or with reference to the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of

disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement. They are : (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed that the decision of the Private Tribunal in respect of the disputes will be binding on them.

(iii) Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to Arbitration, it is an arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement. But where the clause relating to settlement of disputes, contains words which specifically excludes any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement. For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the Authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the Authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement.

(iv) But mere use of the word 'arbitration' or 'arbitrator' in a clause will not make it an arbitration agreement, if it requires or contemplates a further or

fresh consent of the parties for reference to arbitration. For example, use of words such as "parties can, if they *so desire*, refer their disputes to arbitration" or "in the event of any dispute, the parties *may* also agree to refer the same to arbitration" or "if any disputes arise between the parties, they should consider settlement by arbitration" in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement. Similarly, a clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration, is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future.

- vi) The Supreme Court in the case of ***State of Orissa vs. Damodar Das***, (1996) 2 SCC 216 has held as under :

"11. This Court was called upon to consider similar clause in *State of U.P. v. Tipper Chand* AIR 1980 SC 1522. The clause was extracted therein. After consideration thereof, this Court held that after perusing the contents of the said clause and hearing learned Counsel for the parties "we find ourselves in complete agreement with the view taken by the High Court. Admittedly, the clause does not contain any

express arbitration agreement. Nor can such an agreement be spelt out from its terms by implication, there being no mention in it of any dispute, much less of a reference thereof. On the other hand, the purpose of the clause clearly appears to be to vest the Superintending Engineer with supervision of the execution of the work and administrative control over it from time to time". It would, thereby, be clear that this Court laid down as a rule that the arbitration agreement must expressly or by implication be spelt out that there is an agreement to refer any dispute or difference for an arbitration and the clause in the contract must contain such an agreement. We are in respectful agreement with the above ratio. It is obvious that for resolution of any dispute or difference arising between two parties to a contract, the agreement must provide expressly or by necessary implication, a reference to an arbitrator named therein or otherwise of any dispute or difference and in its absence it is difficult to spell out existence of such an agreement for reference to an arbitration to resolve the dispute or difference contracted between the parties. The ratio in Smt. Rukmanibai Gupta v. Collector, Jabalpur and Ors. AIR 1981 SC 479 does not assist the respondent. From the language therein this Court inferred, by implication, existence of a dispute or difference for arbitration. The Full Bench judgment of the Punjab & Haryana High Court relied on by the Counsel was expressly overruled by this Court in Tipper Chand's case (supra). Therefore, it is no longer good law. Moreover, notice was not given to the Public Health Engineer to enter upon the reference but was issued to Chief Engineer to refer the dispute to an arbitrator. The contention in the rejoinder of the appellants that the respondent received the amount without protest to conclude that the amount was received in full and final settlement of the Act,

cannot be accepted unless there is proof or admission in that behalf. The ratio in P.K. Ramaiah & Co. v. NTPC 1994(1)SCALE1 has no application to the facts of the case.

12. We, therefore, hold that Clause 25 of the agreement does not contain an arbitration agreement nor it envisages any difference or dispute that may arise or had arisen between the parties in execution of the works for reference to an arbitrator.”

d) Learned counsel for the plaintiff has argued that London Metal Exchange Ltd is a company under the Companies Act. The said rules framed by the company are contrary to the public policy of India and Indian laws. Learned counsel for the plaintiff has stated that the rules provide the tribunal consisting of two arbitrators or bars the legal practitioners to appear in the arbitration. Thus, the rules of the London Metal Exchange are contrary to the public policy of India and this Court should thus infer incapability of the performance of the arbitration agreement. Learned counsel for the plaintiff has relied upon the following judgments in support of the present proposition :

i) This Court in the case of ***Indian Aluminium Cables Ltd. vs. Ex. Sud Ltd.***, (1993) 49 DLT 367 has held as under :

“(6) According to the learned counsel, it is well settled law that to constitute the arbitration agreement in writing it is not necessary that it should be signed by the parties. It is sufficient that the terms of settlement are reduced to writing. He cited two decisions of the Supreme Court reported as AIR1963SC1417 and [1955] 2SCR857. According to

the learned counsel contract S 22616 was reduced to writing and it was duly sent' to the petitioner for its information. He also argued that in all the correspondence the parties mentioned about this contract S-22616 and reference by incorporation is permissible in law. According to the learned counsel it does not lie in the mouth of the petitioners to say that they were not aware of this contract containing the arbitration clause when they themselves quoted this contract number in future correspondence. He also argued that the arbitration clause has been expressly set out and that it is petitioner's own case that part performance of the contract took place and complete payment was made and as a result of the part performance the petitioner is estopped from denying the existence of the arbitration clause. He drew my attention towards the affidavits filed by the respondent of various persons in support of the contention that the contract S 22616 was duly received by the petitioner and that they were aware of the contents of the contract having arbitration clause. He also drew my attention towards various correspondence on the file showing that in all the correspondence this contract number S 22616 has been mentioned.

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(11) When the existence of the arbitration agreement between the parties is not established on record, the respondent cannot take the plea that this court in India has no jurisdiction. The decision of the Supreme Court in Renusagar Power Co Ltd vs. General Electric Company [1985]1SCR432 and Suresh Jindal v. Rizoli Della AIR1991SC2092 do not apply to the facts of the present case. Each case is to be decided on the basis of facts of that very case. Since the parties had not entered into any

arbitration agreement in this case provisions of Foreign Awards (Recognition and Enforcement) Act 1961 will not apply to this case. A joint reading of Sections 32 and 33 of the Arbitration Act would make it clear that real mode of challenging the existence, validity or effect of an arbitration agreement or an award is by way of application under Section 33. When the existence of an arbitration agreement as alleged by the respondent is not established on record, it becomes futile to argue that nationality of the agreement is British and as such the arbitrator has to conduct the arbitration in accordance with the rules of London Metal Exchange. This question would have arisen if the respondent could have proved that there existed any arbitration agreement between the parties and that the nationality of the agreement is British. The words "any party" in Section 33 of the Arbitration Act should be so construed so as to cover a person who is claimed to be a party to an agreement of arbitration although he does not admit its execution.

(12) Under these circumstances I hold that there is no arbitration agreement in existence between the parties for reference of the alleged disputes to London Metal Exchange and Therefore the purported reference of disputes under the alleged agreement by the respondent to the London Metal Exchange is without jurisdiction, illegal and not binding on the petitioner. However, the respondent may take any other action for the alleged breach of the contract as contained in documents Ex AW1/1 and AWI/2 in the court of law by filing a regular suit in this regard, if so advised."

- ii) In the case of ***SBP & Co. Vs. Patel Engineering Ltd. & Anr.***, (2005) 8 SCC 618 the Supreme Court has clearly held

that if an arbitration agreement is assailed as null, void, inoperative or incapable of being performed an obligation is casted on the civil courts to give the finding on the said issues. Para 18 of the said judgment is reproduced herein below :

“18. It is also not possible to accept the argument that there is an exclusive conferment of jurisdiction on the arbitral tribunal, to decide on the existence or validity of the arbitration agreement. Section 8 of the Act contemplates a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement, on the terms specified therein, to refer the dispute to arbitration. A judicial authority as such is not defined in the Act. It would certainly include the court as defined in Section 2(e) of the Act and would also, in our opinion, include other courts and may even include a special tribunal like the Consumer Forum (See **Fair Air Engineers (P) Ltd. and Anr. v. N.K. Modi** AIR1997SC533. When the defendant to an action before a judicial authority raises the plea that there is an arbitration agreement and the subject matter of the claim is covered by the agreement and the plaintiff or the person who has approached the judicial authority for relief, disputes the same, the judicial authority, in the absence of any restriction in the Act, has necessarily to decide whether, in fact, there is in existence a valid arbitration agreement and whether the dispute that is sought to be raised before it, is covered by the arbitration clause. It is difficult to contemplate that the judicial authority has also to act mechanically or has merely to see the original arbitration agreement produced before it, and mechanically refer the parties to an arbitration. Similarly, Section 9 enables a Court, obviously, as defined in the Act, when approached by a party

before the commencement of an arbitral proceeding, to grant interim relief as contemplated by the Section. When a party seeks an interim relief asserting that there was a dispute liable to be arbitrated upon in terms of the Act, and the opposite party disputes the existence of an arbitration agreement as defined in the Act or raises a plea that the dispute involved was not covered by the arbitration clause, or that the Court which was approached had no jurisdiction to pass any order in terms of Section 9 of the Act, that Court has necessarily to decide whether it has jurisdiction, whether there is an arbitration agreement which is valid in law and whether the dispute sought to be raised is covered by that agreement. There is no indication in the Act that the powers of the Court are curtailed on these aspects. On the other hand, Section 9 insists that once approached in that behalf, "the Court shall have the same power for making orders as it has for the purpose of and in relation to any proceeding before it". Surely, when a matter is entrusted to a civil Court in the ordinary hierarchy of Courts without anything more, the procedure of that Court would govern the adjudication [See R.M.A.R.A. Adaikappa Chettiar and Anr. Vs. R. Chandrasekhara Thevar (AIR 1948 P.C. 12)]"

In view of the judgment of ***Patel Engineering (supra)*** the Court is required to decide the issue as to whether the arbitration clause is valid, null and void, inoperative or incapable of being performed after taking all the evidences and while dealing with the application under Section 45 of the Act.

- iii) In the case of ***Renusagar Power Co. Ltd. vs. General Electric Co. Ltd.***, (1984) 4 SCC 679 the Supreme Court has held as under :

“There is no question of the court getting satisfied about these conditions on any prima facie view or pro tanto finding thereon. Parties have to put their entire material before the court on these issues (whichever may be raised) and the court has to record its finding thereon after considering such material. In this case the requirements of a stay were held to be fully satisfied because the arbitration clause was worded in the widest possible language. The court distinguished the matter relating to the validity or existence of the arbitration agreement from those of its effect or its scope. Validity and existence may be for the court to decide. In construing the validity of arbitration clauses, it must be determined whether the essential terms are sufficiently definite so as to enable the judicial authority to give them an exact meaning. A positive finding on this point can carry the matter before the arbitrator who can then decide upon the scope of the agreement.”

15. By making aforementioned submissions, learned counsel for the plaintiff submitted that the application under Section 45 of the Act filed by the defendants be dismissed and the suit be allowed to proceed further.

16. I have gone through the plaint along with the documents filed by the plaintiff. I have also gone through the application under Section 45 of the Act filed by the defendants and the reply filed by the plaintiff and the documents relied upon by the parties in support of

the submissions and written submissions filed by the parties. I have also given my careful consideration to the submissions advanced by the learned counsel for the parties at the bar and now I shall proceed to deal with various aspects which fall for consideration before this Court in view of the factual position and the submissions advanced by the parties which include both factual and legal submissions.

17. Firstly, it is noteworthy to mention that the learned counsel for the plaintiff has extensively argued on the aspect that the Court seized of the application under Section 45 of the Act has to adjudicate upon the invalidity or in operation of the agreement in case the issue is raised before the Court prior to making the reference to the Arbitral Tribunal. I think that there is no dispute on the legal position as propounded by the learned Senior counsel for the defendants especially after the decision of ***Shin – Etsu Chemical Co. Pvt. Ltd.***, (*supra*) and ***Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc.***, (2013) 1 SCC 641. To this extent, there is no quarrel to the proposition. The Supreme Court in the case of ***Chloro Controls*** (*supra*) which is decided by the Bench comprising of three judges has rather gone ahead by further expounding the view that it is the duty of the Court to examine the plea relating to the invalidity or inoperativeness of the agreement as contended by the party opposing the application under Section 45 of the Act. It has been further held that once the Court finds that the agreement is valid, then the suit in such a case is not maintainable as the provisions of the Section 45 of the Act would have overriding

effect over and above the provisions of Section 9 of the Code of the Civil Procedure as the right to file the civil suit is not absolute right but are subject to restrictions including bar created by the law. In the words of the Supreme Court, it was observed thus :

“Another very significant aspect of adjudicating the matters initiated with reference to Section 45 of the 1996 Act, at the threshold of judicial proceedings, is that the finality of the decision in regard to the fundamental issues stated under Section 45 would further the cause of justice and interest of the parties as well. To illustratively demonstrate it, we may give an example. **Where party is seeking reference to arbitration and party raises objections going to the very root of the matter that the arbitration agreement is null and void, inoperative and incapable of being performed, such objections, if left open and not decided finally at the threshold itself may result in not only parties being compelled to pursue arbitration proceedings by spending time, money and efforts but even the arbitral tribunal would have to spend valuable time in adjudicating the complex issues relating to the dispute between the parties, that may finally prove to be in vain and futile. Such adjudication by the arbitral tribunal may be rendered ineffective or even a nullity in the event the courts upon filing of an award and at execution stage held that agreement between the parties was null and void inoperative and incapable of being performed.**” (Emphasis Supplied)

“The Court may also hold that the arbitral tribunal had no jurisdiction to entertain and decide the issues between the parties. The issue of jurisdiction normally is a mixed question of law and facts. **Occasionally, it may also be a question of law alone. It will be appropriate to decide such questions at the beginning of the proceedings itself and they should have finality. Even when the arbitration law in India contained the provision like**

Section 34 of the 1940 Act which was somewhat similar to Section 4 of the English Arbitration Act, 1889, this Court in the case of Anderson Wright Ltd. (supra) took the view that while dealing with the question of grant or refusal of stay as contemplated under Section 34 of the 1940 Act, it would be incumbent upon the Court to decide first of all whether there is a binding agreement for arbitration between the parties to the suit or not. Applying the analogy thereof will fortify the view that determination of fundamental issues as contemplated under Section 45 of the 1996 Act at the very first instance by the judicial forum is not only appropriate but is also the legislative intent. Even, the language of Section 45 of the 1996 Act suggests that unless the Court finds that an agreement is null and void, inoperative and incapable of being performed, it shall refer the parties to arbitration.”

“157. The provisions of Section 45 of the 1996 Act are to prevail over the provisions of the CPC and when the Court is satisfied that an agreement is enforceable, operative and is not null and void, it is obligatory upon the court to make a reference to arbitration and pass appropriate orders in relation to the legal proceedings before the court, in exercise of its inherent powers.” (Emphasis Supplied)

18. From the reading of the aforementioned observations of Supreme Court in the case of ***Chloro Control*** (supra), it can be safely said whenever there is a plea raised by the party resisting the application under Section 45 of the Act relating to the invalidity of the or inoperativeness of the arbitration agreement, the Court is obligated to decide the said plea prior to making the reference and once the Court finds that the agreement is valid and it is equally obligatory on

the Court to stay the suit by exercise of inherent powers and pass the appropriate orders as to reference of the dispute to the arbitration.

19. Therefore, the moot question which falls for consideration is the tenability of the plea as to invalidity of the arbitration agreement or inoperativeness of the arbitration agreement as raised by the learned counsel for the plaintiff while resisting the application under Section 45 of the Act. If the said objection as to invalidity of the agreement is upheld, then the Court may not make the reference of the dispute to the Arbitral Tribunal and as against the same if the said objection is rejected, the Court should immediately refer the dispute to the arbitration.

20. The plaintiff has challenged the arbitration agreement on various aspects by raising number of pleas which are dealt with in the following manner:

- a) Learned Counsel for the plaintiff has argued that there is no written agreement between the parties duly signed by them containing the arbitration clause. The said plea is sought to be made on the ground that the sales confirmations No.6097-08 dated 15th January, 2009 and No.6429-09 dated 20th January, 2009 are the documents which have been signed under protest and the said documents also do not establish the legal relationship between the parties as the plaintiff has thereafter on 22nd January, 2009 sent the purchase contract containing the terms and conditions, also containing the jurisdiction of the Delhi Court clause. I find that the perusal of the documents filed along

with the suit and the continuous communications exchanged between the parties speak otherwise. This is due to the reason that the sales confirmation dated 15th January, 2009 and 20th January, 2009 are signed by defendant as well by the plaintiff. The sales confirmation dated 15th January, 2009 is already on record, however so far as the second contract is concerned, the plaintiff in its legal notice dated 8th June, 2010 addressed to the defendants stated that there was a second contract entered into between the plaintiff and defendants on similar lines on 20th January, 2009. It is correct that the said sales confirmation is signed by the plaintiff by putting a note “15 Days Detention period is required at final destination Accepted subject to the terms and condition of our purchase contract ref No. CMML/08-09/146 dated 22.01.09”. However, that fact by itself does not mean that the said sales confirmation are not agreements in writing or do not contain terms and conditions including arbitration clause and are not per se signed by the parties and are not intended to create a contractual or legal relationship. Thus there exists clearly an agreement in writing in the form of the sales confirmation which has been duly signed by both the parties although the signature done by the plaintiff is under protest by putting a note on the agreement “15 Days Detention period is required at final destination Accepted subject to the terms and condition of our purchase contract ref No. CMML/08-09/146 dated 22.01.09” which as per the plaintiff has some legal effect of making the sales confirmation non operative. I find that

from the perusal of the sales confirmation, at least one thing is clear which is that there exists an agreement in writing duly signed by the parties containing terms and condition and dispute resolution clause and the plea of legal effect if any of the alleged protest raised by the plaintiff on the sales confirmation will be seen in the next paragraph of this discussion.

- b) The second plea of the plaintiff is that as the plaintiff has signed the sales confirmation dated 15th January, 2009 under the protest, which as per the plaintiff is subject to the terms and conditions contained in the purchase contract dated 22nd January, 2009 that was sent to the defendants later on, therefore, the terms and conditions of the sales confirmation shall stand overridden with the terms and conditions of the purchase contract. As per plaintiff, the terms of the sales confirmation are overridden by the purchase contract more so due to the reason that the purchase contract contained a clause containing deeming fiction if the agreement is not returned by the party to the plaintiff within the period of three days and the said deeming provision makes the purchase agreement binding on both the parties. I find that the said plea of the plaintiff deserves rejection for manifold reasons which are highlighted below :

- Firstly, it is noteworthy to mention that the purchase contract dated 22nd January, 2009 was not signed by the defendants in any capacity, thus it is inconceivable as to how the terms and conditions of the concluded contract in the form of the

sales confirmation can be replaced by way of the subsequent agreement which is not even signed by both the parties.

- Secondly, even it is assumed that there was any such counter offer made by the plaintiff to the defendants by sending the purchase contract, the said counter offer has to be specific about the alteration of the terms and conditions required to be effected within the terms of the sales confirmation itself. The supply of another agreement in lieu of one can never be construed as counter offer for the purposes of the earlier agreement. The offer to sign a fresh agreement is always an offer and not the counter offer seeking to amend the terms of the previous contract unless it is made clear to the other party. Further, the counter offer cannot be ambiguous in nature which leaves a room of doubt with respect to performance of the obligations in the future. I have discerned this position by reading of the documents alongside the happening of the events. On 15th January, 2009, the defendants sent the sales confirmation to the plaintiff for signatures. The plaintiff did not sign the said sales confirmation and instead sent the purchase contract on 22nd January, 2009 containing certain terms and conditions upon the defendants. Later on 27th January, 2009, the same very plaintiff signs the sales confirmation by writing a note alongside the signatures which reads “15 Days free Detention period is required at final destination

Accepted subject to the terms and condition of our purchase contract ref No.CMML/08-09/146 dated 22.01.09”. All this would mean that the plaintiff was not insistent upon his counter offer to alter the terms of the sales confirmation and even if he was so, then the said counter offer was limited to 15 days time period for retention which was required by the plaintiff for detention purposes at the final destination and not beyond the same which the plaintiff had stated in specific words at the time of signing of the sales confirmation which was the event post the service of the purchase contract by the plaintiff to the defendants. This is due to the reason that at the time of the signing of the sales confirmation on 27th January, 2009 and writing the alleged protest note, the plaintiff was specific about the term namely “15 days free time period was required at the final destination” which can also be found in the purchase contract as one of the term, thus the plaintiff himself limited his counter offer only for 15 days time period required at the final destination for detention by being specific only to the said condition contained in the note and thereby conditionally signing the sales confirmation if at all it is to be inferred that the same is conditional acceptance.

Had the plaintiff really intended to alter the clause relating to dispute resolution contained in the sales confirmation, the plaintiff could not have readily signed the

sales confirmation/agreement but should have insisted the defendants to sign the purchase contract instead of the sales confirmation or otherwise could have been specific about the alterations which the plaintiff intended to insist in the sales confirmation prior to signing the sales confirmation. The note of the plaintiff does not contain any specificity about the alteration of the dispute resolution clause contained in the sales confirmation which unequivocally shows his intention to alter the said clause. In the absence of the same, it can be assumed or inferred that all the terms of the purchase contract axiomatically stand incorporated in the sales confirmation to the extent they are repugnant to the terms of the sales confirmation. Adopting this interpretation would mean rewriting the contract and also reducing the sales confirmation into dead letters. Therefore, the counter offer/ conditional acceptance of the plaintiff at the time of the signing of the sales confirmation agreement was not specific in nature to the extent of replacement of the dispute resolution clause or mode of resolving the dispute enabling the defendants to become aware of the plaintiff's position immediately prior to the signing of the sales confirmation. There is also no letter or communication on record written by the plaintiff either prior to 22nd January, 2009 or thereafter to the defendants pointing out that the plaintiff could not sign the sales confirmation unless certain terms including the clause

relating to the dispute resolution are altered in the sales confirmation. In such circumstances, the parties were not *ad idem* as to the alleged counter offer of plaintiff towards the alterations which the plaintiff intended to conduct in the sales confirmation that could have given the defendants chance to either accept or reject the counter offer of the plaintiff.

- Thirdly, the plea of the plaintiff that once the purchase contract was served upon the defendants, the same is sufficient counter offer to the defendants may not also be accepted. This is due to the reason that serving of the purchase contract upon the defendants is offering the defendants to sign the purchase contract instead of the sales confirmation. The defendants always maintained the position that they intended the plaintiff to sign the sales confirmation in the form of the agreement, which was eventually signed by the plaintiff later on 22nd January, 2009. The defendants did not either accept the offer of the plaintiff to sign the purchase contract nor reject the same but always insisted upon signing of the sales confirmation. The plaintiff in order to counter this position also stated that there is a deeming clause contained in the purchase contract making it binding upon both the parties to accept the terms of the purchase contract. I find that said position is unreasonable and cannot be accepted. This is due to the

reason that if the deeming fiction could have come into play on 19th January, 2009 or three days thereafter or even later on when the defendants did not provide the duly signed version of the purchase contract to the plaintiff. The plaintiff could have written to the defendants that the purchase contract has now become binding upon us and there is no need to sign the sales confirmation as a separate agreement. The plaintiff on the contrary fails to take any action of this nature but proceeds to sign the sales confirmation on 27th January, 2009 which was already given signed to him from the defendants' end by putting a limited protest relating to 15 days period required for detention purposes at the final destination without mentioning the alteration of the dispute resolution clause so that the chance may be given to the defendants to consider such offer of alteration. Under these circumstances, it is difficult to assume that any such deeming provision has come into play which makes the purchase contract binding upon the plaintiff and defendants when the plaintiff itself is signing the sales confirmation later on 22nd January, 2009 without informing the defendants anything about the operation of the deeming clause. The said argument of the plaintiff is thus without any substance and is liable to be rejected.

- Fourthly, it is well established principle of law that the arbitration clause is distinct agreement from that of the underlying contract. The arbitration clause which is a

dispute resolution clause as per the well settled principle of law is a collateral term in the contract and cannot perish on account of the change or alteration in the performance as per the well settled principle of law. (See **National Agricultural Co-op. Marketing Federation India Ltd. v. Gains Trading Ltd**, (2007) 5 SCC 692 and also **P.Manohar Reddy & Bros. v. Maharashtra Krishna Valley Development Corporation and Ors.**, (2009) 2 SCC 494). Therefore, even if the parties intended to change the performance of the obligations under the contract like 15 days free time period required for detention at the final destination and accepted subject to terms of the purchase contract, still, it was all the more necessary for the plaintiff to point out about the alteration of dispute resolution mechanism to the defendants as the said term is collateral term in the agreement and does not get perished on account of change in the performances or other alterations in the agreement. The plaintiff did not point out the said fact to the defendants immediately prior to the signing of the sales confirmation on 27th January, 2009 nor there is any communication giving any hint towards the same. Therefore, the dispute resolution clause cannot be said to be altered automatically and impliedly till the time it is specifically the same is abrogated with the consent of the parties. Therefore, the plaintiff cannot wriggle out of the arbitration clause in the manner sought to be done by him.

- Fifthly, it is also noteworthy to mention that both the plaintiff and defendants after signing the sales confirmation carried forward with the working of the contract by referring to the sales confirmation No.6097-08 which can be seen from the communications and emails which have been exchanged between the plaintiff, third parties and the defendants in the month of February and March, 2009. All this means that the intention of the parties was to further the intention of the parties contained in the sales confirmation and not to alter the same after signing the agreement in the month of January, 2009. Therefore, the intention of the parties was always to proceed with the working of the sales confirmation and not to obstruct the same. Thus, in such a case, it cannot be said that the arbitration agreement should be replaced with clause contained in the purchase contract.

For all these reasons, I reject the plea of the plaintiff that the terms of the purchase contract are to be read into the sales confirmation or the sales confirmation was subrogated with the purchase contract by operation of the deeming provision contained in the purchase contract.

- c) The plaintiff has also challenged the arbitration clause contained in clause 'J' as being ambiguous in nature and not qualifying the ingredients of the valid arbitration clause. This plea has been taken by the plaintiff by urging that the arbitration clause nowhere points out the manner of conducting the arbitration and also the number of the arbitration, binding decision attached to

the arbitration etc. I find the said plea as meritless. This is due to the reason that clause 'J' of the sales confirmation starts with the head note arbitration and then it says that all the disputes differences which may arise out of this contract are to be submitted to the Rules and Regulations of the London Metal Exchange in London. The rules and regulations of London Metal Exchange further contain the details, the manner of the appointment of the arbitrator and further procedural aspects contained therein. Even the plaintiff itself argued alternatively that the arbitration in London Metal Exchange is not workable as the rules of London Metal Exchange provides for appointment of two arbitrators which are against the public policy. Once, the plaintiff himself points out that the rules of London Metal Exchange contains the mechanism for appointment of the arbitrator and the manner of conducting of the proceedings, I do not find that the arbitration clause is ambiguous or is not workable on any count merely if the clause provides minimum details of working of the Arbitral Tribunal till the time it incorporates the rules and regulation of the London Metal Exchange in its wordings and subject the parties to the said rules and regulations containing the said procedural rules and the manner of conducting the proceedings.

- d) The plaintiff has also challenged the rules and regulation of London Metal Exchange as being contrary to public policy by pointing out variations in the methods of the working of the arbitrators. Further, it has been argued that there was no cause

of action in London therefore, the arbitration in London is also against the public policy as the London would not be forum vested with the jurisdiction. I reject this contention of the learned counsel for the plaintiff as well. This is due to the reason that the parties are free to choose the place or seat of the arbitration at any place and subject to the rules and regulations of any institution situated therein at least in the cases involving International Commercial Arbitration. Such choice of the forum for conducting the International Commercial Arbitration is provided even under the Act. Thus, there are no public policy issues by merely choosing the forum for the purposes of the seat of the arbitration. Likewise, the curial law for the purposes of the conducting the International Commercial Arbitration proceedings in the foreign court is also within the free choice of the parties and thus the mere fact that the appointments and challenge to the award shall be subject to the different system of law or the said provides different number of the arbitrators or different set of procedure are no grounds which allows this Court to interdict in the cases involving the International Commercial Arbitrations. The recent decision of ***Reliance Industries Ltd. & Ors. v. U.O.I***, (2014) 7 SCC 603 expounds the same view. Accordingly, the submission of the learned counsel for the plaintiff is rejected.

21. These were the grounds on which the plaintiff has challenged the validity of the arbitration agreement entered into between the parties and called upon the Court to hold that the arbitration agreement is invalid or non operative or incapable of being

performed. In view of my discussion done in the preceding paragraphs, I find that none of the grounds raised by the plaintiff to dispute the validity of the arbitration agreement is tenable which can be said to vitiate the arbitration agreement entered into between the parties contained in the sales confirmation. Accordingly, following the dictum in ***Chloro Control*** (supra), I find that no ground exists for this Court to hold that the agreement containing the arbitration clause is invalid, inoperative or incapable of being performed and consequently the present suit is not maintainable and disposed of accordingly. All the pending applications are also disposed of. The parties are directed to take the necessary steps to appoint the Arbitral Tribunal as per the rules and regulations of London Metal Exchange located at London.

22. The application being I.A. No.12391/2013 is accordingly allowed.

(MANMOHAN SINGH)
JUDGE

OCTOBER 09, 2014