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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Order reserved on 29.07.2021

Order delivered on 04.02.2022

CORAM

THE HONOURABLE MR.JUSTICE V.PARTHIBAN

C.M.A.Nos.408, 701, 702, 858, 859, 861, 862, 890 & 892 of 2021
and
C.M.P.Nos.2640, 4224, 4231, 4946, 4948, 4973, 4983, 5115, 5117
of 2021
CMA.Nos.408, 701, 702, 858, 859, 862, 890 & 892 of 2021

1. M/s. Abhibus Services India Pvt. Limited,
Workafella Cyber Crown, Sec-II
Village, Huda Techno Enclave,
Madhapur, Hyderabad - 500 081
2. M/s. Analogics Tech India Limited,
9/10, Road No.6, Nacharam Industrial Estate,
Hyderabad - 500 076

..Appellants in all C.M.As. /
Proposed Respondents 2&3

-Vs-

1. Pallavan Transport Consultancies Services Ltd.
Represented by its Managing Director,
100 Feet Road, Institute of Road Transport Campus,
Taramani, Chennai - 600 013.

.. 1st respondent in all the CMAs. /
1st Appellant

2. Metropolitan Transport Corporation (Chennai)
Represented by its Managing Director,
Pallavan House, Anna Salai,
Chennai - 600 002.

..2nd respondent in CMA.No.408/2021 /
2nd Appellant



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3. Tamil Nadu State Transport Corporation (Tirunelveli)
Represented by its Managing Director,
No.23/2, Tuticorin Road, K.T.C.Nagar,
Tirunelveli - 627 011.
..2nd respondent in CMA.701/2021 /
2nd Appellant
4. State Express Transport Corporation (Tamil Nadu) Ltd.,
represented by its Managing Director,
"Thiruvalluvar House", No.2, Pallavan Salai,
Chennai - 600 002.
..2nd respondent in CMA.702/2021 /
2nd Appellant
5. Tamil Nadu State Transport Corporation (Coimbatore) Ltd.,
Represented by its Managing Director,
37, Mettupalayam Road,
Coimbatore - 641 043.
..2nd respondent in CMA.858/2021 /
2nd Appellant
6. Tamil Nadu State Transport Corporation (Kumbakonam)
represented by its Managing Director,
No.27, Railway Station New Road,
Kumbakonam - 612 001
..2nd respondent in CMA.859/2021 /
2nd Appellant
7. Tamil Nadu State Transport Corporation (Madurai) Ltd.
Represented by its Managing Director, Bye Pass Road,
Madurai - 625 010.
..2nd respondent in CMA.862/2021 /
2nd Appellant
8. Tamil Nadu State Transport Corporation (Salem) Ltd.
Represented by its Managing Director,
12, Ramakrishna Road,
Salem - 636 007.
..2nd respondent in CMA.890/2021 /
2nd Appellant
9. Tamil Nadu State Transport Corporation (Villupuram) Ltd.,
Represented by its Managing Director,
3/137, Salamedu,
Villupuram - 605 602
..2nd respondent in CMA.892/2021 /
2nd Appellant



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10. M/s. Ingenerie Technologies Solutions P Ltd.
Represented by its Authorized Representative,
Mr.Vamsi Krishna Gandavaram,
S/o Sridhar Reddy Gandavaram,
Office at No.558, Swarna Heights,
Arora Colony, Road No.3, Banjara Hills,
Hyderabad - 500 034
Currently having its registered office at
No.19/67, 2nd Floor, Jupiter Complex,
Dr.Ranga Road, Mylapore,
Chennai - 600 004.

..3rd Respondent in all the CMAs. /
1st Respondent

Prayer: Civil Miscellaneous Appeals filed against the order of the Sole Arbitrator dated 05.01.2021 made in I.A.No.2 of 2020 in all batch matters Arb.TN-STU/MTC/2 of 2020, Arb.No.TN-STU/Tirunelveli/6 of 2020, Arb.TN-STU/SETC/7 of 2020, Arb.TN-STU/Coimbatore/9 of 2020, Arb.TN-STU/Kumbakonam 8/2020, Arb.TN-STU/Madurai/3 of 2020, Arb.TN-STU/Salem 4 of 2020 and Arb.TN-STU/Villupuram 5 of 2020 respectively.

CMA.No.861 of 2021

1. M/s. Abhibus Services India Pvt. Limited,
Workafella Cyber Crown, Sec-II
Village, Huda Techno Enclave,
Madhapur, Hyderabad - 500 081
2. M/s. Analogics Tech India Limited,
9/10, Road No.6, Nacharam Industrial Estate,
Hyderabad - 500 076

..Appellants / Respondents 2&3

-Vs-

1. Pallavan Transport Consultancies Services Ltd.
Represented by its Managing Director,
100 Feet Road, Institute of Road Transport Campus,
Taramani, Chennai - 600 013

...1st Respondent / Applicant

2. M/s. Ingenerie Technologies Solutions P Ltd.
Represented by its Authorized Representative,
Mr.Vamsi Krishna Gandavaram,
S/o Sridhar Reddy Gandavaram,
Office at No.558, Swarna Heights,



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Arora Colony, Road No.3, Banjara Hills,
Hyderabad - 500 034
Currently having its registered office at
No.19/67, 2nd Floor,
Jupiter Complex,
Dr.Ranga Road, Mylapore,
Chennai - 600 004.

... 2nd Respondent / 1st Respondent

Civil Miscellaneous Appeal filed against the order of the Sole Arbitrator comprising of Justice R.Banumathi (Retd.) dated 05.01.2021 made in I.A.No.2 of 2020 in all batch matters Arb.TN-STU/MTC/2 of 2020.

For Appellants
in all the CMAs. : Mr.Srinath Sridevan

For Respondents
in C.M.A.Nos.408, 701,
702, 858, 859, 862,
890 & 892 of 2021 : Mr.R.Shanmuga Sundaram,
Advocate General
Assisted by Mr.K.Moorthy
for R1
Mr.R.Shanmuga Sundaram,
Advocate General
Assisted by Mr.D.Raghu for R2
Mr.S.B.Kiran Kumar for R3

For Respondents
in C.M.A.No.861 of 2021 : Mr.R.Shanmuga Sundaram,
Advocate General
Assisted by Mr.K.Moorthy
for R1
Mr.R.Shanmugasundaram
Advocate General Asst.by
Mr.D.Raghu for R2

COMMON JUDGMENT

The appellants herein were the proposed respondents in the above arbitration proceedings.

2. The present appeals are against the order of the learned Arbitrator allowing application (I.A.No.2 of 2020) filed by the respondents/ State Undertakings herein seeking to implead them in their counter claims in the arbitral proceedings. According to the appellants herein, they were not signatories to the arbitration agreement and hence cannot be



impleaded in the first place. More so, the arbitral Tribunal has no power to implead them as parties in terms of the scheme of the Arbitration and Conciliation Act, 1996.

3. The appellants herein being non-signatory to the Arbitration agreement cannot be made parties, in the arbitral proceedings initiated at the instance of the claimant, the 2nd respondent herein as against the State Undertakings. In the course of the arbitral proceedings, on behalf of the State Transport Corporation, Interlocutory Application No.2 of 2020 was filed making a counter claim against the claimant/appellants herein for the first time. When objections were raised against the maintainability of such Application by the appellants herein, the learned arbitral Tribunal framed questions for consideration as under.

i) Whether the proposed respondents are necessary parties to the arbitral Proceedings?

ii) Whether the arbitral Tribunal has jurisdiction to implead the proposed respondents as necessary parties?

4. Before dealing with final decision of the arbitral Tribunal in the I.A., it is essential to delineate the relevant facts that gave rise to the reference to the arbitration proceedings between the 2nd respondent herein being the claimant and the State Transport Corporations, the original parties. For the sake of clarity, the original parties to the Arbitration are described as claimant (the 2nd/3rd respondent herein) and the State Corporation (1st respondent herein).

i) The State Corporation has floated a tender for implementation of a project called Electronic Ticket Machine (hereinafter referred to as 'ETM') in all State Transport Undertakings (hereinafter referred to as 'STUs'). The claimant before the Tribunal, viz. M/s. Ingenerie Technologies Solutions Pvt. Ltd., the 2nd or the 3rd respondent as the case may be in these appeals in response to the call for bids, applied for consideration as consortium along with two other companies on board namely, the appellants herein. After consideration of all the bids, finally, the claimant was selected to execute the project, declaring the claimant as the lead partner of the consortium, comprising both the appellants herein.

ii) Prior to the actual award of the contract on 03.04.2013, several requirements and legal formalities needed to be complied with as per the pre-contract stage called as Request For Proposal (RFP) dated 13.09.2012. During that RFP stage, several criteria had been laid down for consideration of the potential bidders for the project. Ultimately, the



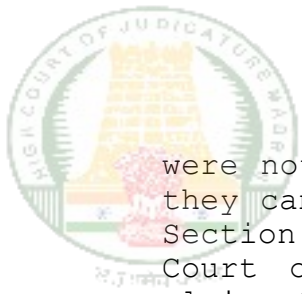
consortium comprising the appellants herein with M/s. Ingenerie Technologies Solutions Pvt. Ltd., as lead partner was selected for execution of the project.

iii) In the course of the execution of the project a dispute arose between the parties which led to the filing of applications before this Court under section 9 of the Arbitration and Conciliation Act, 1996 hereinafter referred to as A & C Act, 1996. The lead partner M/s. Ingenerie Technologies Solutions Pvt. Ltd., approached this Court in O.A.Nos. 317, 318, 319, 320, 321, 322, 323 & 324 of 2020 & A.Nos. 1704, 1705 & 1706 of 2020 seeking interim protection pending reference to Arbitration as against the State Corporations. When the applications came up for consideration, the learned Judge of this Court was informed that the parties had consented to have a common Arbitrator and requested the Court to refer the entire dispute to the arbitral Tribunal. In the face of the submissions of the parties, this Court, by order dated 17.09.2020, disposed of all the applications by appointing a Former Supreme Court Judge, Mrs. R. Banumathi, as sole Arbitrator to enter upon reference and adjudicate the dispute inter se the parties.

5. It is relevant to mention here that Section 9 applications have been filed at the instance of M/s. Ingenerie Technologies Solutions Pvt. Ltd., as against State Corporation, which eventually led to the reference vide aforementioned order of the Court. The appellants were not parties to the applications, though they were admittedly part of the consortium.

6. When the proceedings commenced before the learned Arbitrator, on behalf of the State Corporation counter claims were raised against the claimant M/s. Ingenerie Technologies Solutions Pvt. Ltd. and other two consortium members, the appellants herein. Since the appellants herein were not made parties by the lead partner, the claimant in the reference, the State Corporation was constrained to file application in I.A.No.2 of 2020 dated 15.11.2020 seeking to implead these appellants in the pending proceedings. The learned Arbitrator, after considering various objections raised on behalf of the appellants herein as to the maintainability of the I.A., overruled the same and allowed the Application by a detailed order on 05.01.2021. As against their impleadment in the counter claim by the State Corporations, the present appeals have been filed.

7. On behalf of these appellants, several legal objections had been raised that the arbitral Tribunal was not vested with jurisdiction to implead third party as no such power was available under the scheme of the A & C Act, 1996. One of the main contentions raised therein was that the appellants herein



were not signatories to the arbitration agreement and therefore, they cannot be impleaded in the arbitration proceedings in terms of Section 2(1)(h) of the A & C Act, 1996. Further, when this Court ordered for appointment of the learned Arbitrator, the claimant, the lead partner of the consortium alone was a party before this Court.

8. In the above circumstances, the arbitral Tribunal cannot said to be clothed either with power or jurisdiction to implead third parties in the proceedings in terms of the underlying concept of arbitration and the scheme of the Act in particular with reference to the definition clause of 'party' in Section 2(1)(h) of the Act. If at all any non-signatory party could be impleaded as a consequence of the evolving legal concept namely 'Group of Companies' doctrine, only the Court has the power and jurisdiction to examine whether impleadment of a third party is legally permissible and their presence in the arbitration proceedings is proper and necessary or not on the basis of facts and circumstances of the case. As corollary to the main objection, supplementary objections have also been raised conceding the power of impleadment on a hypothetical supposition, whether the arbitral Tribunal can order impleadment by exercise of its power under Section 17 of the A & C Act, 1996 or not? which provision is intended to provide interim measures, pending arbitration proceedings. Further, in the absence of notice under section 21 of the Act, whether there is a valid commencement of arbitral proceedings in respect of the counter claim against the proposed parties or not. In substance, these objections have been the fulcrum of the defence set up by the appellants herein before the learned arbitral Tribunal.

9. The State Corporation, on the other hand, contended that in the execution of all the documents prior to and till the time of issuing the work order, the claimant was considered only as the lead partner of the Consortium which included the appellants herein. The claimant individually could not have bagged the contract at all, but for the actual participation and partnership of the appellants. Once the contract is given to the consortium, considering each company's contribution of its domain knowledge, all three companies became one entity and deemed to have become parties to all the terms of the contract. In that view of the matter, any agreement entered into by the lead partner could also said to be binding on the other consortium members. This is more so when execution of the project was fully dependant on the active participation of all the consortium members/companies.

10. In the above factual backdrop arguments have been advanced by Mr.Srinath Sridevan, the learned counsel for the



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appellants. Apart from appraising this Court of the basic facts, the learned counsel cited and relied upon several decisions of the Hon'ble Supreme Court and this Court in support of his contention that arbitral Tribunal has no jurisdiction to implead third parties, as it deems fit, in the absence of their consent to the arbitration that gave rise to the reference. According to him, admittedly, the claimant is the only signatory to the contract agreement dated 03.04.2013, wherein Clause 1.9.1 deals with the dispute resolution and reference to arbitration. The said contract has been signed only by the claimant and not by these appellants. In the same contract, these appellants have been described only as sub-contractors.

11. According to him, section 2(i)(h) of the A & C Act, 1996, defines party means "party to an arbitration agreement". Admittedly, these appellants had not been parties to the arbitration agreement dated 03.04.2013. The learned Arbitrator acknowledged this fact in the order, stating that even though these appellants were not signatories to the contract agreement, yet, for effective determination of the contractual issues, particularly, in response to the counter claims, these appellants were necessary parties and thus, ordered the impleadment of the appellants.

12. The learned counsel would submit that these appellants had not been parties either in Section 9 proceedings before this Court, which culminated in the appointment of the learned Arbitrator in O.A.Nos. 317, 318, 319, 320, 321, 322, 323 & 324 of 2020 & A.Nos.1704, 1705 & 1706 of 2020 vide order dated 17.09.2020. In the absence of the present appellants being parties to the proceedings before this Court, the arbitral Tribunal on its own cannot implead third parties in the proceedings, as such power is alien to the scheme of the A & C Act.

13. The learned counsel would further submit that the claimant company itself did not think fit to make the appellants as parties to their claim against the State Corporations, notwithstanding the fact that the appellants are part of the consortium, adding the appellants as parties only in the counter claim by the respondent to the claim (State Corporations) is therefore, legally impermissible, even otherwise. The learned counsel also raised inter alia two other objections that whether power to implead is available under Section 17 of the A & C Act, 1996. Th learned counsel also contended as to the maintainability of the commencement of the arbitration proceedings in respect of the fresh counter claims by the State Corporation in the absence of notice under Section 21 of the A & C Act, 1996.



14. The learned counsel during the course of his arguments has also drawn the attention of this Court to one important factor that in August, 2014, the Law Commission had suggested an amendment to Section 2(1)(h) by adding words "or any other person claiming through or under such party" after the words "party to an arbitration agreement". But despite the recommendation of the Law Commission, when several amendments were introduced in the Act in 2015, by the Amendment Act, (3 of 2016, this recommendation was consciously omitted. According to the learned counsel, conscious omission to amend section 2(1)(h) despite the recommendation of the Law Commission in the statute meant that the constricted meaning of the definition alone is permissible. In terms of the unamended section 2(1)(h), a third party cannot be impleaded at all in the arbitration proceedings.

15. At this point of submission by the learned counsel for the appellants, the learned Advocate General appeared for State Corporation and submitted that in view of the counter claims by the State Corporation against the appellants herein being entangled in these litigations, the entire arbitration proceedings have come to a stand still. According to him, all the State Transport Undertakings in the State are in serious financial doldrums and fighting for its survival. In such view of the matter, these undertakings cannot afford to get enmeshed in a protracted litigations for long.

16. According to the learned Advocate General in the larger consideration of the survival of the Corporation and also not having the wherewithal to fight any further, a memo on its behalf dated 08.10.2021, came to be filed after the orders were reserved in these appeals by this Court. On behalf of the appellants herein, on the following day, Aide Memoire (written summary) dated 09.10.2021 also came to be filed.

17. The contents of the memo of the State Corporation dated 08.10.2021 are extracted hereunder:

The respondents M/s. Pallavan Transport Consultancy Services Ltd and the Tamil Nadu State Transport Corporations, Madurai Tirunelveli and Kumbakonam submit as follows:

1. The above Appeals arise out of the Arbitration proceedings initiated as per orders of this Hon'ble Court in O.A.Nos.317-324 of 2020, dated 17.09.2020 appointing the Hon'ble Mrs.Justice R.BANUMATHI as Sole Arbitrator (TN-STU-2/2020 to 9/2020) and pending before the Hon'ble Mrs.Justice R.BANUMATHI.



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2. In the above arbitration proceedings, the claim was made by M/s. Ingenerie Technologies Solutions Pvt.Ltd against M/s. Pallavan Transport Consultancy services Limited and the State Transport Units. There were counter claim was made by the respondents who are the M/s. Pallavan transport Consultancy Services Ltd and others, who are the State Transport Units.

3. The respondent shave file Interim applications to implead the other members of the consortium partners who are the Appellants before this Hon'ble Court.

4. The Hon'ble Court has passed an Interim order in I.A.No.2 of 2020 for praying the Hon'ble Arbitrator to issue notice to the other members of the consortium the proposed respondents namely M/s. Abhibus Services India Pvt. Ltd & M/s. Analogics Tech India Pvt. Ltd.

5. The Hon'ble Arbitrator was pleased to consider the following questions:

(i) Whether the proposed respondents are necessary parties to the arbitral Proceedings?

(ii) Whether the arbitral Tribunal has jurisdiction to implead the proposed respondents as necessary parties?

6. The Hon'ble Arbitrator had passed an order on 05.01.2021, allowing the applications filed by the respondents and thereby impleading M/s. Abhibus Services India Pvt.Ltd. & M/s. Analogics Tech India Pvt. Limited as respondents in the counter claims filed by the M/s. Pallavan Transport Consultancy Services Ltd and other State Transport Units in all the claim petitions TN-STU-PTCS 1/2020, TN-STU 2/2020 to 9/2020.

7. Against the above order, passed by the Hon'ble Arbitrator, the impleaded respondents have preferred the above Appeals. At the final hearing of the above CMAs, the respondents M/s. Pallavan Transport Consultancy Services Ltd land State Transport Units are advised to proceed with the arbitration and the counter claim against the lead members of consortium M/s. Ingenerie Technologies Solutions Pvt. Ltd and defend the claims made by



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M/s. Ingenerie Technologies Solutions Pvt. Ltd. before the Arbitrator by reserving their right to make claim separately against the consortium partners of M/s. Ingenerie Technolgies Solutions Pvt. Ltd, M/s. Abhibus Services India Pvt. Ltd & M/s. Analogics Tech India Pvt. Limited, if so advised.

Therefore, it is prayed that the above submissions may be recorded and the respondents may be permitted to proceed with the arbitration and complete the arbitration with stipulated time.

Dated at Chennai this the 8th day of October, 2021.

18. Despite the difficulties expressed by the State Corporations in getting entangled in a prolonged litigation in respect of sustaining its counter claim, yet the Corporation is not giving up their rights altogether but they seek to reserve their right to make counter claims against all the three consortium members. The contents of the memo point to the fact that the Corporation is reserving their rights for the present and to come up with counter claims separately, if so advised. The legal effect of such statement is that the counter claims is very much part of the surviving dispute inter-se parties but such claim for the present need not derail the pending arbitration proceedings initiated by the claimant against the Corporation.

19. Although, no serious arguments have been advanced on behalf of the State Corporation in view of the constraints expressed by the learned Advocate General as indicated in the above extracted Memo, nevertheless when the right is sought to be reserved to make a counter claim against the appellants herein, this Court is constrained to deal with the momentous legal issue raised in these appeals as to the power and jurisdiction of the arbitral Tribunal to implead non-signatory in terms of the scheme of the A & C Act, 1996 and with reference to the liberal construct of the meaning 'party' to an arbitration by the courts, lately. As a matter of fact, several judgments have been cited and relied upon, accompanied with detailed arguments, by the learned counsel for the appellants. The counsel besides questioning the power and jurisdiction of the Tribunal on the legal aspect of impleadment of third party, has also extensively placed submissions as how these appellants were not necessary or proper parties, even otherwise.

20. In the said circumstances, this Court has to necessarily deal with all the issues that have come up for



consideration before this Court in the present appeals. In these appeals, very vital and fundamental legal issues have been raised on behalf of the appellants calling for its critical examination of this Court. In the quest for comprehensive verdict, this Court has to embark on a salutary judicial discourse by drawing reference to the scheme of the A & C Act, 1996, the relevant case laws, the legal principles evolved over the years touching upon the relevant provisions of the A & C Act, 1996 prior to and post Amendment Act, 2016 etc.

21. Before dealing with the cardinal issue of whether the arbitral Tribunal has the power to implead a non-signatory as a party to the arbitral proceedings within the frame work of the A & C Act, 1996, this Court is inclined to take a call on how the learned arbitral Tribunal has dealt with the objections raised by the appellants herein and the basis of its overruling the same, eventually holding such power is available firstly and secondly the appellants herein are necessary and proper parties, as they being part of the consortium. On merits, the learned Tribunal held that for the resolution of the dispute qua parties, their presence is mandatory. In the appeals, the learned counsel for appellants have canvassed substantially advancing their case on merits touching upon every factual aspect that they are not parties to the arbitration agreement and they are independent legal entities not an affiliate or a subsidiary of the lead partner and hence, are neither proper nor necessary parties.

22. According to the counsel, reference to arbitration is essentially on the basis of consent and in the absence of any consent from the appellants, adding them as parties in the arbitration proceedings cannot be countenanced in law. In view of the elaborate submissions made on behalf of the appellants, both on merits as well as on the lack of jurisdiction and power of the arbitral Tribunal, this court is constrained to render a composite ruling examining the decision of the learned arbitral Tribunal comprehensively.

23. In terms of the memo filed before this Court, the right being reserved by the State Corporation, such right may also rest on the finding of this Court as to whether the impleadment of these appellants is justified or not in the facts and circumstances of the case. This Court is taking the extraordinary call for the reason that the State Corporation having faced the present challenge should at the end of the day know where they stand legally vis-a-vis their counter claim against the claimant as well as the appellants herein.

24. The learned arbitral Tribunal, in great detail, has referred to the project floated by the State Corporation and



the participation of the consortium of three member companies, the claimant, as the lead partner and the other two members are the appellants herein. The consortium of all the three members participated in the open tender called for on behalf of the State Undertakings and it ultimately, became the successful bidder. The letter of acceptance was issued on 28.02.2013 and the work order was issued on 13.03.2013. The decision to award the contract was solely and principally premised on the combined technical, financial and domain experience by all the three members put together as consortium.

25. As between the lead partner and the appellants herein, the supplement agreements have been entered into for the effective execution of the project by the lead partner, the claimant before the arbitral Tribunal. In terms of certain clauses in RFP, various documents have been executed like Power of Attorney, Memorandum of Understanding by the appellants herein to the satisfaction of the tender requirement and only thereafter, it was accepted and work order was issued. At every stage, all the three members of the consortium participated and complied with the pre-tender as well as post-tender conditions and only thereafter, the consortium was finally selected for the execution of the project. Moreover, without participation of the appellants herein, the lead member alone, cannot execute the project without participation of the appellants herein as the technical experts and experts and experience in their respective field was for the effective execution of the contract.

26. In the above factual background, the learned arbitral Tribunal has dealt with the contentions of these appellants that they were not privy to the contract agreement and therefore, not entitled to be impleaded in the first place. The learned arbitral Tribunal has considered the term of the contract in detail and referred to all the relevant documents executed by the parties that very much included the appellants herein in the run up to the ultimate award of the contract and the final issue of the work order. It is extremely relevant and significant to see as how the learned arbitral Tribunal particularly dealt with the stiff opposition stemming from the appellants herein against their impleadment both on the merits and on the jurisdictional aspect as well. The learned Tribunal, in extenso, has dealt with every facet of the challenge, both on its merits and the maintainability of the I.A. for impleadment but navigated through the objections and surmounted the challenges in its detailed order. In order to appreciate the findings and the reasons that formed the basis of its ultimate conclusion, it is necessary to extract paragraphs 23-50 of the order herein below.



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23. Re: Contention that the Proposed Respondents are not privy to the Contract Agreements:

For proper appreciation of the contentions and determination of the points raised, it is necessary to refer to the relevant clauses in the RFP and Appendices thereof and relevant terms of the Contract Agreements to show that Claimant - Ingenerie and the proposed respondents - Abhibus and Analogics became successful Bidder only as Consortium and satisfying all mandatory requirements as Consortium.

24. Clause I of RFP lays down 'Introduction to Project'. Clause 1.1 therein contains the General terms. The relevant clause reads as under: "I.1. General

1.1.1 The purpose of this Request for Proposal (RFP) is to seek the services of a reputed firm who would conduct requirement analysis, design, develop, test and implement Online Electronic Ticketing Machines (ETM) and Procure, Supply, Install, Commission, Configure, Test, Integrate, Implement, Manage and Support the ETM and Hardware & Network Connectivity / Infrastructure / Equipments / Cabling etc., on Design, Build, Own, Operate and Transfer (DBOOT) model by 285 Depots, 8 Divisions, 20 Regions and a Central Control Centre at Chennai (including required web based software) for the State Transport Undertakings in Tamil Nadu, for the total contract period of 5 years from the date of signing the agreement." (Page 08 Volume 1)

25. The Provision regarding Bidders Registration is contained in Clause 2.2.1 which reads as under:

"2.2.1 The Bidders eligible for participating in the Request for Proposal for process shall be any one of the following:

Category I: The bidder should be an individual Company

(or)

Category II: A combination of maximum of three (3) members, comprising one Prime Bidder (Lead Member) and two other members all are Category-I entity and shall hereinafter be referred as "Consortium".

26. Other Relevant Clauses of RFP as Qualification Parameters are as under:



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"2.2.2 The Bidder/ members of Consortium including Lead Member must be an Information Technology Company / Corporation or Intelligent Transport Solution Provider for Electronic Ticketing Machines.

2.2.3 The Bidder should submit a Power of Attorney as per the format enclosed at Appendix 4, authorizing the signatory of the Proposal to commit the Bidder.

2.2.4 Notwithstanding anything stated elsewhere in these documents, PTCS shall have the right to seek updated information from the Bidders to ensure their continued eligibility. Bidders shall provide evidence of their continued eligibility in a manner that is satisfactory to PTCS. A Bidder may be disqualified if it is determined by PTCS, at any stage of the process, that the Bidder will be unable to fulfil the requirements of the Project or fails to continue to satisfy the eligibility criteria. Supplementary information or documentations may be sought from Bidders at any time and must so be provided within a reasonable time frame as stipulated by PTCS.

2.2.5 A Bidder or member of Consortium which has earlier been barred by Transport Department, Government of Tamil Nadu / any other entity of Government of Tamil Nadu or blacklisted by any State Government or Central Government / Department / Agency in India shall not be eligible to submit a Proposal, either individually or as member of a Consortium, if such bar subsists as on the Proposal Due Date. The Bidder or the member of Consortium shall be required to furnish an affidavit that there is no such bar imposed and existing as on the Proposed Due Date as per format provided in Appendix 8.

In case of Consortium. Prime Bidder is responsible for all related activities with PTCS/STUs. Also, communications, payments and other activities are to be made with Prime Bidders or PTCS/STUs.

27. Clause 2.2.7 deals with Technical Experience Criteria, as per which the Bidder/Consortium Member should be a Company, registered under the Indian Companies Act. In case of a consortium, the Eligibility Criteria will



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2.3.1 Wherever required, the Proposal shall contain the information required for each of the members of the Consortium.

2.3.2 The Proposal shall be signed by the duly authorized signatory of the Lead Member and shall be legally binding on all the members of the Consortium.

2.3.3 Members of the Bidder Consortium shall submit a Power of Attorney in favour of the Lead Member in the format at Appendix 4 authorising the Lead Member and person(s) duly authorized by the Lead Member to sign the Proposal and to make legally binding commitments.

2.3.4 Proposals submitted by a Consortium should comply with the following additional requirements:

a) the number of members in the Consortium would be limited to three (3);
b) the Proposal should contain the information required from each member; c) the Proposal should include a description of the roles and responsibilities of all the members;

d) Members of the Consortium shall nominate one member as the Lead Member and that Member must be a Category I as defined in Clause 2.2.1.

(e) A Bidder who has applied for Project in its individual capacity or as part of a consortium cannot participate as a member of any other consortium applying for the Project;

(f) the Members of the Consortium shall execute a Power of Attorney for Lead Member of Consortium as per the format enclosed as Appendix 5; and

g) The Members of the Consortium shall enter into a Memorandum of Understanding (MoU), as per the format provided under Appendix 9 for the purpose of submission of the Proposal.

The MoU should, inter-alia

i) clearly outline the proposed roles and responsibilities of each member of the Consortium;
ii) include a statement to the effect that all members of the Consortium shall be liable jointly and severally for the Project in accordance with



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the terms of the Contract Agreement; and
iii) clearly refer to the Project for which the arrangement is made.

A copy of the MoU signed by all members should be submitted with the Proposal. The MoU entered into between the members of the Consortium should be specific to the Project and should contain the above requirements, failing which the Proposal shall be considered non-responsive.

2.3.5 Any change in the composition of a Consortium shall not be permitted

29. Format and Signing of Proposal

As per Clause 2.18.1, Bidders shall provide all the information as per this RFP document and in the specified formats. PTCS reserves the right to reject any Proposal that is not in the specified formats. The proposal should be submitted in two parts. Part 1: Technical Proposal and Part 2 Price Proposal. In case of Consortium Members, it specifically requires compliance of signing certain formats:

30. Relevant clauses of Part 1 Technical Proposal are extracted below:

Part 1: Technical Proposal, which would include:

- i) Covering letter-cum-Project Undertaking as per Appendix 1 stating the Proposal Validity period;
- ii) Power of Attorney for Signing of the Proposal (in case of Consortium, this would need to be provided by all the members) as in Appendix 4.
- iii) In case of Consortium, Power of Attorney for designating of the Lead Member of Consortium as in Appendix 5.
- iv) Details of Bidder (in case of Consortium, this would need to be provided by all the members) as Appendix 6.
- v) Completed format of Financial Capability of the Bidder (in case of Consortium, Financial Capability of all the members) as in Appendix 7.
- vi) Format for Affidavit certifying that Business Entity/ Promoter(s)/ Director(s) of Business Entity are not Blacklisted/Barred (as in Appendix 8).
- vii) In case of Consortium, MoU entered into between members in Appendix 9.



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viii) Proof of registration of the Bidder (in case of Consortium, proof or registration of all the Members).

(ix) to (xx)..."

31. Clause 3.7 deals with PTCS right to accept or reject Proposal. Relevant portion of Clause 3.7 reads as under:

"3.7 PTCS's Right to Accept or Reject Proposal

".....

PTCS reserves the right to reject any Proposal, if:

.....

g) there is a change in ownership/ control of the Bidder, where it is a consortium, which is contrary to the terms of this RFP document, including the Contract Agreement.

3.7.4 This would lead to the disqualification of the Bidder. If the Bidder is a Consortium, then the entire Consortium would be disqualified/rejected.

.....

3.7.8 In case it is found after the issue of the LOA or signing of the Contract Agreement or after its execution and during the subsistence thereof, including the contract thereby granted that:

a) one or more of the pre-qualification conditions have not been met by the Bidder,

b) the Bidder has made a material misrepresentation or such material misrepresentation is uncovered;

c) the Bidder has a Conflict of Interest which affects the Bidding Process;

d) The Bidder engages in a corrupt, fraudulent, coercive, undesirable or restrictive practice; or

e) there is a change in ownership/ control of the Bidder, where it is a consortium, which is contrary to the terms of this RFP document, including the contract Agreement.

Then the LOA or the Contract Agreement, as the case may be, shall, notwithstanding anything to the contrary contained therein or in this RFP Document, be liable to be terminated by a communication in writing by the PTCS to the Successful Bidder without the PTCS being liable in any manner whatsoever to the Successful Bidder or System Integrator, as the case may be. In such



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event, the PTCS shall forfeit and appropriate the Bid Security/EMD or Performance Security, as the case may be, as mutually agreed genuine pre-estimated compensation and damages payable and effect of the PTCS, without prejudice to any other rights or remedy that may be available to PTCS.

32. Clause 2.18.2 Part I deals with Requisite for Technical Proposal. In compliance of Clause 2.18.2, Part 1(ii), read with Clause 2.3.3 of RFP, the Consortium Members have executed the Power of Attorney as contained in Appendix 4. We may usefully refer to the said Power of Attorney executed by Abhibus on 23.01.2013. The said Power of Attorney reads as under:

"Power of Attorney

KNOW ALL MEN BY THESE PRESENTS, We, M/s. Abhibus Services India Private Ltd, having registered office at 1st Floor, Lakshmi Tower-B, Nagarjuna Hills, Punjagutta, Hyderabad 500082, do hereby constitute, appoint and authorize Mr. N M R K Reddy, residing at Flat No. 102, Studio Sycamore, Banjara Hills, Road No. 4, Hyderabad 500082, who is presently employed with us and holding the position of Vice President-Govt Sales as our Attorney, to do in our name and on our behalf, all such acts, deeds and things necessary in connection with or incidental to our bid for the Project envisaging Implementation of Global Positioning System (GPS) based - ticketing System through hand-held devices for all State Transport Undertakings Buses in Tamil Nadu RFP RFP No. GPS based ETS-1, including signing and submission of all documents and providing information/responses to Pallavan Transport Consultancy Services Limited, ("PTCS"). representing us in all matters before PTCS, and generally dealing with PTCS in all matters in connection with our bid for the said Project.

We hereby agree to ratify all acts, deeds and things lawfully done by our said Attorney pursuant to this Power of Attorney and that all acts, deeds and things done by our aforesaid attorney shall and shall always be deemed to have been done by us.

For ABHIBUS Service India Private Limited
(Sd.) CHIRRA SUDHAKAR REDDY
MANAGING DIRECTOR & CEO"



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33. In compliance of Clause 2.18.2 Part 1 (ii) read with Clause 2.3.3 of RFP, similar Power of Attorney was executed by Analogics appointing Mr. R. Naveen Kumar Reddy, their General Manager-Operations as Attorney to sign the Tender Documents, etc.

34. In compliance of Clause 2.3.4(g) read with Clause 2.18.2 Part I (vii), the Consortium members viz., Ingenerie, Abhibus and Analogics have executed Memorandum of Understanding/MoU (as per Appendix 9) on 21.01.2013, authorising Ingenerie as Lead Member-Project Management, Project Financing: Abhibus for Project Management, Software Services, Data Center and Control Center Maintenance Management; and Analogics for ETM Supply, Depot Infrastructure Maintenance and Management. The said MoU reads as under:

Memorandum of Understanding

"This MoU entered into this 2st day of January 2013 at INGENERIE TECHNOLOGICES SOLUTIONS PVT LTD and having its Registered Office at G-1, Plot No. 558, Swarna Heights, Aurora Colony, Road No. 3, Banjara Hills, Hyderabad, Andhra Pradesh 500034, (hereinafter referred as 'INGENERIE', which expression unless repugnant to the context or meaning thereof includes its successors and permitted substitutes) of the First Part;

AND

ABHIBUS SERVICES INDIA PRIVATE LIMITED and having its Registered office at 1st Floor, Lakshmi Tower-B, Nagarjuna Hills, Punjagutta, Hyderabad 500082 (hereinafter referred as "ABHIBUS", which expression unless repugnant to the context or meaning thereof includes its successors and permitted substitutes) of the Second Part;

AND

ANALOGICS INDIA PRIVATE LIMITED and having its Registered Office at Plot No. 9/10, Road No. 6, Nacharam Industrial Estate, Nacharam, Hyderabad 500076, (hereinafter referred as "ANALOGICS", which expression unless repugnant to the context or meaning thereof includes its successors and permitted substitutes) of the This Part.

The parties are individually referred as a Party and collectively as Parties.



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WHEREAS Pallavan Transport Consultancy Services Limited (PTCS) has invited Request for Proposal (RFP) from entities interested for Implementation of Global Positioning System (GPS) based e-ticketing System through hand-held devices for all State Transport Undertakings Buses in Tamil Nadu RFP RFP No. GPS based ETS-1, as per the terms contained in the RFP Document and in terms of Contract Agreement.

AND WHEREAS the Parties have had discussions for formation of a Consortium for bidding for the said Project and have reached an understanding on the following points with respect to the Parties "rights and obligations towards each other and their working relationship".

IT IS HEREBY AS MUTUAL UNDERSTANDING OF THE PARTIES AGREED AND DECLARED AS FOLLOWS:

1. That M/s. INGENERIE, M/s. ABHIBUS and M/s. ANALOGICS who are members of the Consortium participate in the Implementation of Global Positioning System (GPS) based e-ticketing System through hand-held devices for all State Transport Undertakings Buses in Tamil Nadu RFP RFP No. GPS based ETS-1.

2. That the parties shall carry out all obligations and responsibilities in terms of the Contract Agreement;

3. That the roles and the responsibilities of each Party at each stage of the Project shall be as follows:

	Name of Member	Role (Specify Lead Member/Other Member)
1	INGENERIE	Lead Member - Project Management, Project Financing
2	ABHIBUS	Project Management, Software Services, Data Center and Control Center Maintenance Management
3	ANALOGICS	ETM Supply, Depot Infrastructure Maintenance and Management

4. That the Parties shall be jointly and severally liable for the execution of the Project in accordance



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with the terms of the Contract Agreement to be executed on award of the Project.

5. That the Parties affirm that they shall implement the Project in good faith and shall take all necessary steps to ensure the expeditious implementation of the Project.

6. That this MOU shall be governed in accordance with the laws of India and courts in Chennai shall have exclusive jurisdiction to adjudicate disputes arising from the terms herein.

IN WITNESS WHEREOF the Parties affirm that the information provided is accurate and true and have caused this MOU to be duly executed on the date and year above mentioned.

1. For M/s. INGENERIE TECHNOLOGICES SOLUTIONS PVT LTD
Sd/ Director

2. For M/s. ABHIBUS SERVICES INDIA PRIVATE LIMITED
Sd/ Director

3. For M/s. ANALOGICS INDIA PRIVATE LIMITED
Sd/ Director

WITNESSES: Three signed

35. The MoU dated 21.01.2013 signed by all the Consortium Members was submitted along with the proposal as it was the mandatory requirement under Clause 2.3 of the RFP -Additional Requirement for Proposal submitted by a Consortium. The MoU and the Clauses thereon clearly show that the bid was submitted by the Consortium Members-Ingenerie, Abhibus and Analogics.

36. In terms of Clause 2.18.2, the Consortium Members- Ingenerie, Abhibus and Analogics have signed their respective Affidavits stating that they are not barred by the Tamil Nadu Government or blacklisted by any State Government or Central Government / Department or Agency in India, either individually or as a member of a Consortium as on 30.06.2012.

37. Appendix 5 is the Format of Power of Attorney for designating the Lead Member of the Consortium. As per Appendix 5, all members of the Consortium authorized the Lead Member to conduct all business for and on behalf of the Consortium and Head Member shall do and act on their behalf as well. In compliance of Clause 2.3.4 (f) read



with 2.18.2 Part I (iii), the Consortium Members have executed the Power of Attorney as per Appendix 5 authorizing INGENERIE as the Lead Member. The said Power of Attorney reads as under:

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Power of Attorney

"Whereas the Pallavan Transport Consultancy Services Limited (PTCS) has invited proposals from interested parties for Implementation of Global Positioning System (GPS) based e-ticketing System through hand-held devices for all State Transport Undertakings Buses in Tamil Nadu RFP No. GPS based ETS-1.

Whereas, M/ INGENERIE, MA ABHIBUS and Ms. ANALOGICS (collectively the "Consortium") being members of the Consortium are interested in bidding for the Project in accordance with the terms and conditions of this Request for Proposal (RFP) Document and other connected documents in respect of the Project, and

Whereas, it is necessary for the Members of the Consortium to designate one of them as the Lead Member with all necessary power and authority to do for and on behalf of the Consortium, all acts, deeds and things as may be necessary in connection with the Consortium's proposal for the Project and its execution.

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS

We, INGENERIE TECHNOLOGIES SOLUTIONS PVT LTD and having its registered office at G-1, Plot No. 558, Swarna Heights, Aurora Colony, Road No. 3, Banjara Hills, Hyderabad, Andhra Pradesh 500034, ABHIBUS SERVICES (INDIA) PRIVATE LIMITED and having its registered office at 1st Floor, Lakshmi Tower-B, Nagarjuna Hills, Punjagutta, Hyderabad 500082 and M/s. ANALOGICS TECH INDIA PRIVATE LIMITED having our registered office at Plot No. 9/10, Road No. 6, Nacharam Industrial Estate, Nacharam, Hyderabad 500076, (hereinafter collectively referred to as the "Principals") do hereby irrevocably designate, nominate, constitute, appoint and authorize INGENERIE TECHNOLOGIES SOLUTIONS PVT LTD and having its registered office at G-1, Plot No. 558, Swarna Heights, Aurora Colony, Road No. 3, Banjara Hills, Hyderabad, Andhra Pradesh 500034, being one of the Members of the Consortium, as the Lead Member and true and lawful attorney of the Consortium (hereinafter referred to as the "Attorney"). We hereby irrevocably authorize the Attorney (with power to sub delegate) to conduct all



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INGENERIE TECHNOLOGIES SOLUTIONS PVT LTD:

1	a) Name	Ingenerie Technologies Solutions Pvt. Ltd.
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Brief description of the Bidder including details of its main lines of business and proposed role and responsibilities in this Project (s): The mainlines of business is to carry on the business of Software development and Customization, Package Development and Customization, Networking, Information Technology enabled services, Internet related Business, and to undertake Projects in software from abroad or within India and to set up and run electronic data processing Centres.

5. (a) Information regarding role of each member should be provided as per table below:

	Name of Member	Role (Specify Lead Member/Other Member)
1	INGENERIE TECHNOLOGIES SOLUTIONS PVT LTD	Lead Member Project Management, Project Financing
2	ABHIBUS SERVICES INDIA PVT LTD	Project Management, Software Services, Data Center and Control Center Maintenance Management
3	ANALOGICS TECH INDIA PVT LTD	ETM Supply, Depot Infrastructure Maintenance and Management

39. The Consortium put together jointly satisfied the eligibility criteria. The above documents clearly spell out the role and responsibilities of each Consortium member and specify that the parties shall be jointly and severally liable for the execution of the Project in accordance with the terms of RFP and Contract Agreement. Nothing is more clear than that of the fact that Ingenerie is the Lead Member and recognized as the Prime Bidder or System Integrator by the Consortium to have all correspondence and related acts with PTCS and STUs and for making payments.



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Proposed Respondents to the Counter claims are not signatories to the Contract Agreement and therefore, they cannot be impleaded as the Respondents in the Counter claims in the arbitral proceedings. The learned counsel also submitted that Part I of the RFP is part of the Contract Agreement; whereas the Contract Agreement is contained in Part II of the RFP. Therefore, main contention of the Proposed Respondents is that they are not parties to the Contract Agreement which contains the disputes resolution Clause 1.9.1.

43. It was additionally submitted that as per the Work Order dated 13.03.2013, the words "Successful Bidder" or "Prime Bidder" or "System Integrator" have the same meaning. In this regard, the learned counsel Mr. Srinath Sridevan placed reliance upon Clause 7 of the Work Order dated 13.03.2013, which reads as under:

"7. Successful Bidder or Operating Agency or Contractor or Vendor or Bidder of System Integrator or Prime Bidder is same meaning.

8. Prime Bidder M/s. Ingenerie Technologies Solutions Pvt Ltd, Hyderabad is responsible for all related activities with PTCS/STUs. Also, communications, payments and other activities are to be made with Prime Bidder by PTCS/STUs.

9. Any change in the composition of the Consortium shall not be permitted."

The above Clause 7 of the Work Order and the other documents executed by the Consortium Members only show that the System Integrator is responsible for all acts, deeds and things and communications with PTCS and STUs. There is no merit in the contention that the Proposed Respondents are not parties to the Contract Agreements and are not bound by the terms thereon.

44. As discussed earlier, Consortium members jointly put together met the eligibility criteria and became the successful bidder in terms of Clause 2.2.1 - Category II and in terms of Clause 2.2.2 and Clause 2.2.3. The Consortium Members have satisfied the additional requirements in terms of Clause 2.3- Additional Requirements for



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proposal submitted by a Consortium. In the MoU executed on 21.01.2013, in terms of Clause 2.3.4 (g) read with Clause 2.18.2 Part I (vii) of RFP, the Consortium members clearly stated that the Consortium Members - parties shall be jointly and severally liable for the execution of the Project in accordance with the terms of the Contract Agreement to be executed on award of the Project. In the MOU, as per Clause 5, members also affirmed that they shall implement the Project in good faith and shall take all necessary steps to ensure the expeditious implementation of the project. Having undertaken that they are jointly and severally liable for implementation of the project in accordance with the terms of the Contract Agreement and having stated that Ingenerie as the Lead Member is responsible for all the acts and deeds as the Lead Member (Ingenerie), it is not open to the Proposed Respondents who are the Consortium members that they are not parties to the Contract Agreement entered by the SI with the STUs. Claimant Ingenerie, who executed the Contract Agreement with STUs is none other than the Lead Member of the Consortium selected by the Consortium members. The Contract Agreement with STUs which contains the clause for Dispute Resolution is the follow up or the consequence of the Acceptance of the bid by the Consortium members for the implementation of the ETM project in eight STUs. The Contract Agreements with STUs which contains the clause Dispute Resolution Clause 1.9.1 is nothing but a verbatim repetition of Appendix 12 Format of Draft Contract Agreement of RFP. In compliance of the terms of the RFP and various Appendices, when the Consortium members have executed documents and successfully got the bid, the Consortium members cannot contend that they are not parties to the Contract Agreement.

45. There is no merit in the contention that the Proposed Respondents are only the sub-contractors. A sub-contractor is not a party to the contract between the employer and the contractor. But in this case, the Proposed Respondents-Abhibus and Analogics are very much parties to the Bid, Documents executed there on and are also parties to the Contract Agreements through the Lead Member - Ingenerie. The Proposed Respondents are not right in contending that they



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power of attorney executed by the appellants, they have conferred a carte blanche authority to the lead partner to represent the consortium in all its dealings, signing of agreements, contract etc. and agreed to ratify and confirm the same.

28. In the above circumstances, the Tribunal felt that there was no escaping from the fact that no privity of contract existed between the appellants herein and the State Corporation. Considering the facts in its entirety with reference to the participation of the appellants in the tender process, the Tribunal concluded that the appellants herein cannot wriggle out of the dispute, as if they had nothing to do with the project at all. When the lead partner is a signatory to the contract agreement, it is deemed to have been signed by the appellants herein also. When unqualified power is given to the lead partner, the parties are bound by the legitimate and lawful action of the attorney as the lead partner of the consortium. The findings and the reasons that formed the basis of conclusion by the learned Tribunal appear to be well founded and anchored.

29. Be that as it may, in order to appreciate the challenge questioning the basis of the conclusion arrived at by the learned Tribunal holding that the appellants are proper and necessary parties, this Court would have to examine whether these appellants could be construed as a party to the arbitration agreement or not, despite the fact that they are not signatories to the agreement. In this regard, a contention was raised with reference to the contract agreement dated 03.04.2013, in particular, that the arbitration clause 1.9.1 contained therein which provided for dispute resolution through arbitration. An emphatic argument has been put forth on behalf of the appellants by the learned counsel Mr.Srinath Sridevan that the claimant alone is the signatory to the agreement. He would lay emphasis on a particular clause in the contract agreement dated 03.04.2013 which defined the claimant alone as a system integrator (SI). Sub clause (c) of the preamble to the agreement in fact stated that consortium consists of the claimant as well as the appellants herein however, the claimant being identified as the lead bidder, a System Integrator (SI).

30. According to the learned counsel, in clause 1.8.4, the appellants herein have been defined as sub-contractors. The agreement indisputably signed only by the lead partner, the claimant. The claimant signed the agreement as an independent company not on behalf of the other two consortium member Companies, the appellants herein. Moreover, it is also an indisputable fact that the appellants herein are independent companies not part of the lead partner as its affiliate, or subsidiary or group company. Therefore, the claimant being the



only signatory to the agreement which provided for Arbitration, the appellants herein being admittedly not a signatory to the agreement cannot be made parties in the arbitral proceedings.

31. In support of this contention, the learned counsel would rely on several decisions emphasising first that non-signatory to the contract cannot be made a party in the arbitral proceedings. Secondly, even if such impleadment is plausible in law, the same is not legally permissible for the arbitral Tribunal to implead parties under the scheme of A & C Act, 1996. The learned counsel, at the outset would rely on a decision of the Hon'ble Supreme Court of India 2010(5) SCC 306 (Indowind Energy Ltd. Vs. Wescare India Ltd.) This Court's attention has been drawn to paragraphs 13, 22 to 24 and 29, which are extracted hereunder.

13. It is fundamental that a provision for arbitration to constitute an arbitration agreement for the purpose of Section 7 should satisfy two conditions: (i) it should be between the parties to the dispute; and (ii) it should relate to or be applicable to the dispute. (See Yogi Agarwal v. Inspiration Clothes & U [(2009) 1 SCC 372] .)

...

22. The scope of examination of the agreement dated 24-2-2006 by the learned Chief Justice or his designate under Section 11(6) is necessarily to be restricted to the question whether there is an arbitration agreement between the parties. The examination cannot extend to examining the agreement to ascertain the rights and obligations regarding performance of such contract between the parties. This Court in SBP & Co. v. Patel Engg. Ltd. [(2005) 8 SCC 618] and in National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd. [(2009) 1 SCC 267] has held that when an application is filed under Section 11, the Chief Justice or his designate is required to decide only two issues, that is, whether the party making the application has approached the appropriate court and whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such agreement. Therefore, the Chief Justice exercising jurisdiction under Section 11 of the Act has to only consider whether there is an arbitration agreement between the petitioner and the respondent(s) in the application under Section 11 of the Act. Any wider examination in such a summary proceeding will not be warranted.



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23. Insofar as the issue of existence of an arbitration agreement between the parties, the learned Chief Justice or his designate is required to decide the issue finally and it is not permissible in a proceeding under Section 11 to merely hold that a party is prima facie a party to the arbitration agreement and that a party is prima facie bound by it. It is not as if the Chief Justice or his designate will subsequently be passing any other final decision as to who are the parties to the arbitration agreement. Once a decision is rendered by the Chief Justice or his designate under Section 11 of the Act, holding that there is an arbitration agreement between the parties, it will not be permissible for the arbitrator to consider or examine the same issue and record a finding contrary to the finding recorded by the court. This is categorically laid down by the Constitution Bench in SBP [(2005) 8 SCC 618] . Therefore the prima facie finding by the learned Chief Justice that Indowind is a party to the arbitration agreement is not what is contemplated by the Act.

24. It is no doubt true that if Indowind had acknowledged or confirmed in any correspondence or other agreement or document, that it is a party to the arbitration agreement dated 24-2-2006 or that it is bound by the arbitration agreement contained therein, it could have been possible to say that Indowind is a party to the arbitration agreement. But that would not be under Section 7(4)(a) but under Section 7(4)(b) or Section 7(5). Be that as it may. That is not the case of Wescare. In fact, the delivery notes/invoices issued by Wescare do not refer to the agreement dated 24-2-2006. Nor does any letter or correspondence sent by Indowind refers to the agreement dated 24-2-2006, either as an agreement executed by it or as an agreement binding on it. We may now refer to the several documents referred to and relied on by Wescare.

...
...

29. In view of the above, we allow this appeal, set aside the order of the High Court appointing an arbitrator in regard to the claims of Wescare against Indowind and dismiss the application under Section 11 (6) of the Act filed by Wescare insofar as Indowind is concerned. The appointment of arbitrator insofar as Subuthi is concerned, is not disturbed. It is however open to Subuthi to raise all contentions including the contention relating to absence of arbitral dispute, before the arbitrator.



32. According to the learned counsel, in the above case, the Hon'ble Supreme Court has examined the scope of examination by the Courts, while considering the application filed under Section 11(6) of the A & C Act, 1996. The Hon'ble Supreme Court in the above case ultimately on finding of fact has set aside the order of the High Court, appointing the Arbitrator in respect of the claim of the claimant against the Company which was found to be not a signatory to the arbitration agreement.

33. The learned counsel would further rely on a decision reported in 2013 (1) SCC 641 (Chloro Controls India Pvt. Ltd. vs. Severn Trent Water Purification inc.). This is a landmark judgment, a precursor to the concept of 'Group of Companies' doctrine, which led to a paradigm change in the perception of the Courts in the matter of non-signatory being made parties to the arbitration proceedings. Being the trail blazing judgment, this Court's attention has been drawn in extenso to paragraph Nos.68, 69, 71 to 73, 90, 92 to 95, 107 to 112, 119 to 122, 128, 131, 131.1 131.2, 131.3, 131.4 & 165, 165.1 & 165.2 which are extracted hereunder.

68. At this stage itself, we would make it clear that we are primarily discussing these submissions purely on a legal basis and not with regard to the merits of the case, which we shall shortly revert to.

69. We have already noticed that the language of Section 45 is at a substantial variance to the language of Section 8 in this regard. In Section 45, the expression "any person" clearly refers to the legislative intent of enlarging the scope of the words beyond "the parties" who are signatory to the arbitration agreement. Of course, such applicant should claim through or under the signatory party. Once this link is established, then the court shall refer them to arbitration. The use of the word "shall" would have to be given its proper meaning and cannot be equated with the word "may", as liberally understood in its common parlance. The expression "shall" in the language of Section 45 is intended to require the court to necessarily make a reference to arbitration, if the conditions of this provision are satisfied. To that extent, we find merit in the submission that there is a greater obligation upon the judicial authority to make such reference, than it was in comparison to the 1940 Act. However, the right to reference cannot be construed strictly as an indefeasible right. One can claim the reference only upon satisfaction of the prerequisites stated under Sections 44 and 45 read with



Schedule I of the 1996 Act. Thus, it is a legal right which has its own contours and is not an absolute right, free of any obligations/limitations.

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71. Though the scope of an arbitration agreement is limited to the parties who entered into it and those claiming under or through them, the courts under the English law have, in certain cases, also applied the "group of companies doctrine". This doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non-signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates. This theory has been applied in a number of arbitrations so as to justify a Tribunal taking jurisdiction over a party who is not a signatory to the contract containing the arbitration agreement. [Russell on Arbitration (23rd Edn.)]

72. This evolves the principle that a non-signatory party could be subjected to arbitration provided these transactions were with group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words, "intention of the parties" is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties.

73. A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the court answers the same in the affirmative, the



reference of even non-signatory parties would fall within the exception afore-discussed.

....

....

90. We have already referred to the contention of Mr Fali S. Nariman, the learned Senior counsel appearing for the appellant, that the provisions of Section 45 of the 1996 Act are somewhat similar to Article II(3) of the New York Convention and the expression "parties" in that section would mean that "all parties to the action" before the court have to be the parties to the arbitration agreement. If some of them are parties to the agreement, while the others are not, Section 45 does not contemplate the applicable procedure and the status of the non-signatories. The consequences of all parties not being common to the action and arbitration proceedings are, as illustrated above, multiplicity of proceedings and frustration of the intended "one-stop action". The rule of mischief would support such interpretation. Even if some unnecessary parties are added to the action, the court can always strike out such parties and even the cause of action in terms of the provisions of CPC. However, where such parties cannot be struck off, there the proceedings must continue only before the court. Thus, it was contended that the provisions of Section 45 cannot be effectively applied or even invoked. Unlike Section 24 of the 1940 Act, under the 1996 Act the court has not been given the power to refer to arbitration some of the parties from amongst the parties to the suit. Section 24 of the 1940 Act vested the court with the discretion that where the court thought fit, it could refer such matters and parties to arbitration provided the same could be separated from the rest of the subject-matter of the suit. Absence of such provision in the 1996 Act clearly suggests that the legislature intended not to permit bifurcated or partial references of dispute or parties to arbitration. Without prejudice to this contention, it was also the argument that it would not be appropriate and even permissible to make reference to arbitration when the issues and parties in action are not covered by the arbitration agreement. Referring to the consequences of all parties not being common to the action before the court and arbitration, the disadvantages are:

- (a) There would be multiplicity of litigation;
- (b) Application of principle of one-stop action would not be possible; and



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(c) It will frustrate the application of the rule of mischief. The court can prevent the mischief by striking out unnecessary parties or causes of action.

It would, it was submitted, thus, imply that a stranger or a third party cannot ask for arbitration. That the expression "claiming through or under" will have to be construed strictly and restricted to the parties to the arbitration agreement.

....

92. To the contra, Mr Salve, learned Senior counsel appearing for Respondent 1, contended that the expressions "parties to arbitration", "any person claiming through or under him" and "at the request of one of the parties" appearing in Section 45 are wide enough to include some or all the parties and even non-signatory parties for the purposes of making a reference to arbitration. It is also the contention that on the true construction of Sections 44, 45 and 46 of the 1996 Act, it is not possible to accept the contention of the appellant that all the parties to an action have to be parties to the arbitration agreement as well as the court proceedings. This would be opposed to the principle that parties should be held to their bargain of arbitration. The court always has the choice to make appropriate orders in exercise of inherent powers to bifurcate the reference or even stay the proceedings in a suit pending before it till the conclusion of the arbitration proceedings or otherwise. According to Mr Salve, if the interpretation advanced by Mr Nariman is accepted, then mischief will be encouraged which would frustrate the arbitration agreement because a party not desirous of going to arbitration would initiate civil proceedings and add non-signatory as well as unnecessary parties to the suit with a view to avoid arbitration. This would completely frustrate the legislative object underlining (sic underlying) the 1996 Act. Non-signatory parties can even be deemed to be parties to the arbitration agreement and may successfully pray for referral to arbitration.

93. As noticed above, the legislative intent and essence of the 1996 Act was to bring domestic as well as international commercial arbitration in consonance with the UNCITRAL Model Rules, the New York Convention and the Geneva Convention. The New York Convention was physically before the legislature and available for its consideration when it enacted the 1996 Act. Article II of the Convention provides that each contracting State shall recognise an agreement and submit to arbitration



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all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not concerning a subject-matter capable of settlement by arbitration. Once the agreement is there and the court is seized of an action in relation to such subject-matter, then on the request of one of the parties, it would refer the parties to arbitration unless the agreement is null and void, inoperative or incapable of performance.

94. Still, the legislature opted to word Section 45 somewhat dissimilarly. Section 8 of the 1996 Act also uses the expression "parties" simpliciter without any extension. In significant contradistinction, Section 45 uses the expression "one of the parties or any person claiming through or under him" and "refer the parties to arbitration", whereas the rest of the language of Section 45 is similar to that of Article II (3) of the New York Convention. The court cannot ignore this aspect and has to give due weightage to the legislative intent. It is a settled rule of interpretation that every word used by the legislature in a provision should be given its due meaning. To us, it appears that the legislature intended to give a liberal meaning to this expression.

95. The language of Section 45 has wider import. It refers to the request of a party and then refers to an arbitral Tribunal, while under Section 8(3) it is upon the application of one of the parties that the court may refer the parties to arbitration. There is some element of similarity in the language of Section 8 and Section 45 read with Article II(3). The language and expressions used in Section 45, "any person claiming through or under him" including in legal proceedings may seek reference of all parties to arbitration. Once the words used by the legislature are of wider connotation or the very language of the section is structured with liberal protection then such provision should normally be construed liberally.

...
...

107. If one analyses the above cases and the authors' views, it becomes abundantly clear that reference of even non-signatory parties to an arbitration agreement can be made. It may be the result of implied or specific consent or judicial determination. Normally, the parties to the arbitration agreement calling for arbitral reference should be the same as those to the action. But this general concept



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is subject to exceptions which are that when a third party i.e. non-signatory party, is claiming or is sued as being directly affected through a party to the arbitration agreement and there are principal and subsidiary agreements, and such third party is signatory to a subsidiary agreement and not to the mother or principal agreement which contains the arbitration clause, then depending upon the facts and circumstances of the given case, it may be possible to say that even such third party can be referred to arbitration.

108. In the present case, the corporate structure of the respondent companies as well as that of the appellant companies clearly demonstrates a legal relationship which not only is inter-legal relationship but also intra-legal relationship between the parties to the lis or persons claiming under them. They have contractual relationship which arises out of the various contracts that spell out the terms, obligations and roles of the respective parties which they were expected to perform for attaining the object of successful completion of the joint venture agreement. This joint venture project was not dependent on any single agreement but was capable of being achieved only upon fulfilment of all these agreements. If one floats a joint venture company, one must essentially know how to manage it and what shall be the methodology adopted for its management. If one manages it well, one must know what goods the said company is to produce and with what technical know-how. Even if these requisites are satisfied, then also one is required to know how to create market, distribute and export such goods. It is nothing but one single chain consisting of different components. The parties may choose to sign different agreements to effectively implement various aforementioned facets right from managing to making profits in a joint venture company. A party may not be signatory to an agreement but its execution may directly be relatable to the main contract even though he claims through or under one of the main parties to the agreement. In such situations, the parties would aim at achieving the object of making their bargain successful by execution of various agreements like in the present case.

109. The New York Convention clearly postulates that there should be a defined legal relationship between the parties, whether contractual or not, in relation to the differences that may have arisen



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concerning the subject-matter capable of settlement by arbitration. We have referred to a number of judgments of the various courts to emphasise that in given circumstances, if the ingredients above-noted exist, reference to arbitration of a signatory and even a third party is possible. Though heavy onus lies on the person seeking such reference, multiple and multi-party agreements between the parties to the arbitration agreement or persons claiming through or under such parties is neither impracticable nor impermissible.

110. Next, we are to examine the issue whether the cause of action in a suit can be bifurcated and a partial reference may be made by the court. Whatever be the answer to this question, a necessary corollary is as to whether the court should or should not stay the proceedings in the suit? Further, this may give rise to three different situations. Firstly, while making reference of the subject-matter to arbitration, whether the suit may still survive, partially or otherwise; secondly, whether the suit, still pending before the court, should be stayed completely; and lastly, whether both the arbitration and the suit proceedings could be permitted to proceed simultaneously in accordance with law.

111. Mr Nariman, the learned Senior counsel, while relying upon the judgments in *Turnock v. Sartoris* [(1889) 43 Ch D 150 (CA)] , *Anderson Wright Ltd. v. Moran and Co.* [AIR 1955 SC 53 : (1955) 1 SCR 862] , *Taunton-Collins v. Cromie* [(1964) 1 WLR 633 : (1964) 2 All ER 332 (CA)] and *Sumitomo Corpn. v. CDC Financial Services (Mauritius) Ltd.* [(2008) 4 SCC 91] again emphasised that the parties to the agreement have to be parties to the suit and also that the cause of action cannot be bifurcated unless there was a specific provision in the 1996 Act itself permitting such bifurcation or splitting of cause of action. He also contended that there is no provision like Sections 21 and 24 of the 1940 Act in the 1996 Act and thus, it supports the view that bifurcation of cause of action is impermissible and such reference to arbitration is not permissible.

112. In *Turnock* [(1889) 43 Ch D 150 (CA)] , the Court had stated that it was not right to cut up that litigation into two actions, one to be tried before the arbitrator and the other to be tried elsewhere, as in that case matters in respect of which the damages were claimed by the plaintiff could not be referred to



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arbitration because questions arising as to the construction of the agreement and provisions in the lease deed were involved and they did not fall within the power of the arbitrator in face of the arbitration agreement. In Taunton-Collins [(1964) 1 WLR 633 : (1964) 2 All ER 332 (CA)] , the Court again expressed the view that it was undesirable that there should be two proceedings before two different Tribunals i.e. the official referee and an arbitrator, as they may reach inconsistent findings.

119. In para 39 of the judgment, this Court held as under: (SBP case [(2005) 8 SCC 618] , SCC pp. 660-61)

"39. It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long-barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the arbitral Tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the arbitral Tribunal."



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This aspect of the arbitration law was explained by a two-Judge Bench of this Court in *Shree Ram Mills Ltd. v. Utility Premises (P) Ltd.* [(2007) 4 SCC 599] wherein, while referring to the judgment in *SBP & Co.* [(2005) 8 SCC 618] particularly the above paragraph (para 39) of *SBP case* [(2005) 8 SCC 618], this Court held that the scope of order under Section 11 of the 1996 Act would take in its ambit the issue regarding territorial jurisdiction and the existence of the arbitration agreement. The Court noticed that if these issues are not decided by the Chief Justice or his designate, there would be no question of proceeding with the arbitration. It held as under: (*Shree Ram Mills case* [(2007) 4 SCC 599], SCC pp. 607-08, para 27)

"27. ... Thus, the Chief Justice has to decide about the territorial jurisdiction and also whether there exists an arbitration agreement between the parties and whether such party has approached the Court for appointment of the arbitrator. The Chief Justice has to examine as to whether the claim is a dead one or in the sense whether the parties have already concluded the transaction and have recorded satisfaction of their mutual rights and obligations or whether the parties concerned have recorded their satisfaction regarding the financial claims. In examining this if the parties have recorded their satisfaction regarding the financial claims, there will be no question of any issue remaining. It is in this sense that the Chief Justice has to examine as to whether there remains anything to be decided between the parties in respect of the agreement and whether the parties are still at issue on any such matter. If the Chief Justice does not, in the strict sense, decide the issue, in that event it is for him to locate such issue and record his satisfaction that such issue exists between the parties. It is only in that sense that the finding on a live issue is given. Even at the cost of repetition we must state that it is only for the purpose of finding out whether the arbitral procedure has to be started that the Chief Justice has to record satisfaction that there remains a live issue in between the parties. The same thing is about the limitation which is always a mixed question of law and fact. The Chief Justice only has to record his satisfaction that prima facie the issue has not become dead by the lapse of time or that any party to the agreement has not slept over its rights beyond the time permitted by law to agitate those issues covered by the agreement. It is for this



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reason that it was pointed out in the above paragraph that it would be appropriate sometimes to leave the question regarding the live claim to be decided by the arbitral Tribunal. All that he has to do is to record his satisfaction that the parties have not closed their rights and the matter has not been barred by limitation. Thus, where the Chief Justice comes to a finding that there exists a live issue, then naturally this finding would include a finding that the respective claims of the parties have not become barred by limitation."

(emphasis supplied)

Thus, the Bench while explaining the judgment of this Court in SBP & Co. [(2005) 8 SCC 618] has stated that the Chief Justice may not decide certain issues finally and upon recording satisfaction that prima facie the issue has not become dead even leave it for the arbitral Tribunal to decide.

120. In National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd. [(2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] , another equi-Bench of this Court after discussing various judgments of this Court, explained SBP & Co. [(2005) 8 SCC 618] in relation to scope of powers of the Chief Justice and/or his designate while exercising jurisdiction under Section 11(6), held as follows: (National Insurance Co. Ltd. case [(2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] , SCC p. 283, para 22)

"22. Where the intervention of the Court is sought for appointment of an arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in SBP & Co. [(2005) 8 SCC 618] This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the arbitral Tribunal to decide.

22.1. The issues (first category) which the Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.



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22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the arbitral Tribunal) are:

(a) Whether the claim is a dead (long-barred) claim or a live claim.

(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the arbitral Tribunal are:

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration."

121. We may notice that at first blush, the judgment in Shree Ram Mills [(2007) 4 SCC 599] is at some variance with the judgment in National Insurance Co. Ltd. [(2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] but when examined in depth, keeping in view the judgment in SBP & Co. [(2005) 8 SCC 618] and provisions of Section 11(6) of the 1996 Act, both these judgments are found to be free from contradiction and capable of being read in harmony in order to bring them in line with the statutory law declared by the larger Bench in SBP & Co. [(2005) 8 SCC 618] The expressions "Chief Justice does not in strict sense decide the issue" or "is prima facie satisfied", will have to be construed in the facts and circumstances of a given case. Where the Chief Justice or his designate actually decides the issue, then it can no longer be prima facie, but would be a decision binding in law. On such an issue, the arbitral Tribunal will have no jurisdiction to redetermine the issue. In Shree Ram Mills [(2007) 4 SCC 599], the Court held that the Chief Justice could record a finding where the issue between the parties was still alive or was dead by lapse of time. Where it prima facie found the issue to be alive, the Court could leave the question of limitation and also open to be decided by the arbitral Tribunal.

122. The above expressions are mere observations of the Court and do not fit into the contours of the



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principle of ratio decidendi of the judgment. The issues in regard to validity or existence of the arbitration agreement, the application not satisfying the ingredients of Section 11(6) of the 1996 Act and claims being barred by time, etc. are the matters which can be adjudicated by the Chief Justice or his designate. Once the parties are heard on such issues and the matter is determined in accordance with law, then such a finding can only be disturbed by the court of competent jurisdiction and cannot be reopened before the arbitral Tribunal. In SBP & Co. [(2005) 8 SCC 618] , the seven-Judge Bench clearly stated: (SCC p. 650, para 20)

"20. ... The finality given to the order of the Chief Justice on the matters within his competence under Section 11 of the Act are incapable of being reopened before the arbitral Tribunal."

Certainly the Bench dealing with Shree Ram Mills [(2007) 4 SCC 599] did not intend to lay down any law in direct conflict with the seven-Judge Bench judgment in SBP & Co. [(2005) 8 SCC 618] In the reasoning given in Shree Ram Mills case [(2007) 4 SCC 599] , the Court has clearly stated that matters of existence and binding nature of arbitration agreement and other matters mentioned therein are to be decided by the Chief Justice or his designate and the same is in line with the judgment of this Court in SBP & Co. [(2005) 8 SCC 618] It will neither be permissible nor in consonance with the doctrine of precedent that passing observations by the Bench should be construed as the law while completely ignoring the ratio decidendi of that very judgment. We may also notice that the judgment in Shree Ram Mills [(2007) 4 SCC 599] was not brought to the notice of the Bench which pronounced the judgment in National Insurance Co. Ltd. [(2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117]

128. The judgment of this Court in Shin-Etsu Chemical Co. Ltd. [(2005) 7 SCC 234] preceded the judgment of this Court in SBP & Co. [(2005) 8 SCC 618] Though the Constitution Bench in the latter case referred to this judgment in para 89 of the judgment but did not discuss the merits or otherwise of the case presumably for absence of any conflict. However, as already noticed, the Court clearly took the view that the findings returned by the Chief Justice while exercising his judicial powers under Section 11 relatable to Section 8 are final and not open to be



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questioned by the arbitral Tribunal. Sections 8 and 45 of the 1996 Act are provisions independent of each other. But for the purposes of reference to arbitration, in both cases, the applicant has to pray for a reference before the Chief Justice or his designate in terms of Section 11 of the 1996 Act. We may refer to the exact terminology used by the larger Bench in *SBP & Co.* [(2005) 8 SCC 618] in relation to the finality of such matters, as reflected in para 12 of the judgment which reads as under: (SCC pp. 643-44)

"12. Section 16 of the Act only makes explicit what is even otherwise implicit, namely, that the arbitral Tribunal constituted under the Act has the jurisdiction to rule on its own jurisdiction, including ruling on objections with respect to the existence or validity of the arbitration agreement. Sub-section (1) also directs that an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. It also clarifies that a decision by the arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. Sub-section (2) of Section 16 enjoins that a party wanting to raise a plea that the arbitral Tribunal does not have jurisdiction, has to raise that objection not later than the submission of the statement of defence, and that the party shall not be precluded from raising the plea of jurisdiction merely because he has appointed or participated in the appointment of an arbitrator. Sub-section (3) lays down that a plea that the arbitral Tribunal is exceeding the scope of its authority, shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. When the Tribunal decides these two questions, namely, the question of jurisdiction and the question of exceeding the scope of authority or either of them, the same is open to immediate challenge in an appeal, when the objection is upheld and only in an appeal against the final award, when the objection is overruled. Sub-section (5) enjoins that if the arbitral Tribunal overrules the objections under sub-section (2) or (3), it should continue with the arbitral proceedings and make an arbitral award. Sub-section (6) provides that a party aggrieved by such an arbitral award overruling the plea on lack of jurisdiction and the exceeding of the scope of authority, may make an application on these grounds for setting aside the award in accordance with Section 34 of the Act. The question, in the context of sub-



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section (7) of Section 11 is, what is the scope of the right conferred on the arbitral Tribunal to rule upon its own jurisdiction and the existence of the arbitration clause, envisaged by Section 16(1), once the Chief Justice or the person designated by him had appointed an arbitrator after satisfying himself that the conditions for the exercise of power to appoint an arbitrator are present in the case. Prima facie, it would be difficult to say that in spite of the finality conferred by sub-section (7) of Section 11 of the Act, to such a decision of the Chief Justice, the arbitral Tribunal can still go behind that decision and rule on its own jurisdiction or on the existence of an arbitration clause. It also appears to us to be incongruous to say that after the Chief Justice had appointed an arbitral Tribunal, the arbitral Tribunal can turn round and say that the Chief Justice had no jurisdiction or authority to appoint the Tribunal, the very creature brought into existence by the exercise of power by its creator, the Chief Justice. The argument of the learned Senior counsel, Mr K.K. Venugopal that Section 16 has full play only when an arbitral Tribunal is constituted without intervention under Section 11(6) of the Act, is one way of reconciling that provision with Section 11 of the Act, especially in the context of sub-section (7) thereof. We are inclined to the view that the decision of the Chief Justice on the issue of jurisdiction and the existence of a valid arbitration agreement would be binding on the parties when the matter goes to the arbitral Tribunal and at subsequent stages of the proceeding except in an appeal in the Supreme Court in the case of the decision being by the Chief Justice of the High Court or by a Judge of the High Court designated by him."

(emphasis supplied)

We are conscious of the fact that the above dictum of the Court in SBP case [(2005) 8 SCC 618] is in relation to the scope and application of Section 11 of the 1996 Act. It has been held in various judgments of this Court but more particularly in SBP [(2005) 8 SCC 618] which is binding on us that before making a reference, the Court has to dispose of the objections as contemplated under Section 8 or Section 45, as the case may be, and wherever needed upon filing of affidavits. Thus, to an extent, the law laid down by this Court on Section 11 shall be attracted to an international arbitration which takes place in India as well as domestic arbitration. This, of course,



would be applicable at pre-award stage. Thus, there exists a direct legal link, limited to that extent.

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131. 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:

131.1. To illustratively demonstrate it, we may give an example. Where Party A is seeking reference to arbitration and Party B 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 hold that the agreement between the parties was null and void inoperative and incapable of being performed. The court may also hold that the arbitral Tribunal had no jurisdiction to entertain and decide the issues between the parties.

131.2. 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.

131.3. 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 *Anderson Wright Ltd.* [AIR 1955 SC 53 : (1955) 1 SCR 862] 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.

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131.4. 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.

...

...

165. Having dealt with all the relevant issues in law, now we would provide answer to the questions framed by us in the beginning of the judgment as follows:

165.1. Section 45 is a provision falling under Chapter I of Part II of the 1996 Act which is a self-contained code. The expression "person claiming through or under" would mean and take within its ambit multiple and multi-party agreements, though in exceptional case. Even non-signatory parties to some of the agreements can pray and be referred to arbitration provided they satisfy the prerequisites under Sections 44 and 45 read with Schedule I. Reference of non-signatory parties is neither unknown to arbitration jurisprudence nor is it impermissible.

165.2. In the facts of a given case, the court is always vested with the power to delete the names of the parties who are neither necessary nor proper to the proceedings before the court. In the cases of group companies or where various agreements constitute a composite transaction like mother agreement and all other agreements being ancillary to and for effective and complete implementation of the mother agreement, the court may have to make reference to arbitration even of the disputes existing between signatory or even non-signatory parties. However, the discretion of the court has to be exercised in exceptional, limiting, befitting and cases of necessity and very cautiously.

34. According to the learned counsel, the above decision is a pioneering judgment which clarified several aspects of the



issues that touch upon the subject matter of challenge herein. The Hon'ble Supreme Court has also recognised the principle of "Group of Company doctrine" in the context of international awards and the entire consideration of the Hon'ble Supreme Court was with reference to sections 44 and 45 of the A & C Act, 1996 relating to enforcement of foreign awards.

35. In this regard, the learned counsel sought to distinguish the language in section 45 and section 2 (1) (h) which define party to an agreement in the Act 1996.

Section 45

45. Power of judicial authority to refer parties to arbitration. -Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through 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.

Section 2(1) (h)

"party" means a party to an arbitration agreement;

36. As far as the enforcement of foreign awards is concerned, the expression used are wide enough to include any person claiming through or under him. However, the language that is used in 2 (1) (h) is restricted only to the party to the agreement. In this connection, the learned counsel would once again draw the attention of this Court to the slew of amendments which was introduced in the Act 2016 after the recommendations of the Law Commission in its "Supplementary to Report No.246 on Amendments to Arbitration and Conciliation Act, 1996". One of the recommendations which was suggested was to expand the definition of Clause 2 (1) (h) to include "or in any person claim through or under such party" after the words "party to a arbitration agreement". The suggestion was made only to bring the domestic arbitration on par with the international arbitration but ultimately, the suggestion was not agreed to and the definition as it stood earlier remained as such as on date. At the same time, several other suggestions have been accepted and amendments have been effected in the Amendment Act 2016 with effect from 23.10.2015. In the said circumstances, the Courts or for that matter arbitral Tribunal cannot lose sight of the fact that while considering impleading a non-signatory as party, the



Courts cannot expand the scope and amplitude of the section against the intendment of the Parliament.

37. The learned counsel would further proceed to refer to few more decisions in his support. A reference is made to 2017 (9) SCC 729 (Duro Felguera vs. Gangavaram Port Trust). This Court's attention has been drawn to paragraph Nos.56 to 60.

56. Having said that, this being one of the first cases on Section 11(6-A) of the 1996 Act before this Court, I feel it appropriate to briefly outline the scope and extent of the power of the High Court and the Supreme Court under Sections 11(6) and 11(6-A).

57. This Court in SBP & Co. v. Patel Engg. Ltd. [SBP and Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] overruled Konkan Railway Corpn. Ltd. v. Mehul Construction Co. [Konkan Railway Corpn. Ltd. v. Mehul Construction Co., (2000) 7 SCC 201] and Konkan Railway Corpn. Ltd. v. Rani Construction (P) Ltd. [Konkan Railway Corpn. Ltd. v. Rani Construction (P) Ltd., (2002) 2 SCC 388] to hold that the power to appoint an arbitrator under Section 11 is a judicial power and not a mere administrative function. The conclusion in the decision as summarised by Balasubramanyan, J. speaking for the majority reads as follows : (SBP & Co. case [SBP and Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] , SCC pp. 663-64, para 47)

"47. We, therefore, sum up our conclusions as follows:

(i) The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power.

(ii) The power under Section 11(6) of the Act, in its entirety, could be delegated, by the Chief Justice of the High Court only to another Judge of that Court and by the Chief Justice of India to another Judge of the Supreme Court.

(iii) In case of designation of a Judge of the High Court or of the Supreme Court, the power that is exercised by the Designated Judge would be that of the Chief Justice as conferred by the statute.



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(iv) The Chief Justice or the Designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the Designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the Designated Judge.

(v) Designation of a District Judge as the authority under Section 11(6) of the Act by the Chief Justice of the High Court is not warranted on the scheme of the Act.

(vi) Once the matter reaches the arbitral Tribunal or the sole arbitrator, the High Court would not interfere with the orders passed by the arbitrator or the arbitral Tribunal during the course of the arbitration proceedings and the parties could approach the Court only in terms of Section 37 of the Act or in terms of Section 34 of the Act.

(vii) Since an order passed by the Chief Justice of the High Court or by the Designated Judge of that Court is a judicial order, an appeal will lie against that order only under Article 136 of the Constitution to the Supreme Court.

(viii) There can be no appeal against an order of the Chief Justice of India or a Judge of the Supreme Court designated by him while entertaining an application under Section 11(6) of the Act.

(ix) In a case where an arbitral Tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the arbitral Tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act.



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(x) Since all were guided by the decision of this Court in *Konkan Railway Corpn. Ltd. v. Rani Construction (P) Ltd.* [*Konkan Railway Corpn. Ltd. v. Rani Construction (P) Ltd.*, (2002) 2 SCC 388] and orders under Section 11(6) of the Act have been made based on the position adopted in that decision, we clarify that appointments of arbitrators or arbitral Tribunals thus far made, are to be treated as valid, all objections being left to be decided under Section 16 of the Act. As and from this date, the position as adopted in this judgment will govern even pending applications under Section 11(6) of the Act.

(xi) Where District Judges had been designated by the Chief Justice of the High Court under Section 11(6) of the Act, the appointment orders thus far made by them will be treated as valid; but applications if any pending before them as on this date will stand transferred, to be dealt with by the Chief Justice of the High Court concerned or a Judge of that Court designated by the Chief Justice.

(xii) The decision in *Konkan Railway Corpn. Ltd. v. Rani Construction (P) Ltd.* [*Konkan Railway Corpn. Ltd. v. Rani Construction (P) Ltd.*, (2002) 2 SCC 388] is overruled."

(emphasis supplied)

58. This position was further clarified in *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.* [*National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] To quote : (SCC p. 283, para 22)

"22. Where the intervention of the court is sought for appointment of an arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in *SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618] This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the arbitral Tribunal to decide.



there has to be six Tribunals – two for international commercial arbitration involving the Spanish Company M/s Duro Felguera, S.A. and four for the domestic.

38. In fact, the above decision was rendered after amendments were introduced in the Act in 2015 wherein sub clause 6(A) was inserted in Section 11. After the introduction of the sub-clause 6(A), the Court's examination of application under section 11(6) is confined and restricted only to examine on a prima facie or peripheral consideration of existence of any arbitration agreement between the parties to the dispute. The earlier legal position as it existed prior to the Amendment Act 2016 was, the Courts before reference were called upon to decide finally as to whether there was any valid arbitration agreement between the parties to the dispute or not. After to the Amendment Act 2016, particularly, insertion of Section 6A in Section 11 the Court's consideration at the stage of disposing of an application under section 11 is only minimal. The power to refuse to refer is restricted to exceptional and rarest of rare cases where the Courts find that the disputes are dead woods and to be weeded out at the threshold. In all other cases, the conceptional shift in consideration by the courts is that "when in doubt do refer".

39. This Court's further attention has been drawn to 2018 (16) SCC 413 (Cheran Properties Ltd. vs. Kasthuri & Sons). The Hon'ble Supreme Court in the above case has extensively dealt with the "Group of Companies" doctrine and the binding nature of arbitral agreement on a non-signatory. The Hon'ble Supreme Court has summarised the law on the important legal aspect which is the core subject matter of consideration before this Court. It is very crucial and important to refer to paragraph Nos. 19 to 30 , 43 to 47 of the judgment as under:

19. The decision in Indowind [Indowind Energy Ltd. v. Wescare (India) Ltd., (2010) 5 SCC 306 : (2010) 2 SCC (Civ) 397] was followed by a two-Judge Bench in Prasad [S.N. Prasad v. Monnet Finance Ltd., (2011) 1 SCC 320 : (2011) 1 SCC (Civ) 141] . The issue in that case was whether a guarantor to a loan who is not a party to a loan agreement between the lender and borrower could be made a party to a reference to an arbitration in regard to a dispute governing the repayment of the loan and be subjected to the arbitral award. The loan agreement contained an arbitration clause. In the view of this Court : (S.N. Prasad case [S.N. Prasad v. Monnet Finance Ltd., (2011) 1 SCC 320 : (2011) 1 SCC (Civ) 141] , SCC p. 325, para 10)



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"10. An arbitration agreement between the lender on the one hand and the borrower and one of the guarantors on the other, cannot be deemed or construed to be an arbitration agreement in respect of another guarantor who was not a party to the arbitration agreement. Therefore, there was no arbitration agreement as defined under Sections 7(4)(a) or (b) of the Act, insofar as the appellant was concerned, though there was an arbitration agreement as defined under Section 7(4)(a) of the Act in regard to the second and third respondents."

Consequently, the impleadment of the appellant as party to the arbitration proceedings and the award were held to be unsustainable. The principle which was formulated by the Court was this : (SCC p. 324, para 8)

"8. ... The Act makes it clear that an arbitrator can be appointed under the Act at the instance of a party to an arbitration agreement only in respect of disputes with another party to the arbitration agreement. If there is a dispute between a party to an arbitration agreement, with other parties to the arbitration agreement as also non-parties to the arbitration agreement, reference to arbitration or appointment of arbitrator can be only with respect to the parties to the arbitration agreement and not the non-parties."

20. Both these decisions were prior to the three-Judge Bench decision in Chloro Controls [Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] . In Chloro Controls [Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] this Court observed that ordinarily, an arbitration takes place between persons who have been parties to both the arbitration agreement and the substantive contract underlying it. English Law has evolved the "group of companies doctrine" under which an arbitration agreement entered into by a company within a group of corporate entities can in certain circumstances bind non-signatory affiliates. The test as formulated by this Court, noticing the position in English law, is as follows : (SCC pp. 682-83, paras 71 & 72)



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"71. Though the scope of an arbitration agreement is limited to the parties who entered into it and those claiming under or through them, the courts under the English law have, in certain cases, also applied the "group of companies doctrine". This doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non-signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates. This theory has been applied in a number of arbitrations so as to justify a Tribunal taking jurisdiction over a party who is not a signatory to the contract containing the arbitration agreement. [Russell on Arbitration (23rd Edn.)]

72. This evolves the principle that a non-signatory party could be subjected to arbitration provided these transactions were with group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words, "intention of the parties" is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties."

The Court held that it would examine the facts of the case on the touchstone of the existence of a direct relationship with a party which is a signatory to the arbitration agreement, a "direct commonality" of the subject-matter and on whether the agreement between the parties is a part of a composite transaction : (SCC p. 683, para 73)

"73. A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or



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(Civ) 689] . Indowind [Indowind Energy Ltd. v. Wescare (India) Ltd., (2010) 5 SCC 306 : (2010) 2 SCC (Civ) 397] arose out of a proceeding under Section 11(6). The decision turns upon a construction of the arbitration agreement as an agreement which binds parties to it. The decision in Prasad [S.N. Prasad v. Monnet Finance Ltd., (2011) 1 SCC 320 : (2011) 1 SCC (Civ) 141] evidently involved a guarantee, where the guarantor who was sought to be impleaded as a party to the arbitral proceeding was not a party to the loan agreement between the lender and borrower. The loan agreement between the lender and borrower contained an arbitration agreement. The guarantor was not a party to that agreement.

23. As the law has evolved, it has recognised that modern business transactions are often effectuated through multiple layers and agreements. There may be transactions within a group of companies. The circumstances in which they have entered into them may reflect an intention to bind both signatory and non-signatory entities within the same group. In holding a non-signatory bound by an arbitration agreement, the court approaches the matter by attributing to the transactions a meaning consistent with the business sense which was intended to be ascribed to them. Therefore, factors such as the relationship of a non-signatory to a party which is a signatory to the agreement, the commonality of subject-matter and the composite nature of the transaction weigh in the balance. The group of companies doctrine is essentially intended to facilitate the fulfilment of a mutually held intent between the parties, where the circumstances indicate that the intent was to bind both signatories and non-signatories. The effort is to find the true essence of the business arrangement and to unravel from a layered structure of commercial arrangements, an intent to bind someone who is not formally a signatory but has assumed the obligation to be bound by the actions of a signatory.

24. International conventions on arbitration as well as the UNCITRAL Model Law mandate that an arbitration agreement must be in writing. Section 7 of the Arbitration and Conciliation Act, 1996 affirms the same principle. Why does the law postulate that there should be a written agreement to arbitrate? The reason is simple. An agreement to arbitrate excludes the jurisdiction of national courts. Where parties have



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agreed to resolve their disputes by arbitration, they seek to substitute a private forum for dispute resolution in place of the adjudicatory institutions constituted by the State. According to Redfern and Hunter on International Arbitration, the requirement of an agreement to arbitrate in writing is an elucidation of the principle that the existence of such an agreement should be clearly established, since its effect is to exclude the authority of national courts to adjudicate upon disputes. [Redfern and Hunter on International Arbitration, 5th Edn. – 2.13, pp. 89-90.]

25. Does the requirement, as in Section 7, that an arbitration agreement be in writing exclude the possibility of binding third parties who may not be signatories to an agreement between two contracting entities? The evolving body of academic literature as well as adjudicatory trends indicate that in certain situations, an arbitration agreement between two or more parties may operate to bind other parties as well. Redfern and Hunter explain the theoretical foundation of this principle:

"... The requirement of a signed agreement in writing, however, does not altogether exclude the possibility of an arbitration agreement concluded in proper form between two or more parties also binding other parties. Third parties to an arbitration agreement have been held to be bound by (or entitled to rely on) such an agreement in a variety of ways : first, by operation of the 'group of companies' doctrine pursuant to which the benefits and duties arising from an arbitration agreement may in certain circumstances be extended to other members of the same group of companies; and, secondly, by operation of general rules of private law, principally on assignment, agency, and succession... [Id at p. 99.] "

The group of companies doctrine has been applied to pierce the corporate veil to locate the "true" party in interest, and more significantly, to target the creditworthy member of a group of companies [Op cit fn. 16, 2.40, p. 100.] . Though the extension of this doctrine is met with resistance on the basis of the legal imputation of corporate personality, the application of the doctrine turns on a construction of the arbitration agreement and the circumstances relating to the entry into and performance of the underlying contract. [Id, 2.41 at p. 100.]



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26. Russell on Arbitration [24th Edn., 3-025, pp. 110-11.] formulates the principle thus:

"Arbitration is usually limited to parties who have consented to the process, either by agreeing in their contract to refer any disputes arising in the future between them to arbitration or by submitting to arbitration when a dispute arises. A party who has not so consented, often referred to as a third party or a non-signatory to the arbitration agreement, is usually excluded from the arbitration. There are however some occasions when such a third party may be bound by the agreement to arbitrate. For example, ..., assignees and representatives may become a party to the arbitration agreement in place of the original signatory on the basis that they are successors to that party's interest and claim "through or under" the original party. The third party can then be compelled to arbitrate any dispute that arises."

27. Garry B. Born in his treatise on International Commercial Arbitration indicates that:

"The principal legal bases for holding that a non-signatory is bound (and benefited) by an arbitration agreement ... include both purely consensual theories (e.g., agency, assumption, assignment) and non-consensual theories (e.g. estoppel, alter ego) ."

Explaining the application of the alter ego principle in arbitration, Born notes:

"Authorities from virtually all jurisdictions hold that a party who has not assented to a contract containing an arbitration clause may nonetheless be bound by the clause if that party is an 'alter ego' of an entity that did execute, or was otherwise a party to, the agreement. This is a significant, but exceptional, departure from the fundamental principle ... that each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate rights and liabilities ."

28. Explaining group of companies doctrine, Born states:

"the doctrine provides that a non-signatory may be bound by an arbitration agreement where a group of companies exists and the parties have engaged in conduct (such as negotiation or performance of the relevant contract) or made statements indicating the intention assessed objectively and in good faith, that



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the non-signatory be bound and benefited by the relevant contracts. [Id at pp. 1448-49.] "

While the alter ego principle is a rule of law which disregards the effects of incorporation or separate legal personality, in contrast the group of companies doctrine is a means of identifying the intentions of parties and does not disturb the legal personality of the entities in question. In other words:

"the group of companies doctrine is akin to principles of agency or implied consent, whereby the corporate affiliations among distinct legal entities provide the foundation for concluding that they were intended to be parties to an agreement, notwithstanding their formal status as non-signatories. "

...

...

29. The decision in Indowind [Indowind Energy Ltd. v. Wescare (India) Ltd., (2010) 5 SCC 306 : (2010) 2 SCC (Civ) 397] arose from an application under Section 11 of the Arbitration and Conciliation Act, 1996. Indowind was not a signatory to the contract and was held not to be a party to the agreement to refer disputes to arbitration. Indowind [Indowind Energy Ltd. v. Wescare (India) Ltd., (2010) 5 SCC 306 : (2010) 2 SCC (Civ) 397] held that an application under Section 11 was not maintainable. The present case does not envisage a situation of the kind which prevailed before this Court in Indowind [Indowind Energy Ltd. v. Wescare (India) Ltd., (2010) 5 SCC 306 : (2010) 2 SCC (Civ) 397] . The present case relates to a post award situation. The enforcement of the arbitral award has been sought against the appellant on the basis that it claims under KCP and is bound by the award. Section 35 of the Arbitration and Conciliation Act, 1996 postulates that an arbitral award "shall be final and binding on the parties and persons claiming under them respectively" (emphasis supplied). The expression "claiming under", in its ordinary meaning, directs attention to the source of the right. The expression includes cases of devolution and assignment of interest (Advanced Law Lexicon by P. Ramanatha Aiyar [3rd Edn., Vol. I, p. 818.]). The expression "persons claiming under them" in Section 35 widens the net of those whom the arbitral award binds. It does so by reaching out not only to the parties but to those who claim under them, as well. The expression "persons claiming under them" is a legislative recognition of the doctrine that besides the parties, an arbitral



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award binds every person whose capacity or position is derived from and is the same as a party to the proceedings. Having derived its capacity from a party and being in the same position as a party to the proceedings binds a person who claims under it. The issue in every such a case is whether the person against whom the arbitral award is sought to be enforced is one who claims under a party to the agreement.

30. Mr Sibal has sought to make a distinction between the provisions of Section 45 and the unamended Section 8. Section 45, forms a part of Part II dealing with the enforcement of foreign awards to which the New York Convention applies. It contemplates a reference by a judicial authority to arbitration at the request of one of the parties "or any person claiming through or under him", where there is an arbitration agreement. The submission of Mr Sibal is that a similar expression "any person claiming through or under him" has been introduced in the amended provisions of Section 8 (substituted by Act 3 of 2016 with effect from 23-10-2015) but that this expression did not find place in the unamended provision. The submission is a non sequitur. Both Sections 8 and 45 operate in the sphere of the duty of a judicial authority to refer parties to arbitration. In the present case Section 35 is the material provision, which expressly stipulates that an arbitral award is, final and binding not only on the parties but on persons claiming under them.

...

...

43. We have referred to the above findings for the completeness of the record. These findings of the Madras High Court would indicate that virtually every one of the submission which was urged before this Court have been negatived.

44. Finally, having covered the entire gamut of submissions which were urged on behalf of the appellant, it would be worthwhile to revisit the fundamental principles which were formulated nearly fifty years ago in a judgment of a three-Judge Bench of this Court in Satish Kumar v. Surinder Kumar [Satish Kumar v. Surinder Kumar, (1969) 2 SCR 244 : AIR 1970 SC 833] . That case arose under the provisions of the Arbitration Act, 1940. The question which arose before this Court was whether an award under the Act requires registration under Section 17



(1)(b) of the Registration Act, if it effects partition of immovable property above the value of Rs 100. A Full Bench of the Patna High Court in *Seonarain Lal v. Prabhu Chand* [Seonarain Lal v. Prabhu Chand, 1958 SCC OnLine Pat 15 : AIR 1958 Pat 252] held that unless a decree is passed in terms of the award (in terms of the position as it stood under the 1940 Act) it had no legal effect. In holding thus, the Patna High Court had relied upon *Sardool Singh v. Hari Singh* [Sardool Singh v. Hari Singh, 1966 SCC OnLine P&H 265 : ILR (1967) 1 P&H 622], a Punjab Full Bench decision holding that under the Arbitration Act, 1940, an award was effective only when a decree follows a judgment on the award. The Punjab Full Bench held that even if the award is registered, it is still a "waste paper" unless it is made a rule of the court. In appeal, this Court held that the two Full Benches had taken a view contrary to that formulated in an unreported decision of this Court in *Uttam Singh Duggal & Co. v. Union of India* [Uttam Singh Duggal & Co. v. Union of India Civil Appeal No. 162 of 1962, order dated 11-10-1962 (SC)] wherein it was held thus : (*Satish Singh case* [*Satish Kumar v. Surinder Kumar*, (1969) 2 SCR 244 : AIR 1970 SC 833], AIR p. 836, para 8)

"8. ... 'The true legal position in regard to the effect of an award is not in dispute. It is well settled that as a general rule, all claims which are the subject-matter of a reference to arbitration merge in the award which is pronounced in the proceedings before the arbitrator and that after an award has been pronounced, the rights and liabilities of the parties in respect of the said claims can be determined only on the basis of the said award. After an award is pronounced, no action can be started on the original claim which had been the subject-matter of the reference. As has been observed by Mookerjee, J., in *Bhajahari Saha Bankiya v. Behary Lal Basak* [*Bhajahari Saha Bankiya v. Behary Lal Basak*, ILR (1906) 33 Cal 881] at ILR p. 898, the award is, in fact, a final adjudication of a Court of the parties' own choice, and until impeached upon sufficient grounds in an appropriate proceeding, an award, which is on the fact of it regular, is conclusive upon the merits of the controversy submitted, unless possibly the parties have intended that the award shall not be final and conclusive ... in



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reality, an award possesses all the elements of vitality even though it has not been formally enforced and it may be relied upon in a litigation between the parties relating to the same subject-matter. This conclusion, according to the learned Judge, is based upon the elementary principle that, as between the parties and their privies, an award is entitled to that respect which is due to the judgment of a court of last resort. Therefore, if the award which has been pronounced between the parties has in fact, or can, in law, be deemed to have dealt with the present dispute, the second reference would be incompetent. This position also has not been and cannot be seriously disputed (Uttam Singh Duggal case [Uttam Singh Duggal & Co. v. Union of India Civil Appeal No. 162 of 1962, order dated 11-10-1962 (SC)])."

(emphasis supplied)

45. The above position was followed in Satish Kumar [Satish Kumar v. Surinder Kumar, (1969) 2 SCR 244 : AIR 1970 SC 833] as stating a binding principle of law. The earlier decision was reiterated in the following observations : (AIR p. 836, para 9)

"9. ... In our opinion this judgment lays down that the position under the Act is in no way different from what it was before the Act came into force, and that an award has some legal force and is not a mere waste paper. If the award in question is not a mere waste paper but has some legal effect it plainly purports to or affects property within the meaning of Section 17(1)(b) of the Registration Act."

(emphasis supplied)

46. The present case which arises under the Arbitration and Conciliation Act, 1996 stands on even a higher pedestal. Under the provisions of Section 35, the award can be enforced in the same manner as if it were a decree of the court. The award has attained finality. The transmission of shares as mandated by the award could be fully effectuated by obtaining a rectification of the register under Section 111 of the Companies Act. The remedy which was resorted to was competent. The view [Kasturi & Sons Ltd. v. Sporting Pastime India Ltd., 2017 SCC OnLine NCLT 767] of the NCLT, which has been affirmed [Cheran Properties



Ltd. v. Kasturi & Sons Ltd., 2017 SCC OnLine Nclat 523] by the NCLAT does not warrant interference.

47. For the above reasons, we are of the view that the appeals are lacking in merit. The appeals shall stand dismissed.

40. The above decision of the Hon'ble Supreme Court of India has recognised the modern business transactions effected through multiple layers of agreement. It also recognised the transactions within a group of companies for execution of common contract. It also taken note of the circumstances that may reflect an intention to bind both signatory and non-signatory entities within the same group. The Hon'ble Supreme Court has in clear legal terms recognised the emerging concept of "Group of Companies" doctrine and held that such doctrine is to be applied even in domestic arbitrations in view of the trending business transactions.

41. The learned counsel has further drawn the attention of this Court to 2004(7) SCC 288 (Milkfood Limited vs. GMC Icecream (P) Ltd). He would particularly rely on paragraph No.69 of the judgment which is extracted hereunder.

69. The UNCITRAL Model Rules of Arbitration vis-à-vis provision of Section 14 of the English Arbitration Act, 1996 must be construed having regard to the decisions of the English courts as also this Court which addressed the form of notice to be given in order to commence the arbitration for the purpose of Section 34(3) of the Limitation Act. By reason of Section 14, merely the form of notice and strict adherence thereto has become redundant, as now in terms of Section 14 of the Arbitration Act there is otherwise no specific requirement as to the form of notice subject to any contract operating in the field. (See paras 5-020, 5-027 and 5-028 of Russell on Arbitration, 22nd Edn.) Section 21 of the 1996 Act must be construed accordingly. It defines the moment of the commencement of arbitral proceedings. In Rao, P. Chandrasekhara: The Arbitration and Conciliation Act, 1996, it is stated:

"Section 21 defines the moment of the commencement of arbitral proceedings. It gives freedom to the parties to agree on the date of commencement of arbitral proceedings. For instance, in the case of arbitration administered by an arbitration institution, they may agree to abide by the arbitration rules of that institution for determining



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the point of time at which the arbitral proceedings can be said to have commenced. Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. Section 3 is relevant on the question as to when a request can be said to have been received by the respondent. The request made to the respondent should clearly indicate that the claimant seeks arbitration of the dispute.

Section 21 is of direct relevance in connection with the running of periods of limitation under Section 43 and the savings provision in Section 85(2) (a)."

42. The above decision has been relied upon to lay emphasis on the mandatory nature of Section 21 of the Act. According to the learned counsel, while making a counter claim and seeking to implead the appellants herein as parties, the respondent State Corporation has not issued any notice under Section 21 of the Act. In the absence of the same, the impleadment sought on the basis of their counter claim is to be rejected for non-compliance with mandatory procedure laid down in the said section. According to the learned counsel unless proper notice is issued under Section 21, there cannot be any valid commencement of arbitration at all. The counter claim therefore, against the appellants herein cannot be countenanced in law. The impugned order of impleadment is liable to be interfered with on this ground alone without labouring with the larger issue of whether the Tribunal has the power and jurisdiction to implead them as party to the arbitration proceedings or not?

43. The learned counsel would then refer to 2017 SCC Online Delhi 7228 (Alupro Buildings Systems Pvt. Ltd. vs. Ozone Overseas Pvt Ltd.). The learned counsel would particularly draw the attention of this Court to paragraph No.30 which is extracted hereunder.

30.Considering that the running theme of the Act is the consent or agreement between the parties at every stage, Section 21 performs an important function of forging such consensus on several aspects viz. the scope of the disputes, the determination of which disputes remain unresolved; of which disputes are time-barred; of identification of the claims and counter-claims and most importantly, on the choice of arbitrator. Thus, the inescapable conclusion on a proper interpretation of Section 21 of the Act is that in the absence of an agreement to the contrary, the notice under Section 21 of the Act by the claimant



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invoking the arbitration clause, preceding the reference of disputes to arbitration, is mandatory. In other words, without such notice, the arbitration proceedings that are commenced would be unsustainable in law.

44. The above decision of the Delhi High Court reiterated the principle laid down by the Hon'ble Supreme Court of India in the former decision extracted above. The notice under Section 21 is held to be mandatory. As far as this legal contention is concerned this Court is of the view that a plain and bland construction of a provision may not suit in all situations where courts are confronted with variegated legal scenario with different factual settings. This Court would take a call on this objection at the appropriate stage as part of its judicial discourse, while dealing with all facets of the challenge respectively by the appellants herein.

45. The learned counsel then proceeded to place his submission on the core issue of maintainability of the I.A. for impleadment of the appellants herein in the absence of any power in the scheme of the A & C Act, 1996 by referring to a decision of the learned Judge of this Court reported in 2020 (5) MLJ 198 (V.G.Santhosam and Ors. Vs. Shanthi Gnanasekaran and Ors.) Reference has been made to paragraphs 62, 69 to 74, 80 to 85, 99 to 102, 108 & 109 which are extracted hereunder.

62. An analysis of sub-sections (2), (3) and (4) of Section 7 shows that an Arbitration Agreement will be considered to be in writing if it is contained in -

(a) a document signed by the parties; or

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other; or

(d) a contract between the parties making a reference to another document containing an arbitration Clause indicating a mutual intention to incorporate the arbitration Clause from such other 42/87 document into the contract.

69. The Hon'ble Supreme Court unambiguously enumerated that "in the absence of an arbitration agreement between Wescare and Indowind, no claim against Indowind or no dispute with Indowind can be the subject-matter of reference to an arbitrator. This



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is evident from a plain, simple and normal reading of Section 7 of the Act."

70. In the case of Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., [(2013) 1 SCC 641], Scope of jurisdiction while referring the parties to arbitration were considered by the Hon'ble Supreme Court in paragraphs 118, 119, 131.2, 131.3, 131.4 and 133.1, held as under:—

"118. An application for appointment of the arbitral Tribunal under Section 45 of the 1996 Act would also be governed by the provisions of Section 11(6) of the Act. This question is no more res integra and has been settled by decision of a Constitution Bench of seven Judges of this Court in SBP & Co. v. Patel Engg. Ltd. [(2005) 8 SCC 618], wherein this Court held that power exercised by the Chief Justice is not an administrative power. It is a judicial power. It is a settled principle that the Chief Justice or his designate Judge will decide preliminary aspects which would attain finality unless otherwise directed to be decided by the arbitral Tribunal.

119. In para 39 of the judgment, this Court held as under: (SBP case [(2005) 8 SCC 618], SCC pp. 660-61)

"39. It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long-barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the arbitral Tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these aspects, the



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Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the arbitral Tribunal."

This aspect of the arbitration law was explained by a two-Judge Bench of this Court in *Shree Ram Mills Ltd. v. Utility Premises (P) Ltd.* [(2007) 4 SCC 599] wherein, while referring to the judgment in *SBP & Co.* [(2005) 8 SCC 618] particularly the above paragraph (para 39) of *SBP* case [(2005) 8 SCC 618], this Court held that the scope of order under Section 11 of the 1996 Act would take in its ambit the issue regarding territorial jurisdiction and the existence of the arbitration agreement. The Court noticed that if these issues are not decided by the Chief Justice or his designate, there would be no question of proceeding with the arbitration. It held as under: (*Shree Ram Mills* case [(2007) 4 SCC 599], SCC pp. 607-08, para 27)

"27. ... Thus, the Chief Justice has to decide about the territorial jurisdiction and also whether there exists an arbitration agreement between the parties and whether such party has approached the Court for appointment of the arbitrator. The Chief Justice has to examine as to whether the claim is a dead one or in the sense whether the parties have already concluded the transaction and have recorded satisfaction of their mutual rights and obligations or whether the parties concerned have recorded their satisfaction regarding the financial claims. In examining this if the parties have recorded their satisfaction regarding the financial claims, there will be no question of any issue remaining. It is in this sense that the Chief Justice has to examine as to whether there remains anything to be decided between the parties in respect of the agreement and whether the parties are still at issue on any such matter. If the Chief Justice does not, in the strict sense, decide the issue, in that event it is for him to locate such issue and record his satisfaction that such issue exists between the parties. It is only in that sense that the finding on a live issue is given. Even at the cost of repetition we must state that it is only for the purpose of finding out whether the arbitral procedure has to be



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started that the Chief Justice has to record satisfaction that there remains a live issue in between the parties. The same thing is about the limitation which is always a mixed question of law and fact. The Chief Justice only has to record his satisfaction that prima facie the issue has not become dead by the lapse of time or that any party to the agreement has not slept over its rights beyond the time permitted by law to agitate those issues covered by the agreement. It is for this reason that it was pointed out in the above paragraph that it would be appropriate sometimes to leave the question regarding the live claim to be decided by the arbitral Tribunal. All that he has to do is to record his satisfaction that the parties have not closed their rights and the matter has not been barred by limitation. Thus, where the Chief Justice comes to a finding that there exists a live issue, then naturally this finding would include a finding that the respective claims of the parties have not become barred by limitation."

(emphasis supplied)

Thus, the Bench while explaining the judgment of this Court in *SBP & Co.* [(2005) 8 SCC 618] has stated that the Chief Justice may not decide certain issues finally and upon recording satisfaction that prima facie the issue has not become dead even leave it for the arbitral Tribunal to decide.

131.2. 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.

131.3. 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 *Anderson Wright Ltd.* [AIR 1955 SC 53 : (1955) 1 SCR 862] 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.

131.4. 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



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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.

133.1. Firstly, Sukanya [(2003) 5 SCC 531] was a judgment of this Court in a case arising under Section 8, Part I of the 1996 Act while the present case relates to Section 45, Part II of the Act. As such that case may have no application to the present case."

71. As far as the judgment of the Apex Court, cited above, the first point to be considered is that His Lordship Swatanter Kumar, J. (as He then was), in His opening paragraph of the judgment, emphatically reiterated that "Leave granted. The expanding need for international arbitration and divergent schools of thought, have provided new dimensions to the arbitration jurisprudence in the international field. The present case is an ideal example of invocation of arbitral reference in multiple, multi-party agreements with intrinsically interlinked causes of action, more so, where performance of ancillary agreements is substantially dependent upon effective execution of the principal agreement.

72. The abovesaid findings of the Hon'ble Supreme Court of India, in the case of Chloro Controls India (P) Ltd., cited supra, is crystal clear that, while invoking an arbitral reference in multiple, multi-party agreements with intrinsically interlinked causes of action, more so, where performance of ancillary agreements is substantially dependent upon effective execution of the principal agreement. Such facts and circumstances would not arise as far as the present lis on hand is concerned. The present lis relates to a domestic arbitral proceedings wherein the Partnership Deed between the appellants and the respondents 2 to 6 are definite and regarding such facts, there is no dispute between the parties, including the first respondent. Therefore, the multi-party agreement with intrinsically interlinked causes of action has not arisen as far as the facts and circumstances of the present cases are concerned. In paragraph-70 of the judgment, cited supra, the Hon'ble Supreme Court unambiguously enumerated that normally, an arbitration takes place between the persons who have, from the outset, been parties to both the arbitration agreement as well as the substantive contract underlining that



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agreement. The occasional circumstances are narrated by the Supreme Court and in those circumstances, in the case of Chloro Controls India (P) Ltd., cited supra, the Supreme Court arrived a conclusion that there is no absolute obstructions to law/the arbitration agreement. Arbitration and it could be possible between a signatory to an arbitration agreement and a third party. However, the Supreme Court held that heavy onus lies on that party to show that, in fact and in law, it is claiming "through" or "under" the signatory party as contemplated under Section 45 of the 1996 Act. In paragraph-71, the Supreme Court held that the "Group of Companies Doctrine" was mainly extended in the judgment, cited supra, wherein there is a principal agreement and other ancillary agreements which flow from and out of the same transaction and the right also consequently flows between the parties, may not be signatory in the principal agreement. However, those circumstances have not arisen as far as the present cases are concerned. Even in paragraph-72 of the case of Chloro Controls India (P) Ltd., cited supra, the Supreme Court held that "intention of the parties" is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties.

73. In this case, the facts regarding the execution of the Partnership Deed by the father of the first respondent late Mr. V.G. Panneerdas is not disputed by the first respondent. The reconstitution of Partnership Deeds on various occasions for the last 37 years are also not disputed between the parties, including the first respondent. Under these circumstances, the first respondent has filed a petition before the Arbitrator after a lapse of 37 years from the constitution of the original Partnership Deed by her father late Mr. V.G. Panneerdas. Therefore, the present cases cannot be construed as exceptional. The exceptional circumstances cannot be extended in view of the fact that the present arbitration is a domestic arbitration without reference to Section 45 of the Arbitration Act, 1996 and this apart, the Partnership Deed between the father and sons were established and the same is admitted by the first respondent and there is no right flows from those Partnership Deeds in favour of the first respondent. This being the factum, the judgment of the Supreme Court, cited supra, may not have any application with reference to the facts and the



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circumstances of the present cases on hand and consequently, the reliance placed by the learned Senior counsel appearing on behalf of the first appellant deserves no merit consideration.

74. In the case of Cheran Properties Ltd. v. Kasturi & Sons Ltd., [(2018) 16 SCC 413], wherein in paragraphs 21, 22, 23, 24 and 25, the Hon'ble Supreme Court of India, held as under:-

"21. Explaining the legal basis that may be applied to bind a non-signatory to an arbitration agreement, this Court in Chloro Controls case [Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] held thus : (SCC p. 694, paras 103.1, 103.2 & 105)

"103.1. The first theory is that of implied consent, third-party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle. They apply to private as well as public legal entities.

103.2. The second theory includes the legal doctrines of agent-principal relations, apparent authority, piercing of veil (also called "the alter ego"), joint venture relations, succession and estoppel. They do not rely on the parties' intention but rather on the force of the applicable law.

105. We have already discussed that under the group of

companies doctrine, an arbitration agreement entered into by a company within a group of companies can bind its non-signatory affiliates, if the circumstances demonstrate that the + intention of the parties was to bind both the signatory as well as the non-signatory parties."

22. The position in Indowind [Indowind Energy Ltd. v. Wescare (India) Ltd., (2010) 5 SCC 306 : (2010) 2 SCC (Civ) 397] was formulated by a Bench of two Judges before the evolution of law in the three-Judge Bench decision in ChloroControls [Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC



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(Civ) 689]. Indowind [Indowind Energy Ltd. v. Wescare (India) Ltd., (2010) 5 SCC 306 : (2010) 2 SCC (Civ) 397] arose out of a proceeding under Section 11(6). The decision turns upon a construction of the arbitration agreement as an agreement which binds parties to it. The decision in Prasad [S.N. Prasad v. Monnet Finance Ltd., (2011) 1 SCC 320 : (2011) 1 SCC (Civ) 141] evidently involved a guarantee, where the guarantor who was sought to be impleaded as a party to the arbitral proceeding was not a party to the loan agreement between the lender and borrower. The loan agreement between the lender and borrower contained an arbitration agreement. The guarantor was not a party to that agreement.

23. As the law has evolved, it has recognised that modern business transactions are often effectuated through multiple layers and agreements. There may be transactions within a group of companies. The circumstances in which they have entered into them may reflect an intention to bind both signatory and non-signatory entities within the same group. In holding a non-signatory bound by an arbitration agreement, the court approaches the matter by attributing to the transactions a meaning consistent with the business sense which was intended to be ascribed to them. Therefore, factors such as the relationship of a non-signatory to a party which is a signatory to the agreement, the commonality of subject-matter and the composite nature of the transaction weigh in the balance. The group of companies doctrine is essentially intended to facilitate the fulfilment of a mutually held intent between the parties, where the circumstances indicate that the intent was to bind both signatories and nonsignatories. The effort is to find the true essence of the business arrangement and to unravel from a layered structure of commercial arrangements, an intent to bind someone who is not formally a signatory but has assumed the obligation to be bound by the actions of a signatory.

24. International conventions on arbitration as well as the UNCITRAL Model Law mandate that an arbitration agreement must be in writing. Section 7 of the Arbitration and Conciliation Act, 1996 affirms the same principle. Why does the law postulate that there should be a written agreement to arbitrate? The reason is simple. An agreement to arbitrate excludes the jurisdiction of national courts. Where parties have agreed to resolve their disputes by arbitration, they seek to substitute a private forum for dispute



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resolution in place of the adjudicatory institutions constituted by the State. According to Redfern and Hunter on International Arbitration, the requirement of an agreement to arbitrate in writing is an elucidation of the principle that the existence of such an agreement should be clearly established, since its effect is to exclude the authority of national courts to adjudicate upon disputes. [Redfern and Hunter on International Arbitration, 5th Edn. – 2.13, pp. 89-90.]

25. Does the requirement, as in Section 7, that an arbitration agreement be in writing exclude the possibility of binding third parties who may not be signatories to an agreement between two contracting entities? The evolving body of academic literature as well as adjudicatory trends indicate that in certain situations, an arbitration agreement between two or more parties may operate to bind other parties as well. Redfern and Hunter explain the theoretical foundation of this principle:

"... The requirement of a signed agreement in writing, however, does not altogether exclude the possibility of an arbitration agreement concluded in proper form between two or more parties also binding other parties. Third parties to an arbitration agreement have been held to be bound by (or entitled to rely on) such an agreement in a variety of ways : first, by operation of the 'group of companies' doctrine pursuant to which the benefits and duties arising from an arbitration agreement may in certain circumstances be extended to other members of the same group of companies; and, secondly, by operation of general rules of private law, principally on assignment, agency, and succession.... [Id at p. 99.]"

The group of companies doctrine has been applied to pierce the corporate veil to locate the "true" party in interest, and more significantly, to target the creditworthy member of a group of companies [Op cit fn. 16, 2.40, p. 100.]. Though the extension of this doctrine is met with resistance on the basis of the legal imputation of corporate personality, the application of the doctrine turns on a construction of the arbitration agreement and the circumstances relating to the entry into and performance of the underlying contract. [Id, 2.41 at p. 100.]"

80. This Court is of the considered opinion that even such a right is traceable in favour of the first



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respondent, then the only possible course would be to approach the Competent Court of Law and establish her legal right, if any, available based on the documents or the evidences. Civil rights are to be established independently before the Competent Civil Court by the parties. However, such civil rights cannot be adjudicated or enforced by the Arbitrator in the contracted arbitration proceedings under the provisions of the Act. If an Arbitrator is allowed to adjudicate the civil rights of the parties or the rights regarding inheritance of properties, then it would result in submerger of the very Arbitration Agreement.

81. The Arbitrator is a person appointed in order to resolve the dispute between the parties under certain terms and conditions in the Arbitration Agreement. The disputes between the parties are definite and existence of Arbitration Agreement is an essential one, while-so, the Arbitrator cannot invoke the powers contemplated under Order 1, Rule 10 of the Code of Civil Procedure, wherein wide powers are granted, so as to implead a person, which is otherwise unconnected with the partnership or in the Arbitration Agreement. If such a concept of power to impleadment is provided to the Arbitrator, then the scope of arbitration proceedings will be, not only widened but, the purpose and the object of the Act, would be defeated. Thus, the Arbitrator is empowered to adjudicate the disputes strictly with reference to the Arbitration Agreement and with the consent of the parties to the Arbitration Agreement. Contrary to the contractual agreement between the parties, the Arbitrator cannot exercise any powers so as to implead a third party to the Arbitration Agreement for the purpose of adjudicating the right of any such third party.

82. The first respondent herein admittedly is not a party to the Arbitration Agreement nor a signatory in the Partnership Deed or any dispute relatable to the civil rights are subjected to the arbitral adjudication. Admittedly, the first respondent last 37 years has not raised any dispute regarding the reconstitution of Partnership Deeds between the partners. Under these circumstances, the impleading petition is filed in order to participate in the arbitration proceedings to establish the civil rights of the first respondent, relatable to the Law of Inheritance. In the event of claiming the legacy of late Mr. V.G. Panneerdas, the first respondent is at liberty to approach the Competent Court of Law and



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arbitration proceedings are not a Forum for adjudication of such civil rights. Thus, the impleading petition at the threshold is liable to be rejected as not maintainable for the simple reason that the first respondent is neither a partner or the right flows from and out of the Partnership Deed, enabling this Court to consider her case as an exceptional one.

83. However, the Arbitrator usurped the wide powers conferred under Order 1, Rule 10 of the Code of Civil Procedure and impleaded the first respondent for the purpose of adjudicating the disputes aroused through an Arbitration Agreement. It violates the very contractual obligation between the Arbitrator as well as the parties to the Arbitration Agreement under the provisions of the Arbitration and Conciliation Act, 1996. The Arbitrator in the event of exercising such wide powers under the Code of Civil Procedure, the same would infringe the rights of other parties, which cannot be adjudicated in the arbitration proceedings.

84. Even after impleadment, the possible disputes to be raised by the first respondent in the arbitration proceedings are that she is the legal heir of late Mr. V.G. Panneerdas and therefore, she is entitled to be a partner in the partnership firm in her capacity as a legal heir. This Court is doubtful, whether such a dispute affecting the rights of all other legal heirs shall be adjudicated by the Arbitrator in the arbitration proceedings. Considering the scope of the arbitration proceedings and taking note of the rights of the legal heirs of late Mr. V.G. Panneerdas and the terms and conditions of the Partnership Deed as well as the disputes raised under the Arbitration Act, it is highly improper on the part of the learned Arbitrator to adjudicate the civil rights of the parties under the General Laws. In such an event, the Arbitrator would be travelling beyond the scope of the Arbitration Act and such a power is not vested with an Arbitrator under the provisions of the Arbitration Act, 1996.

85. Therefore, the civil rights of the parties are to be established before the Competent Court of Law. The disputes raised under the Arbitration Act alone can be adjudicated by the Arbitrator by exercising the powers conferred under the Act. The Arbitrator cannot be equated with the Court of Law and this proposition is well settled as the Arbitrator is a creator of the Statute and has no inherent power, which exists in the Civil Court and the Arbitrator cannot exercise the inherent power and has to exercise the powers strictly



within the ambit of the Arbitration Act and certainly not beyond the scope of the arbitration proceedings.

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99. The spirit of the order passed by the Arbitrator with reference to the Arbitration Act is to be considered by this Court. The above findings would reveal that the Arbitrator has made an initiation to decide the legal rights of the parties, including the rights of the first respondent. The Arbitrator in express terms held that the impleadment of party, provisions contained in the Code of Civil Procedure through Order 1, Rule 10 gives a wide power to a Court and in our context, the same must apply to an arbitral Tribunal. Such a conclusion arrived by the arbitral Tribunal is undoubtedly an exercise of inherent power, which is impermissible in law. The power which is not contemplated under the Arbitration Act, cannot be exercised by the arbitral Tribunal. The power being statutory in character, the inherent power is not vested. While-so, the Arbitrator cannot invoke the provisions of the Code of Civil Procedure for the purpose of impleading a third person into the arbitral proceedings and he is bound to be strict with reference to the contracted Arbitration Agreement as well as the parties to the Arbitration Agreement and the adjudication must be within the parameters of the disputes raised between the parties to the Arbitration Agreement.

100. The decision of the Hon'ble Supreme Court of India in the case of Chloro Controls India (P) Ltd., cited supra, has got a restricted implication, as in the opening paragraph itself, the Apex Court, clarified the scope of widening of arbitral proceedings. The Supreme court in unambiguous terms held that a third party cannot be impleaded as a party to the arbitral proceedings. Only on exceptional circumstances, where there is multiple, multi-party agreements with intrinsically interlinked causes of action, more so, where performance of ancillary agreements is substantially dependent upon effective execution of the principal agreement. Thus, there must be a link between the Principal Arbitration Agreement and an ancillary agreement if any. The circumstances mostly would arise in business transactions between the Multinational Companies in international



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arbitration proceedings under Section 45 of the Arbitration act. Thus, such exceptional circumstances is a rare occasion as far as the domestic Arbitration Agreements are concerned. But however, the parties, who are filing such an application must establish such intrinsically interlinked causes of action for the purpose of participating in the arbitral adjudication.

101. There is no express provision available for impleadment of a third party in the Arbitration Act. Even there is no implied provision, which is traceable under the Act. In the absence of any provision when the Arbitrator is impleading a person for an effective adjudication of the disputes under the Arbitration Act, then the principles laid down by the Supreme Court in the case of Chloro Controls India (P) Ltd., cited supra, is to be followed.

102. In the order impugned, the Arbitrator arrived a conclusion that the impleadment of the first respondent will help to secure a comprehensive adjudication of the extent to which the heirs of the parents, who were partners during the respective lifetime could claim right or not. Such a broad exercise of power invoked by the Arbitrator for the purpose of determining the civil rights of a person is beyond the scope of the provisions of the Arbitration Act. If the Arbitrator is appointed under the Arbitration Act is allowed to decide the civil rights of a person, who is otherwise not a party to the Arbitration Agreement, then the Arbitrator would be exercising the inherent power conferred to the Civil Court, which is not contemplated.

108. "The Doctrine of No-Prejudice" cannot have any application with reference to the impleadment of a person in a dispute under the Arbitration Agreement within the ambit and provisions of the Arbitration Act, 1996. The impact of the application of the said Doctrine, would result in exercise of inherent powers of the Court of Law. Thus, the rights of a third person to an Arbitration Agreement cannot be adjudicated during the further or final hearing of the arbitral proceedings.



any legal proposition but the decision was rendered entirely on the factual matrix of that case.

48. Lastly, the learned counsel would rely on a English decision of the Court of Appeal reported in (2009) BUS LR (City of London v Sancheti).

49. The above case which came up before the English Court with reference to the bilateral investment treaty between United Kingdom and Indian Government. The Court of appeal has considered Section 9 of the Arbitration Act, 1996. In that context, in paragraph 29, the Court has observed as under.

29. I have no doubt that section 9 cannot apply if the parties to the court proceedings are not the parties (or persons claiming through or under a party: section 82(2)) to the arbitration agreement. It would be wholly inconsistent with the purpose and structure of the 1996 Act in general, and of section 9 in particular, if a stay could be obtained against a claimant who was not a party to the arbitration agreement. The fact that section 9 refers only to a "party to an arbitration agreement against whom legal proceedings are brought ... in respect of a matter which under the agreement is to be referred to arbitration" does not obviate the need for the claimant also to be a party. It is not sufficient that there simply be "a matter" which is to be referred to arbitration.

50. After making the above observation, the Court has finally held in paragraph No.35 which is extracted hereunder.

35. In the present case the Corporation of London is not a party to the arbitration agreement. The relevant party is the United Kingdom Government. The fact that in certain circumstances a state may be responsible under international law for the acts of one of its local authorities, or may have to take steps to redress wrongs committed by one of its local authorities, does not make that local authority a party to the arbitration agreement.

51. The learned counsel would therefore submit that the Courts have taken a consistent view that non-signatory to the contract cannot be made a party even in circumstances wherein a State may be responsible under International Law for acts of one of its legal authorities, as held above in the court of appeal.

52. The learned counsel however would submit that lately the Courts have come up with the concept of "Group of Companies"



doctrine and held that in exceptional circumstances, even non-signatory to the arbitration agreement can be made a party. But, he would add that in the case on hand, factually the appellants herein are not part of the Group Company of the lead partner, the claimant. The learned counsel contended that the appellants and the 3rd respondent are completely different entities and they are not "Group Companies" at all. According to him, the arbitral Tribunal did not render any finding on that aspect and in the absence of any such finding, the application of the "Group of Companies" doctrine is invalid and erroneous, even assuming the Tribunal enjoyed the power to implead these parties in the arbitral proceedings.

53. The learned counsel would further submit that even if the "Group of Companies" doctrine is to be applied in certain exceptional cases, whether impleadment in furtherance of the application of the doctrine could be validly ordered by the learned arbitral Tribunal by exercise of power under Section 17 of the Act, 1996 or not? Section 17 deals with interim measures to be put in place pending arbitral proceedings. According to the learned counsel, Section 17 is co-extensive with section 9 of the Act. The arbitral Tribunal is empowered to pass orders by way of interim measure only at the instance of a party to the arbitration. The application filed by the State Corporations for impleadment of the appellants herein is stated to be under Section 17 (ii) (e) read with 19(3) of the Act. Section 17(ii) (e) and 19(3) of the Act read as under.

17. Interim measures ordered by arbitral Tribunal- (ii) for an interim measure of protection in respect of any of the following matters, namely:-

...

(e) such other interim measure of protection as may appear to the arbitral Tribunal to be just and convenient.

19. Determination of rules of procedure-

..

(3) Failing any agreement referred to in sub-section (2), the arbitral Tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.

54. The learned counsel would submit that by no stretch of legal standards, the above provisions could even be remotely construed as conferring power on the arbitral Tribunal for impleading third parties. According to the learned counsel, there are two fallacies that could be noticed in the matter. One that the very application under Section 17(ii) (e) r/w 19(3) of



the Act for impleadment of third party is flawed and misconceived. The ambit of Section 17 unambiguously provide only transitional scope for ordering interim measures which would certainly not include power to add third parties and expand the scope of the reference itself. Adding a new party to the dispute changes the complexion of the original proceedings and as such it cannot be said that impleadment is a temporary measure and the power to order impleadment is tenable in terms of Section 17 of the A & C Act, 1996. Therefore, the exercise of power by arbitral Tribunal without any express sanction from the scheme of the Act and particularly, under section 17 of the Act is invalid and non-est in law.

55. The learned counsel would therefore sum up contending that the impleadment of the appellants by the arbitral Tribunal is unsustainable in law in terms of the Scheme of the A & C Act, 1996 and also the case laws cited supra. Even on merits, the appellants being not a part of the Group Company, therefore, Group Company doctrine evolved by the Courts for making the non-signatory as party to the arbitral proceedings in exceptional circumstances is also not attracted in this case. Having been described as sub-contractors in the very contract agreement itself, the appellants herein cannot be construed as necessary and proper parties to the dispute.

56. Further, when the appellants herein have not made any claim against the respondent State Corporations, it is not open to them to implead the appellants for their counter claims alone. The question of counter claim comes only when there is a claim and in the absence of any claim by the appellants herein, the impleadment sought as a consequence of the counter claim by the State Corporations is misplaced and not tenable in law. He would therefore, request this Court to allow the appeals and set aside the common order of the arbitral Tribunal dated 05.01.2021 in I.A.No.2 of 2020 for all or any one of the grounds raised as above.

57. As stated in the preamble to the judgment, no arguments have been advanced on behalf of the State Corporations in view of constraints expressed by the learned Advocate General who appeared for them. The entire contents of the written memo dated 08.10.2021 filed on behalf of the State Corporations have also been extracted supra. This Court has also explained above the necessity to deal with all the issues so that the rights and claims of the parties are clarified leaving no room for uncertainty or ambiguity in future.

58. The legal uncertainty namely the power and jurisdiction of the arbitral Tribunal to implead non-signatory to the proceedings that has been hanging fire for some time,



needed a definite ruling in the larger interest of crystallizing the contours of powers of the arbitral Tribunal within the frame work of the A & C Act, 1996 r/w the relevant case laws.

59. The heralding of change of perception of the Courts in India could be traced to the land mark decision of the Hon'ble Supreme Court of India rendered in the matter of Chloro Controls India Pvt. Ltd. vs. Severn Trent Water Purification Inc. 2013(1) SCC 641. The Hon'ble Supreme Court in a paradigm shift of its earlier constricted view on the aspect, has recognised the emerging principle of "Group of Companies" doctrine having to face with multiple structured business transactions, the resultant disputes and claims while enforcing of international awards and also the language used in section 45 of the A & C Act. The Hon'ble Supreme Court on a holistic and a pragmatic consideration has invoked 'Group of Companies' doctrine in cases involving multiple agreements constituting a composite transaction in the judgment as under:

165.2. In the facts of a given case, the court is always vested with the power to delete the names of the parties who are neither necessary nor proper to the proceedings before the court. In the cases of group companies or where various agreements constitute a composite transaction like mother agreement and all other agreements being ancillary to and for effective and complete implementation of the mother agreement, the court may have to make reference to arbitration even of the disputes existing between signatory or even non-signatory parties. However, the discretion of the court has to be exercised in exceptional, limiting, befitting and cases of necessity and very cautiously.

60. As a matter of fact, this decision was rendered earlier to the Amendment Act 2016. In this regard, amendment that has been brought about in Section 8 is quite significant and crucial for the present consideration. The amendment to the Section is presumably was a fall out of the evolving and expanding concept of making non-signatory, a party to the arbitration proceedings, departing from the conventional thinking with a view to be in tune with new commercial world order. The relevance of the amendment to section 8 on the present adjudication would be dealt with at the appropriate place hereunder.

61. Following the above landmark judgment of the Hon'ble Supreme Court, another judgment of the Hon'ble Supreme Court 2018(16) SCC 413 (Cheran Properties Ltd. vs. Kasthuri & Sons)



has also been referred to and paragraphs 19 to 30, 43 to 47 have been extracted supra, in the earlier part of the order.

62. The Hon'ble Supreme Court in the above decision has dealt with the ambit and scope of Section 7 of the Act and also the "Group Companies" doctrine. In fact, the Court has very succinctly held that the efforts is to find the true essence of the business arrangement and to unravel from the layered structure of commercial arrangement, intending to bind some one who is not formal signatory but assume obligation to be bound by the action of the signatory. The Court reaffirmed the legal position that even a non-signatory can be made liable under the award and it can be enforced against the non-signatory as well. In fact, the Hon'ble Supreme Court in that case, dealt with Section 35 of the Act and held that the arbitral award is final and binding not only on the parties but on persons claiming under them. The Court also recognised the legal principle that a non-signatory can also be made a party to the arbitral proceedings. The Court has clearly indicated that in no uncertain terms that the "Group of Companies" doctrine has been applied to pierce the Corporate Veil to locate the true party in interest and more significantly to target the creditworthy member of Group of Companies. The Court has also found that the application of law was met with legal resistance, but however held that the doctrine was to serve its purpose on the construction of arbitration agreement and the circumstances relating to the performance of the underlying contract. The Courts jurisprudential appreciation of the emerging and evolving new vistas on this aspect could be inspiring from the following observations in the Cheran Properties judgment.

25. Does the requirement, as in Section 7, that an arbitration agreement be in writing exclude the possibility of binding third parties who may not be signatories to an agreement between two contracting entities? The evolving body of academic literature as well as adjudicatory trends indicate that in certain situations, an arbitration agreement between two or more parties may operate to bind other parties as well. Redfern and Hunter explain the theoretical foundation of this principle:

"... The requirement of a signed agreement in writing, however, does not altogether exclude the possibility of an arbitration agreement concluded in proper form between two or more parties also binding other parties. Third parties to an



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arbitration agreement have been held to be bound by (or entitled to rely on) such an agreement in a variety of ways : first, by operation of the 'group of companies' doctrine pursuant to which the benefits and duties arising from an arbitration agreement may in certain circumstances be extended to other members of the same group of companies; and, secondly, by operation of general rules of private law, principally on assignment, agency, and succession... "

The group of companies doctrine has been applied to pierce the corporate veil to locate the "true" party in interest, and more significantly, to target the creditworthy member of a group of companies [Op cit fn. 16, 2.40, p. 100.] . Though the extension of this doctrine is met with resistance on the basis of the legal imputation of corporate personality, the application of the doctrine turns on a construction of the arbitration agreement and the circumstances relating to the entry into and performance of the underlying contract. [Id, 2.41 at p. 100.]

26. Russell on Arbitration [24th Edn., 3-025, pp. 110-11.] formulates the principle thus:

"Arbitration is usually limited to parties who have consented to the process, either by agreeing in their contract to refer any disputes arising in the future between them to arbitration or by submitting to arbitration when a dispute arises. A party who has not so consented, often referred to as a third party or a non-signatory to the arbitration agreement, is usually excluded from the arbitration. There are however some occasions when such a third party may be bound by the agreement to arbitrate. For example, ..., assignees and representatives may become a party to the arbitration agreement in place of the original signatory on the basis that they are successors to that party's interest and claim "through or under" the original party. The third party can then be



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compelled to arbitrate any dispute that arises."

27. Garry B. Born in his treatise on International Commercial Arbitration indicates that:

"The principal legal bases for holding that a non-signatory is bound (and benefited) by an arbitration agreement ... include both purely consensual theories (e.g., agency, assumption, assignment) and non-consensual theories (e.g. estoppel, alter ego) "

Explaining the application of the alter ego principle in arbitration, Born notes:

"Authorities from virtually all jurisdictions hold that a party who has not assented to a contract containing an arbitration clause may nonetheless be bound by the clause if that party is an 'alter ego' of an entity that did execute, or was otherwise a party to, the agreement. This is a significant, but exceptional, departure from the fundamental principle ... that each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate rights and liabilities ."

28. Explaining group of companies doctrine, Born states:

"the doctrine provides that a non-signatory may be bound by an arbitration agreement where a group of companies exists and the parties have engaged in conduct (such as negotiation or performance of the relevant contract) or made statements indicating the intention assessed objectively and in good faith, that the non-signatory be bound and benefited by the relevant contracts. "

While the alter ego principle is a rule of law which disregards the effects of incorporation or separate legal personality, in contrast the group of companies doctrine is a means of identifying the intentions of



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respect of "a matter" which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced – "as to a matter" which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Section 8. The words "a matter" indicate that the entire subject-matter of the suit should be subject to arbitration agreement.

16. The next question which requires consideration is – even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible under Section 8 of the Act. In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action, that is to say, the subject-matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject-matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject-matter of an action brought before a judicial authority is not allowed."

(emphasis in original)

21. Mr Sibal, learned Senior counsel for the respondents submitted that the High Court rightly relied upon Sukanya Holdings [Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya, (2003) 5 SCC 531] as it relates to Part I of the Act that the parties who are not signatories to the arbitration agreement (in this case, Astonfield under Sale and Purchase Agreement) cannot be referred to arbitration. It was further submitted that Chloro Controls [Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] arises under Part II of the Act and was rightly distinguished by the High Court and Sukanya Holdings [Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya, (2003) 5 SCC 531] was not overruled by Chloro Controls [Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] and hence, the appellants cannot rely upon Chloro Controls [Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC



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(Civ) 689] . It was contended that the Sale and Purchase Agreement (5-3-2012) under which huge money was parted with, is the main agreement having no arbitration clause cannot be referred to arbitration. It was submitted that the subject-matter of the suit cannot be bifurcated between the parties to arbitration agreement and others.

22. In Chloro Controls [Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] , this Court was dealing with the scope and interpretation of Section 45 of the Act, Part II of the Act and in that context, discussed the scope of relevant principles on the basis of which a non-signatory party also could be bound by the arbitration agreement. Under Section 45 of the Act, an applicant seeking reference of disputes to arbitration can either be a party to the arbitration agreement or any person claiming through or under such party. Section 45 uses the expression "... at the request of one of the parties or any person claiming through or under him..." includes non-signatory parties who can be referred to arbitration provided they satisfy the requirements of Sections 44 and 45 read with Schedule I of the Act.

23. In para 73 of Chloro Controls [Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] , this Court held as under: (SCC p. 683)

"73. A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed."



(emphasis supplied)

24. In a case like the present one, though there are different agreements involving several parties, as discussed above, it is a single commercial project, namely, operating a 2 MWp Photovoltaic Solar Plant at Dongri, Raksa, District Jhansi, Uttar Pradesh. Commissioning of the Solar Plant, which is the commercial understanding between the parties and it has been effected through several agreements. The agreement – Equipment Lease Agreement (14-3-2012) for commissioning of the Solar Plant is the principal/main agreement. The two agreements of Rishabh with Juwi India: (i) Equipment and Material Supply Contract (1-2-2012); and (ii) Engineering, Installation and Commissioning Contract (1-2-2012) and the Rishabh's Sale and Purchase Agreement with Astonfield (5-3-2012) are ancillary agreements which led to the main purpose of commissioning the Photovoltaic Solar Plant at Dongri, Raksa, District Jhansi, Uttar Pradesh by Dante Energy (lessee). Even though, the Sale and Purchase Agreement (5-3-2012) between Rishabh and Astonfield does not contain arbitration clause, it is integrally connected with the commissioning of the Solar Plant at Dongri, Raksa, District Jhansi, U.P. by Dante Energy. Juwi India, even though, not a party to the suit and even though, Astonfield and Appellant 1 Ameet Lalchand Shah are not signatories to the main agreement viz. Equipment Lease Agreement (14-3-2012), it is a commercial transaction integrally connected with commissioning of Photovoltaic Solar Plant at Dongri, Raksa, District Jhansi, U.P. Be it noted, as per Clause (v) of Article 4, parties have agreed that the entire risk, cost of the delivery and installation shall be at the cost of the Rishabh (lessor). Here again, we may recapitulate that engineering and installation is to be done by Juwi India. What is evident from the facts and intention of the parties is to facilitate procurement of equipments, sale and purchase of equipments, installation and leasing out the equipments to Dante Energy. The dispute between the parties to various agreements could be resolved only by referring all the four agreements and the parties thereon to arbitration.

25. Parties to the agreements, namely, Rishabh and Juwi India: (i) Equipment and Material Supply Agreement; and (ii) Engineering, Installation and Commissioning Contract and the parties to Sale and Purchase Agreement between Rishabh and Astonfield are one and the same as that of the parties in the main



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agreement, namely, Equipment Lease Agreement (14-3-2012). All the four agreements are inter-connected. This is a case where several parties are involved in a single commercial project (Solar Plant at Dongri) executed through several agreements/contracts. In such a case, all the parties can be covered by the arbitration clause in the main agreement i.e. Equipment Lease Agreement (14-3-2012).

26. Since all the three agreements of Rishabh with Juwi India and Astonfield had the purpose of commissioning the Photovoltaic Solar Plant project at Dongri, Raksa, District Jhansi, Uttar Pradesh, the High Court was not right in saying that the Sale and Purchase Agreement (5-3-2012) is the main agreement. The High Court, in our view, erred in not keeping in view the various clauses in all the three agreements which make them as an integral part of the principal agreement, namely, Equipment Lease Agreement (14-3-2012) and the impugned order of the High Court cannot be sustained.

64. In the above matter, the Hon'ble Supreme Court, after advertng to the three different agreements involving several parties with reference to a single commercial project, ultimately, held that the various clauses in all the three agreements are all integral part of the principal agreement. The Court, eventually set aside the order passed by the High Court which refused to recognise that all the three agreements are integral part of the principal agreement.

65. In a later judgment of the Hon'ble Supreme Court reported in 2020 (12) SCC 767 (MTNL vs. Canara Bank & others), the Hon'ble Supreme Court, after referring to various sub-clauses of Section 7 of the Act, 1996, has held that the non-signatory can be bound by the Arbitration agreement on the basis of the "Group of Companies" doctrine. The Honble Supreme Court has also held that the Court has invoked this doctrine to join a non-signatory member of the group, as a necessary party to the arbitration. The learned arbitral Tribunal has relied upon this decision for ordering the impleadment of the appellants herein. The relevant discussion and the conclusion reached by the Hon'ble Supreme Court as found in paragraph Nos. 9.1 to 10.8 are extracted hereunder:

9.1. Section 7 defines "arbitration agreement" and reads as follows:

"7. Arbitration agreement.—(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain



disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

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(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in—

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

9.2. The arbitration agreement need not be in any particular form. What is required to be ascertained is the intention of the parties to settle their disputes through arbitration. The essential elements or attributes of an arbitration agreement is the agreement to refer their disputes or differences to arbitration, which is expressly or impliedly spelt out from a clause in an agreement, separate agreement, or documents/correspondence exchanged between the parties.

9.3. Section 7(4)(b) of the 1996 Act, states that an arbitration agreement can be derived from exchange of letters, telex, telegram or other means of communication, including through electronic means. The 2015 Amendment Act inserted the words "including communication through electronic means" in Section 7(4)(b). If it can prima facie be shown that parties are ad idem, even though the other party may not have signed a formal contract, it cannot absolve him from the liability under the agreement [Govind Rubber Ltd. v. Louis Dreyfus Commodities Asia (P) Ltd., (2015) 13 SCC 477 : (2016) 1 SCC (Civ) 733] .

9.4. Arbitration agreements are to be construed according to the general principles of construction of statutes, statutory instruments, and other contractual



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documents. The intention of the parties must be inferred from the terms of the contract, conduct of the parties, and correspondence exchanged, to ascertain the existence of a binding contract between the parties. If the documents on record show that the parties were ad idem, and had actually reached an agreement upon all material terms, then it would be construed to be a binding contract. The meaning of a contract must be gathered by adopting a common sense approach, and must not be allowed to be thwarted by a pedantic and legalistic interpretation. [Union of India v. D.N. Revri & Co., (1976) 4 SCC 147]

9.5. A commercial document has to be interpreted in such a manner so as to give effect to the agreement, rather than to invalidate it. An "arbitration agreement" is a commercial document inter partes, and must be interpreted so as to give effect to the intention of the parties, rather than to invalidate it on technicalities.

9.6. In *Khardah Co. Ltd. v. Raymon & Co. (India) (P) Ltd.* [Khardah Co. Ltd. v. Raymon & Co. (India) (P) Ltd., (1963) 3 SCR 183 : AIR 1962 SC 1810] , this Court while ascertaining the terms of an arbitration agreement between the parties, held that : (AIR p. 1820, para 30)

"30.....If on a reading of the document as a whole, it can fairly be deduced from the words actually used therein, that the parties had agreed on a particular term, there is nothing in law which prevents them from setting up that term. The terms of a contract can be express or implied from what has been expressed. It is in the ultimate analysis a question of construction of the contract."

9.7. In interpreting or construing an arbitration agreement or arbitration clause, it would be the duty of the court to make the same workable within the permissible limits of the law. This Court in *Enercon (India) Ltd. v. Enercon GmbH* [Enercon (India) Ltd., (2014) 5 SCC 1 : (2014) 3 SCC (Civ) 59] , held that a common sense approach has to be adopted to give effect to the intention of the parties to arbitrate the disputes between them. Being a commercial contract, the arbitration clause cannot be construed with a purely legalistic mindset, as in the case of a statute.



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9.8. In this case, MTNL raised a preliminary objection that there was no arbitration agreement in writing between the parties, at this stage of the proceedings. We will first deal with this issue. The agreement between MTNL and Canara Bank to refer the disputes to arbitration is evidenced from the following documents exchanged between the parties, and the proceedings:

9.8.1. The minutes of the meeting dated 27-3-2001 was convened by the Cabinet Secretariat, wherein all three parties were present and participated in the proceedings. The Committee on Disputes, in the meeting dated 16-12-2008 expressed the view that all the three parties should take recourse to arbitration in view of the different interlinked transactions between them. Canara Bank suggested that to expedite the arbitration, it should be conducted under the Arbitration and Conciliation Act, 1996. This was accepted by MTNL, and no objection was raised.

9.8.2. Pursuant to the proceedings conducted by the Cabinet Secretariat, Canara Bank addressed letters dated 5-3-2009 and 17-3-2010 to MTNL, wherein it enclosed a draft arbitration agreement, wherein all three parties i.e. Canara Bank, CANFINA and MTNL would be joined in the arbitration proceedings.

9.8.3. In the writ petition filed by Canara Bank, the Delhi High Court vide order dated 16-9-2011 [Canara Bank v. MTNL, 2011 SCC OnLine Del 5705] recorded the consent of MTNL and Canara Bank to be referred to arbitration by a sole arbitrator under the 1996 Act. The relevant extract of the order dated 16-9-2011 [Canara Bank v. MTNL, 2011 SCC OnLine Del 5705] passed by the Delhi High Court reads as follows : (SCC OnLine Del para 2)

"2. Unfortunately, although the parties had displayed their willingness for arbitration, the Committee on Disputes could not resolve the specific clauses of the arbitration agreement. Nor have the parties been able to arrive at a consensus with regard to the specific clauses of the arbitration agreement. As noted in the order dated 1-10-2010 [ONGC v. CCE, 1995 Supp (4) SCC 541] , according to the petitioner, it is a matter of arbitration as to whether the petitioner is liable for the acts or omissions of CANFINA. However, the respondents were insisting that the petitioners should agree to take over the liabilities



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and admit them in the arbitration agreement itself. It has now been agreed by the parties that both these issues could be made the subject-matter of arbitration, namely, whether the petitioner is liable for the acts or omissions of CANFINA and whether the petitioner is liable to take over the liabilities of CANFINA. There is no necessity now of requiring the petitioner to agree to take over the liabilities of CANFINA prior to the arbitration proceedings because that itself would be one of the points to be decided in the course of arbitration. Even though the learned counsel for the petitioner has placed before us the subsequent decisions of the Supreme Court with regard to the scope and ambit of powers of the Committee on Disputes, we are making the present order because the parties themselves have agreed to go in for arbitration as a mode for resolving their disputes. This is welcome because both the parties are PSUs. The counsel for the parties shall suggest names of the arbitrators."

9.8.4. Pursuant thereto, MTNL participated in the proceedings conducted by the sole arbitrator, and filed its claim, and counterclaim. No objection was raised before the sole arbitrator that there was no arbitration agreement in writing between the parties. The only objection raised was that CANFINA should be joined as a necessary party in the proceedings.

9.9. The agreement between the parties as recorded in a judicial order, is final and conclusive of the agreement entered into between the parties. [State of Maharashtra v. Ramdas Shrinivas Nayak, (1982) 2 SCC 463 : 1982 SCC (Cri) 478. See also Chitra Kumari v. Union of India, (2001) 3 SCC 208] The appellant MTNL after giving its consent to refer the disputes to arbitration before the Delhi High Court, is now estopped from contending that there was no written agreement to refer the parties to arbitration.

9.10. An additional ground, for rejecting the preliminary objection raised by MTNL is based on Section 7(4)(c) of the Arbitration and Conciliation Act, 1996. Section 7(4)(c) provides that there can be an arbitration agreement in the form of exchange of statement of claims and defence, in which the existence of the agreement is asserted by one party, and not denied by the other. [Savitri Goenkav. Kanti Bhai Damani, 2009 SCC OnLine Del 177 : (2009) 1 Arb LR 320] In the present case, Canara Bank had filed its statement of claim before the arbitrator, and MTNL



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filed its reply to the statement of claim, and also made a counterclaim against Canara Bank. The statement of claim and defence filed before the arbitrator would constitute evidence of the existence of an arbitration agreement, which was not denied by the other party, under Section 7(4)(c) of the 1996 Act. In view of the aforesaid discussion, the objection raised by MTNL is devoid of any merit, and is hereby rejected.

10. Joinder of CANFINA in the arbitral proceedings

10.1. Canara Bank raised an objection to the joinder of Respondent 2 CANFINA as a party to the arbitration proceedings.

10.2. As per the principles of contract law, an agreement entered into by one of the companies in a group, cannot be binding on the other members of the same group, as each company is a separate legal entity which has separate legal rights and liabilities. The parent, or the subsidiary company, entering into an agreement, unless acting in accord with the principles of agency or representation, will be the only entity in a group, to be bound by that agreement. Similarly, an arbitration agreement is also governed by the same principles, and normally, the company entering into the agreement, would alone be bound by it.

10.3. A non-signatory can be bound by an arbitration agreement on the basis of the "group of companies" doctrine, where the conduct of the parties evidences a clear intention of the parties to bind both the signatory as well as the non-signatory parties. Courts and Tribunals have invoked this doctrine to join a non-signatory member of the group, if they are satisfied that the non-signatory company was by reference to the common intention of the parties, a necessary party to the contract.

10.4. The doctrine of "group of companies" had its origins in the 1970s from French arbitration practice. The "group of companies" doctrine indicates the implied consent to an agreement to arbitrate, in the context of modern multi-party business transactions. It was first propounded in Dow Chemical v. Isover-Saint-Gobain [Dow Chemical v. Isover-Saint-Gobain, 1984 Rev Arb 137 : (1983) 110 JDI 899], where the arbitral Tribunal held that:

"... the arbitration clause expressly accepted by certain of the companies of the group should bind the



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other companies which, by virtue of their role in the conclusion, performance, or termination of the contracts containing said clauses, and in accordance with the mutual intention of all parties to the proceedings, appear to have been veritable parties to these contracts or to have been principally concerned by them and the disputes to which they may give rise."

10.5. The group of companies doctrine has been invoked by courts and Tribunals in arbitrations, where an arbitration agreement is entered into by one of the companies in the group; and the non-signatory affiliate, or sister, or parent concern, is held to be bound by the arbitration agreement, if the facts and circumstances of the case demonstrate that it was the mutual intention of all parties to bind both the signatories and the non-signatory affiliates in the group. The doctrine provides that a non-signatory may be bound by an arbitration agreement where the parent or holding company, or a member of the group of companies is a signatory to the arbitration agreement and the non-signatory entity on the group has been engaged in the negotiation or performance of the commercial contract, or made statements indicating its intention to be bound by the contract, the non-signatory will also be bound and benefitted by the relevant contracts. [Interim award in ICC Case No. 4131 of 1982, IX YB Comm Arb 131 (1984); Award in ICC Case No. 5103 of 1988, 115 JDI (Clunet) 1206 (1988). See also Gary B. Born : International Commercial Arbitration, Vol. I, 2009, pp. 1170-1171.]

10.6. The circumstances in which the "group of companies" doctrine could be invoked to bind the non-signatory affiliate of a parent company, or inclusion of a third party to an arbitration, if there is a direct relationship between the party which is a signatory to the arbitration agreement; direct commonality of the subject-matter; the composite nature of the transaction between the parties. A "composite transaction" refers to a transaction which is interlinked in nature; or, where the performance of the agreement may not be feasible without the aid, execution, and performance of the supplementary or the ancillary agreement, for achieving the common object, and collectively having a bearing on the dispute.

10.7. The group of companies doctrine has also been invoked in cases where there is a tight group structure with strong organisational and financial



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links, so as to constitute a single economic unit, or a single economic reality. In such a situation, signatory and non-signatories have been bound together under the arbitration agreement. This will apply in particular when the funds of one company are used to financially support or restructure other members of the group. [ICC Case No. 4131 of 1982, ICC Case No. 5103 of 1988.]

10.8. The "group of companies" doctrine has been invoked and applied by this Court in Chloro Controls (India) (P) Ltd. v. Severn Trent Water Purification Inc. [Chloro Controls (India) (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] The Madras High Court has invoked the group of companies doctrine in a foreign seated arbitration in SEI Adhavan Power (P) Ltd. v. Jinneng Clean Energy Technology Ltd., 2018 SCC OnLine Mad 13299 : (2018) 4 CTC 464.] , with respect to an international commercial agreement. Recently, this Court in Ameet Lalchand Shah v. Rishabh Enterprises [Ameet Lalchand Shah v. Rishabh Enterprises, (2018) 15 SCC 678 : (2019) 1 SCC (Civ) 308] , invoked the group of companies doctrine in a domestic arbitration under Part I of the 1996 Act.

In the above case, the main company namely Canara Bank raised objection for joining its subsidiary company as a party to the arbitration proceedings. In that context, the Hon'ble Supreme Court held that it was a case where the 'group of companies' doctrine could be applied and held that the reference in respect of the subsidiary company was also legally valid, though not a signatory to the arbitration agreement.

66. It is relevant to mention the last of the three decisions referred to above have been rendered post amendment to Section 8(1) of the Act in 2016 which had come into effect from 23.10.2015. After the decision of the Hon'ble Supreme Court in Chloro Controls India Pvt. Ltd. Case, which primarily considered the enforcement of the foreign award in terms of Section 45 of the Act, the ratio has been imported and applied in domestic arbitrations as well. The last three decisions which have been referred to would vouch for the evolution of the legal principle on the aspect of non-signatory being made a party to the arbitration proceedings by applying the 'group of companies' doctrine in domestic arbitration as well.

67. As stated above, in view of the modern business transactions and multi layered agreements and contracts, there are situations where the companies join together and enter into



a contract for execution of a project. In the evolving business context, the 'Group of Companies' doctrine has gained traction, earlier with reference to multi national contracts and the doctrine has been applied progressively in domestic arbitrations as well. In the backdrop of the above development on the conceptional widening of application of the rule of adding non-signatory as party to meet the requirement of the present day transactions involving multiple companies jointly, the Law Commission in its 246th report dated August 2014 has recommended inter alia amendment to section 8 to bring it on par with section 45.

68. This Court, earlier referred to Section 8 of the Act and the amendment which was effected in 2016. The amendment to Section 8 is to be seen as it reads today.

8. Power to refer parties to arbitration where there is an arbitration agreement - (1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.

69. Before the substitution by the amended Act 2016, sub clause (1) read as under:

8. Power to refer parties to arbitration where there is an arbitration agreement -

(1) A Judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitted his right statement on the substance of the dispute, refer the parties to arbitration.

70. There is a conscious widening of the amplitude of section 8 to bring it on par with section 45 of the Act. Therefore, today, it is possible to refer any party to the arbitration, be it signatory or non-signatory, on a prima facie consideration. In such view of the matter, the arguments placed on the definition clause of section 2 (1)(h) by the learned counsel may not carry much conviction with this Court in the present times. As on date, in terms of section 8(1) and also, the legal principle laid down by the Courts with reference to



"Group of Companies" doctrine, it is legally permissible for making a non-signatory as a party to the arbitral proceedings. This legal position thus, is beyond any pale of negotiation or contest. However, the Courts have only cautioned that impleadment of non-signatory must be only in exceptional circumstances and such exceptional circumstances have also been illustrated by the Courts.

71. As a matter of fact, after the amendment to Section 8 (1) of the Act 1996, there may not be any peremptory requirement to look out any legal precedents in order to hold that non-signatory to an arbitration agreement can also be made a party to the arbitration. However, it is imperative to refer to few decisions which dealt with the issue after the evolution of the concept of "Group Companies" doctrine which has its origin only in the recent past. The concept became more pronounced in the ruling of the Hon'ble Supreme Court of India in 2013 (1) SCC 641 (Chloro Controls India Pvt. Ltd. vs. Severn Trent Water Purification inc.). That was a case where the Hon'ble Supreme Court was dealing with the international arbitration with reference to Section 45 of the Act. As regards the controversy relating to the non-signatory to be made as party the Court has reasoned in paragraph No.95 which is extracted hereunder.

95. The language of Section 45 has wider import. It refers to the request of a party and then refers to an arbitral Tribunal, while under Section 8(3) it is upon the application of one of the parties that the court may refer the parties to arbitration. There is some element of similarity in the language of Section 8 and Section 45 read with Article II(3). The language and expressions used in Section 45, "any person claiming through or under him" including in legal proceedings may seek reference of all parties to arbitration. Once the words used by the legislature are of wider connotation or the very language of the section is structured with liberal protection then such provision should normally be construed liberally.

The observation of the Hon'ble Supreme Court in the above said paragraph would obviate any opaque or obscure understanding on the said controversy. When section 45 has been accorded with liberal construct, with reference to non-signatory being made a party in the arbitral proceedings, on the basis of the "Group of Companies" doctrine, after 2016 amendment to section 8(1), the same reasoning holds good for application of the said doctrine in domestic arbitrations as well.

72. In fact, even earlier to the Amendment Act 2016, when the decision was rendered by the Hon'ble Supreme Court in Chloro



Controls' case, application of 'Group of Companies' doctrine became legally permissible, though in exceptional cases. This could be seen from the ruling of the Hon'ble Supreme Court in paragraph Nos. 69, 71 to 73 which have been extracted supra. After the amendment in 2016 to section 8(1), the lurking doubts in the legal minds stood clarified and it is too late in the day to contest that the non-signatory cannot be made a party to an arbitration at all. The unambiguous and unequivocal legal position today is that non-signatory can be made a party to the arbitration, provided that the party which is seeking to implead itself or a party which is seeking to implead a non-signatory has to satisfy the judicial authority, their interest in the arbitration being directly and intrinsically concerned with the outcome of the arbitration proceedings. The Courts, on a prima facie consideration can refer non-signatory also the arbitration by exercise of its power in pending matter, be it under Sections 8, 9 or 11 as the case may be. The contention that non-signatory cannot be made as party to the arbitral proceedings is no more valid and to be overruled as being antiquated, and to be discredited as old fashioned opposition in today's contextual legal developments on the subject matter.

73. It is needless to mention here that reference to the arbitration proceedings is aimed at resolution of all connected disputes qua parties and to avoid multiplicity of proceedings and litigation. That being the essence of consideration, when more than one party is concerned with the dispute in the arbitration, by reason of its direct involvement in the dispute or in the contracts and the agreement which gave rise to the dispute, it is immaterial that whether that party is in fact, signatory to the arbitration agreement or not. Today, in the modern commercial contracts, a hyper-technical objection cannot be successfully raised namely, that one of the parties to the agreement is in fact not the signatory to the arbitration agreement and as such cannot be made party to the arbitral proceedings. Such pedantic view would be ante thesis to the contemporary commercial contracts involving participation of multiple companies in execution of large scale contracts or projects. For that matter, any project be it medium, large or even small may require participation of more than one company with a specialised domain expertise for effective and all round execution of the project.

74. There is a phenomenal shift in the legal focus after the development of "Group of Companies" doctrine. It is not the form of the agreement, but it is the substance that should be looked into. The ultimate consideration of the Courts is to see the nature of participation of the non-signatory companies/entities in the contract/agreement and the extent of its involvement. From the fact, if it could be gathered,



companies though different and independent entities have forged partnership and coming together for a common commercial business venture, unless any specific clause is incorporated in the agreement providing for reference to arbitration, the parties forging alliance/ partnership are to be deemed to have implicitly and essentially given consent for arbitration. However, the Courts are cautioned not to exercise such power to add non-signatory to the arbitral proceedings as a matter of routine, but as a matter of exception to the rule. The caution is necessary in view of the fundamental legal principle that reference to arbitration proceedings is the result of consent of parties and no party without its consent could be pitchforked into the proceedings. When exception is chiselled out from the rule, the courts naturally need to be circumspect, in dealing with impleadment of non-signatory to the arbitral proceedings.

75. Now reverting to the present case, after the Chloro Controls India Pvt. Ltd. case, and subsequent to the amendment to Section 8(1) of the Act 2016, a few decisions have been cited and relevant paragraphs have also been extracted supra.

76. This Court would like to draw a particular observation as contained in para 10.6 in the judgment of the Hon'ble Supreme Court in MTNL vs. Canara Bank & others (2020 (12) SCC 767) which is reproduced hereunder once again.

10.6. The circumstances in which the "group of companies" doctrine could be invoked to bind the non-signatory affiliate of a parent company, or inclusion of a third party to an arbitration, if there is a direct relationship between the party which is a signatory to the arbitration agreement; direct commonality of the subject-matter; the composite nature of the transaction between the parties. A "composite transaction" refers to a transaction which is interlinked in nature; or, where the performance of the agreement may not be feasible without the aid, execution, and performance of the supplementary or the ancillary agreement, for achieving the common object, and collectively having a bearing on the dispute.

77. The above quintessence observation of the Hon'ble Supreme Court would be the single guiding principle that the Court should bear in mind while referring non-signatory to the arbitral proceedings. This Court, in fact, has referred to two



other decisions, post 2016 amendment to section 8(1) in 2018 (16) SCC 413 (Cheran Properties Ltd. vs. Kasthuri & Sons) and 2018 (15) SCC 678 (Ameet Lalchand Shah v. Rishabh Enterprises). In those cases, the Hon'ble Supreme Court expressed similar views consistent with the concept of "Group of Companies" doctrine.

78. This Court is also impelled once again to refer to paragraph 92 to 94 of the judgment of Chloro Controls India (P) Ltd case for the sake of clarity hereunder.

92. To the contra, Mr Salve, learned Senior counsel appearing for Respondent 1, contended that the expressions "parties to arbitration", "any person claiming through or under him" and "at the request of one of the parties" appearing in Section 45 are wide enough to include some or all the parties and even non-signatory parties for the purposes of making a reference to arbitration. It is also the contention that on the true construction of Sections 44, 45 and 46 of the 1996 Act, it is not possible to accept the contention of the appellant that all the parties to an action have to be parties to the arbitration agreement as well as the court proceedings. This would be opposed to the principle that parties should be held to their bargain of arbitration. The court always has the choice to make appropriate orders in exercise of inherent powers to bifurcate the reference or even stay the proceedings in a suit pending before it till the conclusion of the arbitration proceedings or otherwise. According to Mr Salve, if the interpretation advanced by Mr Nariman is accepted, then mischief will be encouraged which would frustrate the arbitration agreement because a party not desirous of going to arbitration would initiate civil proceedings and add non-signatory as well as unnecessary parties to the suit with a view to avoid arbitration. This would completely frustrate the legislative object underlining (sic underlying) the 1996 Act. Non-signatory parties can even be deemed to be parties to the arbitration agreement and may successfully pray for referral to arbitration.

93. As noticed above, the legislative intent and essence of the 1996 Act was to bring domestic as well as international commercial arbitration in consonance with the UNCITRAL Model



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Rules, the New York Convention and the Geneva Convention. The New York Convention was physically before the legislature and available for its consideration when it enacted the 1996 Act. Article II of the Convention provides that each contracting State shall recognise an agreement and submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not concerning a subject-matter capable of settlement by arbitration. Once the agreement is there and the court is seized of an action in relation to such subject-matter, then on the request of one of the parties, it would refer the parties to arbitration unless the agreement is null and void, inoperative or incapable of performance.

94. Still, the legislature opted to word Section 45 somewhat dissimilarly. Section 8 of the 1996 Act also uses the expression "parties" simpliciter without any extension. In significant contradistinction, Section 45 uses the expression "one of the parties or any person claiming through or under him" and "refer the parties to arbitration", whereas the rest of the language of Section 45 is similar to that of Article II(3) of the New York Contention. The court cannot ignore this aspect and has to give due weightage to the legislative intent. It is a settled rule of interpretation that every word used by the legislature in a provision should be given its due meaning. To us, it appears that the legislature intended to give a liberal meaning to this expression.

79. The arguments advanced as referred to by the Hon'ble Supreme Court and reasoning of the Hon'ble Supreme Court in paragraph Nos. 92 and 94 above would crystalize the legal position leaving no room for entertaining any doubt. When the Hon'ble Supreme Court made an observation as above that there is a dissimilarity in the use of expression in Section 8 and Section 45, the dissimilarity being removed post 2016 amendment to section 8(1), the section has been brought on par with section 45, providing latitude to the courts to add non-signatory as parties to the arbitral proceedings.

80. In the earlier part of this decision, order of the learned arbitral Tribunal from paragraph 23 to 50 have been extracted supra with the view to highlight how the Tribunal has



incisively considered all the facts, materials and the case laws and the comprehensive findings recorded therein. It does not require a profound appreciation of the facts, to conclude that the appellants herein have been part of the entire transactions from the stage of fulfilling the pre-bid requirements and till the final acceptance of the contract/ agreement and the issuance of the work order. The relationship of the appellants with the lead partner in the execution of the subject project is intertwined and the completion of the project is fully dependant on the sharing of the domain knowledge, their technical participation among the three companies, on the ground. When these appellants intrinsically had been part of the agreement/ contract, the attempt by the appellants to extricate themselves from the contractual obligations on the basis of their antiquated plea that they being non-signatory to the arbitration agreement is to be rejected in considering the established fact of that these appellants herein have been integral part of the work contract/agreement and therefore they are necessary and proper parties to the proceedings.

81. The learned arbitral Tribunal has analytically recorded every document that was executed by the appellants herein towards fulfilment of the contractual requirements and the clauses of those documents executed by these appellants have been appreciated by the learned arbitral Tribunal which have also been extracted supra. The nature of transaction and the participation of these appellants and their involvement in the composite project would on all fours come within the framework of the ruling of the Hon'ble Supreme Court in paragraph 73 in Chloro Controls India (P) Ltd. Case (2013 (1) SCC 641). The said paragraph has also been extracted by the learned arbitral Tribunal in paragraph No.52 of the order.

82. The learned counsel for the appellants strongly urged that in the arbitration agreement, the appellants have been defined as sub contractors in terms of clause 1.8.4 of the contract agreement dated 03.04.2013 and hence, cannot be construed as parties to the agreement. This Court is unable to countenance such submission in the light of the above ruling of the Honb'le Supreme Court and also considering the entirety of the facts and circumstances of the case. Merely because that these appellants have been defined as sub contractors in the contract agreement, the appellant Companies cannot claim that they are not privy to the contract per se and therefore, not liable to be added as parties. The arguments of the learned counsel in this regard may not also be valid when the sub-clause is read carefully, which is extracted herein below.

"1.8.4. SUB CONTRACTORS

SI shall not subcontract (to other parties



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not forming part of proposed consortium with M/s. Ingeneri Technologies Solutions PVT. Ltd, Hyderabad, Abhibus Services India Limited, Hyderabad and Analogics Tech India Private Limited, Hyderabad if any or other than the named Sub Contractors) any work related to the ETM Project unless otherwise agreed by the STU.

The above expression "sub contractor" was with reference to unnamed sub contractors and not with reference to the appellants herein. The clause factually contemplates prohibition of sub contracting to third parties other than the parties forming part of the consortium which did not in substance mean, the appellants herein have been relegated to the status of sub-contractors, and therefore they are outside the entire framework of the contract agreement. As stated above, it is not the description of the party or a formal affixture of signature is relevant or crucial but the relationship of the parties ought to be understood beyond the peripheral realm of the sedate description of the parties. In this connection, it is relevant to extract section 7 of the Arbitration and Conciliation Act, 1996.

7. Arbitration agreement. –

(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in—

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

83. From the combined reading of the above sub-clauses in the section, deduction as to any explicit or implicit agreement



to arbitration must stem from the nature of the document executed by the parties. In this case, there is no denial of the fact that these appellants have been part of the principal contract agreement dated 03.04.2013 and the award of contract was actuated only because of the fact that the appellants and the claimant submitted their bid as consortium for execution of the project in tandem. Merely because the lead partner alone has signed the contract agreement containing an arbitration clause, these appellants cannot plead that they have nothing to do with the agreement with a sole view to avoid being impleaded as parties to the arbitration proceedings. Such stand taken on behalf of the appellants herein is nothing but self serving, an attempt to craftily disengage themselves from the contractual obligations.

84. As a matter of fact, in the teeth of the power of attorney executed by the appellants herein as part of the requirement of the contract agreement, particularly with reference to its contents which had been extracted in para 37 of the order of the learned arbitral Tribunal, it does not lie in the mouth of these appellants to contend that they are not party to the arbitration agreement. These appellants having executed the power of attorney to the lead partner to represent them and agreed to ratify the acts, deeds and things lawfully done by the lead partner and all acts, deeds and things done by the attorney shall always be deemed to have been done by them / consortium. They cannot selectively seek to crawl out of the arbitration proceedings initiated at the instance of their very lead partner. Their contention that they are only defined as a sub-contractor in the contract agreement dated 03.04.2013 in Clause 1.8.4. appears to be too legally naïve for its acceptance by the Court in the overall facts and the circumstances of the case.

85. One other contention which has been seriously advanced by the learned counsel, that these appellants are not "group companies" as they are neither affiliate or subsidiary of the lead partner company, the claimant. They being independent companies, cannot be dubbed as "group company" for the purpose of application of the 'Group of Companies' doctrine. The contention has been specifically incorporated in this Aide Memoire dated 09.10.2021 filed before this Court. The said contention is a reflection of complete misreading of the doctrine of 'group of companies' evolved by the Courts. The meaning of 'Group of Companies' and 'Group Companies' is clearly distinguishable and understandable even in common parlance. It is quite strange that on behalf of the appellant such twisted interpretation has been to the doctrine. The contention therefore is liable to be rejected as being an attempt to obfuscate and to distort the true legal principle.

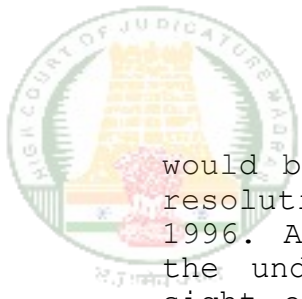


86. In the entirety of the facts and circumstances of the case read with the rulings of the Courts as discussed above, this Court factually has no hesitation to hold that these appellants are proper and necessary parties to the arbitral proceedings, though being non-signatory to the agreement. The facts and the materials clearly demonstrate without any modicum of doubt, that as the lead partner, the claimant deemed to have represented the interests of the appellants herein also in the arbitration proceedings and in the bargain if any liability or claim/ counter claim arising under the terms of the same contract agreement, intrinsically linked to the claim of the claimant, the appellants herein have to necessarily face any counter claims by other parties to the contract, namely the State Corporations herein.

87. While concluding as above, a correlated issue has been raised as to whether the appellants herein could be impleaded only in the counter claim alone and on that account the impleadment is valid in law or not? According to the learned counsel, when these appellants have not chosen to make any claim against the State Corporations, the counter claim by the Corporation against them cannot be countenanced in law at all is the one more dimension to the challenge in these applications. This Court is unable to appreciate as to the legality of such argument for the reason as set forth below.

88. Merely because the claimant has not chosen to make the other two member companies of the consortium as parties to the arbitration proceedings, it does not preclude the State Corporations, the respondents before the arbitral Tribunal from coming up with their counter claims against the claimant as well as against the other two consortium members. The right to make counter claims against all the members of the consortium cannot stand negated in view of the fact that the lead partner, while raising a claim against the respondent Corporations has not chosen to have the other two members of the consortium as being part of its claim.

89. As stated above, when the contract agreement contemplated a comprehensive execution of the project as a consequence of the participation of all the three member companies of the consortium, any rights and liabilities arising from the understanding, all the three companies are necessarily to be made part of the dispute resolution to avoid multiplicity of proceedings. When the counter claim arising out of the perceived non-performance of the parties or violation of the terms of the contract agreement, according to the aggrieved parties (State Corporations) such parties cannot be driven to seek a separate reference for the purpose of enforcing their claim arising out of the same contract agreement. Such scenario



would be antithetical to the letter and spirit of the dispute resolution mechanism envisaged in the scheme of the A & C Act, 1996. A comprehensive resolution of the dispute qua parties is the underlying principle of arbitration which cannot be lost sight of. In these circumstances, this Court does not find the argument plausible or valid but on the other hand, finds the same a desperate plea to avoid being part of the dispute resolution for serving their own ends.

90. One other important issue has been raised on behalf of the appellants is whether there was a valid commencement of the arbitration proceedings against the appellants herein without any notice being issued under section 21 of the Act, 1996 or not. In this regard, a decision of the Hon'ble Delhi High Court has been referred to in the matter of Aulpro Building Systems Pvt.Limited Vs. Ozone Overseas Pvt. Limited (2018 (3) RAJ 94 (Delhi)).

91. No doubt compliance with section 21 is held to be mandatory for commencement of arbitration, by the Delhi High Court. However, as far as the case on hand is concerned, when the lead partners approached this Court under section 9 of the Arbitration Act and in the said proceedings, it was agreed to refer the dispute to arbitration and consent was given to that effect by the lead partner to the proceedings, in the opinion of this Court, such consent was deemed to have been given on behalf of the consortium. In the least, it should be construed that consent is binding on the other member companies of the consortium. On the basis of the consent given by the claimant, the petitioner before this Court in O.A.Nos. 317, 318, 319, 320, 321, 322, 323 & 324 of 2020 & A.Nos.1704, 1705 & 1706 of 2020, the matter was referred to the arbitration, appointing a former Hon'ble Judge of the Supreme Court of India, by its order dated 17.09.2020.

92. After the reference was made by consent of parties, it is not open to the appellants herein to disown the relationship with their lead partner only in respect of the counter claims made against them, on the ground that there was no valid commencement of arbitration proceedings as against them. The objections as raised above may not be valid and sustainable as the arbitration proceedings qua parties are already under way, the counter claim by the respondents to the claim is very much integral part of the same proceedings. Therefore, the question of issuance of notice under section 21 of the A & C Act in respect of the counter claim did not arise at all, as there cannot be any fresh commencement of arbitral proceedings qua the same parties to the agreement.



93. Compliance with section 21 of the Act 1996, arises at the pre-reference stage to the arbitration. Insistence on this compliance is a redundant formality after reference of the dispute to the arbitration, in the face of the counter claim being interlinked and intrinsically connected with the claim in the dispute. If this Court were to accept the said contention of the learned counsel for the appellants herein, the respondents to the claim before the arbitral Tribunal would be forced to approach the judicial authority/ court again after giving notice under section 21 and thereafter, there will be one more reference and constitution of one more arbitral Tribunal leading to multiplicity of proceedings for the same inter connected causes of action. Such scenario has to be mandatorily avoided in an alternate dispute resolution mechanism as held by the Courts consistently. Therefore, the objection towards non-compliance with Section 21 cannot be countenanced in law and the decision relied on by the learned counsel as above may not have any application to this case.

94. As a matter of fact, on behalf of the State Corporations application (I.A.No.2/2002) has been filed. What is sought in the I.A. is permission to take notice on the appellants herein insofar as the counter claim is concerned. It is interesting to note that from the averments contained in the I.A. filed by the State Corporations, it could be seen that at the very first available instance, the objection had been raised on behalf of the Corporations for non-joinder of necessary parties in the claim. However, no steps had been taken by the claimant in that regard forcing the State Corporations to file the I.A. for joinder of necessary parties. It is useful to refer to the averments contained in the application filed on behalf of the State Corporations in I.A.No.2/2020 from paragraphs Nos.4 to 8.

"4. The applicants herein submit that the first respondent herein had initiated the present arbitration proceedings without arraying the 2nd and 3rd respondent herein as parties to the proceedings and filed interim application and claim petition.

5. The applicants submit that the Agreements with the respective STUs, were executed by the 1st respondent on behalf of all the consortium members i.e. on behalf of the 2nd and 3rd respondent also. The Arbitration Agreement i.e. Cl. 1.9 has been invoked and pursuance to the same, the present arbitration proceedings are initiated at the instance of the 1st respondent herein. The first respondent had initiated the present arbitration in its individual capacity without arraying or representing the other two



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consortium members. The applicants had in the first instance i.e., in their Reply statement to the sec.17 applicant, being the first pleading of the applicant, had raised the issue of non-joinder of necessary parties. However, no steps to implead the respondents 2 & 3 herein has been made by the 1st respondent herein in both their interim application and the main claim statement.

6. The applicants state that the term "Agreement" had been defined in Clause 1.1.1.(a) of the Contract Agreement, to mean the Contract Agreement dated 05.04.2013 together with all Schedules, contents and specifications of the Part I of the RFP, corrigendum/amendments and LOA & Work order given to the claimant. The Consortium consisting of all the 3 respondent participated in the open Tender called for by PTCS in 2013, for implementing the ETM (Electronic Ticket Machine) Project in all STUs. After detailed scrutiny of the combined technical aspects and their demonstration, the PTCS selected the System Integrator (SI) Lead Consortium and then PTCS issued the Letter of Acceptance (LOA) dated 28/02/2013 & Common work order on behalf of all STUs on 13/03/2013 and to treat the PTCS's work order to implement the Project in all STUs and for all purposes.

7. Based on the combined technical, financial, similar domain experience in the field and capacity of all the three consortium partners, as per Clause. 2.2.6, 2.2.7 & 2.2.8 of the RFP, the contract was awarded to the Consortium. M/s.Analogics (the ETM Supplier) had exited from the consortium on 09/11/2018 and M/s.Abhibus (Software & backend server support) had already left from the consortium on 11/01/2017. As the two companies have already left the consortium, there is no Consortium functioning since 11/01/2017. The said facts came to the knowledge of the applicants from the reply letters issued by the other consortium members in reply to the show cause notice during August 2020. Hence, the 1st respondent had now lost the chance of continuing their claim against the applicants in its representative capacity on behalf of the respondents No.2 & 3.

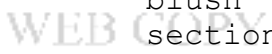
8. It is respectfully submitted that for the reasons stated above the respondents 2 & 3 are proper and necessary parties to the counter claim filed by the applicants herein and as such they are arrayed as respondents 2 & 3 in the counter claim. In terms of



Sec.2(h) of the Arbitration and Conciliation Act, 1996 party means party to an arbitration agreement. The arbitration agreement for the present case is contained in Cl.19 and the said agreement which has been executed by the consortium consisting of all the 3 respondent and signed by the 1st respondent who had represented the other 2 members (Respondent No.2 & 3); hence in all practical purposes, all the 3 respondents are party to the arbitration agreement. By applying the principles u/s.17 (e) and 19(3) in the light of the above facts, it is just and necessary to issue notice on the 2nd and 3rd respondent for the Counter Claim filed by the applicants herein. Serious prejudice, hardship and loss will be caused to the applicants, if due notice is not served on the respondents 2 & 3."

95. From the above averments, the stand of the State Corporations was made clear and unambiguous that the claimant had failed to make the appellants herein as parties to the arbitration proceedings. That being the case, failure on the part of the claimant to make other consortium members as parties to the arbitral proceedings cannot perforce the respondents (State Corporations) to abandon their counter claim against the claimant as well as other parties to the contract, namely, the appellants herein. The adverse consequence of the wanton default by the claimant company cannot be allowed to befall the State Corporations. When one party to the contract is making a claim against the other party to the contract, it is certainly permissible that the other party confronted with their claim can equally come up with counter claim by duly adding necessary parties for resolution of the complete dispute arising out of the same contract agreement.

96. Now at the risk of repetition reverting to the contention of the learned counsel for the appellant once again that the definition of 'party' to an arbitration agreement under section 2(1)(h) is narrow and constricted and as such it does not provide scope for wide and expansive interpretation to include any other party other than the party to the signatory to the Arbitration agreement. A reference had been made in that regard to the 246th Law Commission report dated August 2004, wherein the commission had recommended to add words "or any other person claiming through or under such party" after the words "party to an arbitration agreement". When series of amendments was made in 2016 in the Principal Act (Act 3 of 2016), this recommendation of the Law Commission was not accepted and no change was brought about in the section. According to the learned counsel, the Section ought to be read in the restricted sense and on which construction of the



97. The above submission may look attractive on a first blush on a precipitative understanding, if sub-clause and section 2(1)(h) is to be read in isolation. But what is to be examined fundamentally is the entire scheme of the Act, 1996. After the introduction of the amendments in 2016, particularly, with reference to Section 8(1) of the Act, the definition of Section 2(1)(h) has to be read in conjunction with the amended Section 8(1) of the Act. Section 2(1)(h) merely defines the meaning of 'party' and it does not define or clarify who is construed as party to the agreement. Moreover the Hon'ble Supreme Court in the decision reported in 2015(13) SCC 477 (Govind Rubber Ltd. v. Louis Dreyfus Commodities Asia Private Ltd.), has categorically held after referring to section 7 and its sub clauses, has held that "in order to constitute an arbitral agreement, it need not be signed by all the parties." The Court further held that if it can be prima facie shown that the parties are at ad idem, then the mere fact of one party not signing the agreement cannot absolve him from the liability under the agreement. The legal expression in the judgement is "construing an arbitral agreement, the Court should seek to give effect to the intention of the parties. The Court held that party to an agreement need not mean a signatory to the agreement

99. Therefore, the Court's endeavour is oriented towards harmonious construction of the section in the light of the various laws laid down by the Hon'ble Supreme Court and to provide thrust and purpose in furtherance of the spirit of the A & C Act, 1996.



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100. Now returning to the most important challenge touching upon the kernel of the issue of jurisdiction and power of arbitral Tribunal in adding parties during the course of the proceedings who are non-signatories to the arbitration agreement, this Court would have to consider two aspects emerging from the challenge.

i) Whether arbitral Tribunal has the power to implead a party in exercise of its power under section 17 of the Act in the first place? or

ii) Whether the power to implead is otherwise traceable within the overall frame work or the scheme of the Act or not?

101. As far as the first aspect is concerned, this Court has already concluded that Section 17 could be invoked or applied for impleading non-signatory. But for the sake of continuity and amplification, it is once again dealt with as under. In regard to the first issue, the learned counsel for the appellants contended that hypothetically if such power is to be conceded, the exercise of power under Section 17 for impleadment of third party cannot be countenanced in law. The learned counsel, however did not make any submission whether any other provision of the Act could be substituted in order to legally sanctify the impugned order, otherwise. But while dealing with the challenge, this Court has to inevitably look for and examine any other provision in the Act for drawing legal support to uphold the exercise of power by the learned Tribunal.

102. As far as the first limb of contention is concerned, section 17 is a mirror image of Section 9 of the A & C Act, 1996. both these Sections contemplate interim measures to be ordered by the Court or the arbitral Tribunal. The scope of both the sections does not pose any difficulty for this Court to embark on a needless exercise of demystifying and elucidating the transitory nature of application of Section 17 .

103. Section 17 is open to be invoked by the parties only on certain contingencies as provided in its sub-clauses. Section 17, as a whole, read as under:

17. Interim measures ordered by arbitral Tribunal

(1) A party may, during the arbitral proceedings, apply to the arbitral Tribunal—

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or



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(ii) for an interim measure of protection in respect of any of the following matters, namely:-

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the arbitral Tribunal to be just and convenient,

and the arbitral Tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.

(2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral Tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were an order of the Court.

104. As far as I.A.No.2/2020 filed by the State Corporation is concerned, the same has been filed under Section 17(ii)(e) r/w 19(3) of the Act, 1996. Section 17(ii)(e), though provide a blanket and wide power for the arbitral Tribunal to pass order/direction as an interim measure or protection to be just and convenient, the invocation of the sub-clause by the arbitral Tribunal is intended to serve as an interim protection qua



parties before the Tribunal. By no stretch of legal standard, such provision could be invoked and resorted to for adding a non-signatory to the arbitration, that too, in a counter claim. Adding a party to the counter claim amounted to bringing about an additional reference for adjudication which can never be termed as an interim measure or protection so as for the Tribunal to have recourse to Section 17(ii)(e).

105. In the considered opinion of this Court, invocation of section 17 r/w section 19(3) of the Act is misconceived and amounted to traversing beyond the application of the Section. Section 19, as a matter of fact deals with the determination of rules of procedure and the section and its sub clauses read as under:

19. Determination of rules of procedure

(1) The arbitral Tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).

(2) Subject of this Part, the parties are free to agree on the procedure to be followed by the arbitral Tribunal in conducting its proceedings.

(3) Failing any agreement referred to in sub-section (2), the arbitral Tribunal may subject to this Part, conduct the proceedings in the manner it considers appropriate.

(4) The power of the arbitral Tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

The Interlocutory Application filed by invoking section 17(ii)(e) and 19(3) in the considered view of this Court may not be procedurally correct as the sub clauses in the section cannot overstep beyond the scope and the ambit of the section as defined and applied. The impleadment of third party, non signatory is to be held as outside the frame work of the above Sections and therefore, the impleadment ordered by exercise of power under these sections is not valid in law from the point of view of grave procedural infirmity.

106. Be that as it may, leaving aside the procedural infirmity, as stated above, more important consideration of this Court is as to whether the arbitral Tribunal could said to have been enjoined with power to implead non-signatory in terms of the scheme of the Act or not at all? While examining the challenge what comes to the attention of this Court is Section 16 of the Act. This Section provide authority to the arbitral Tribunal to rule on its own jurisdiction. The Section and its sub-clauses read as under.



16. Competence of arbitral Tribunal to rule on its jurisdiction.

(1) The arbitral Tribunal may rule on its own jurisdiction, including ruling on any objections, with respect to the existence or validity of the arbitration agreement, and for that purpose,-

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract, and

(b) a decision by the arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence, however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

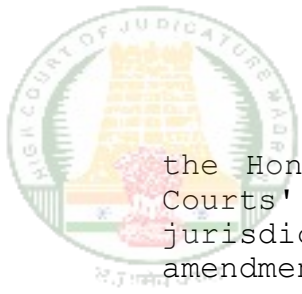
(3) A plea that the arbitral Tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral Tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3) admit a later plea if it considers the delay justified.

(5) The arbitral Tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), and, where the arbitral Tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.

107. The scope and application of section 16 is clearly defined and the same is beyond any pale of doubt. The arbitral Tribunal is conferred with competence to rule on its own jurisdiction. The power of the arbitral Tribunal has been further strengthened and amplified after the amendment to the Act in 2016 in respect of Section 11(6-A). After the amendment,



the Hon'ble Supreme Court and High Courts have held that the Courts' have been assigned a very restricted and limited jurisdiction in referring the matter to arbitration. After the amendment, the Courts have to refer to arbitration any dispute on a peripheral, prima facie consideration only, unlike earlier, the Courts were to pronounce the validity of the arbitration agreement at the pre-referral stage. Once, on a prima facie finding, a reference is made, all objections can be raised before the arbitral Tribunal by the parties including the maintainability of the arbitration and the Tribunal is invested with the power to examine the objections and rule on its own jurisdiction.

108. In the final sum up, the Court cannot leave out the latest all encompassing ruling of the Hon'ble Supreme Court on the subject matter. The judgment reported in 2021 (2) SCC 1 - Vidya Drolia Vs. Durga Trading Corpn. has exhaustively analysed the relevant amendments to the Act, particularly, with reference to Sections 8 and 11 and held as to how the jurisdiction of the Court at the threshold level is limited only to refer the matter to the arbitration and nothing more. The relevant observations of the Hon'ble Supreme Court as found in paragraphs 146, 147, 154, 229, 232, 233, 234, 238 and 239 are extracted hereunder.

146. We now proceed to examine the question, whether the word "existence" in Section 11 merely refers to contract formation (whether there is an arbitration agreement) and excludes the question of enforcement (validity) and therefore the latter falls outside the jurisdiction of the court at the referral stage. On jurisprudentially and textualism it is possible to differentiate between existence of an arbitration agreement and validity of an arbitration agreement. Such interpretation can draw support from the plain meaning of the word "existence". However, it is equally possible, jurisprudentially and on contextualism, to hold that an agreement has no existence if it is not enforceable and not binding. Existence of an arbitration agreement presupposes a valid agreement which would be enforced by the court by relegating the parties to arbitration. Legalistic and plain meaning interpretation would be contrary to the contextual background including the definition clause and would result in unpalatable consequences. A reasonable and just interpretation of "existence" requires understanding the context, the purpose and the relevant legal norms applicable for a binding and enforceable



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arbitration agreement. An agreement evidenced in writing has no meaning unless the parties can be compelled to adhere and abide by the terms. A party cannot sue and claim rights based on an unenforceable document. Thus, there are good reasons to hold that an arbitration agreement exists only when it is valid and legal. A void and unenforceable understanding is no agreement to do anything. Existence of an arbitration agreement means an arbitration agreement that meets and satisfies the statutory requirements of both the Arbitration Act and the Contract Act and when it is enforceable in law.

147.1. In *Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd.*, (2019) 9 SCC 209 : (2019) 4 SCC (Civ) 324], this Court had examined the question of stamp duty in an underlying contract with an arbitration clause and in the context had drawn a distinction between the first and second part of Section 7(2) of the Arbitration Act, albeit the observations made and quoted above with reference to "existence" and "validity" of the arbitration agreement being apposite and extremely important, we would repeat the same by reproducing para 29 thereof : (SCC p. 238)

"29. This judgment in *Hyundai Engg. case* [*United India Insurance Co. Ltd. v. Hyundai Engg. & Construction Co. Ltd.*, (2018) 17 SCC 607 : (2019) 2 SCC (Civ) 530] is important in that what was specifically under consideration was an arbitration clause which would get activated only if an insurer admits or accepts liability. Since on facts it was found that the insurer repudiated the claim, though an arbitration clause did "exist", so to speak, in the policy, it would not exist in law, as was held in that judgment, when one important fact is introduced, namely, that the insurer has not admitted or accepted liability. Likewise, in the facts of the present case, it is clear that the arbitration clause that is contained in the sub-contract would not "exist" as a matter of law until the sub-contract is duly stamped, as has been held by us above. The argument that Section 11(6-A) deals with "existence", as opposed to Section 8, Section 16 and Section 45, which deal with "validity" of an arbitration agreement is answered by this Court's



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understanding of the expression "existence" in Hyundai Engg. case [United India Insurance Co. Ltd. v. Hyundai Engg. & Construction Co. Ltd., (2018) 17 SCC 607 : (2019) 2 SCC (Civ) 530] , as followed by us."

Existence and validity are intertwined, and arbitration agreement does Invalid agreement is no agreement.

147.6. Exercise of power of prima facie judicial review of existence as including validity is justified as a court is the first forum that examines and decides the request for the referral. Absolute "hands off" approach would be counterproductive and harm arbitration, as an alternative dispute resolution mechanism. Limited, yet effective intervention is acceptable as it does not obstruct but effectuates arbitration.

147.7. Exercise of the limited prima facie review does not in any way interfere with the principle of competence-competence and separation as to obstruct arbitration proceedings but ensures that vexatious and frivolous matters get over at the initial stage.

154.3. The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of "second look" on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.

229. This brings us to the question of what prima facie case means, as is required to determine the non-existence of a valid arbitration agreement under Section 8 of the Act. The meaning and scope of "prima facie" has greatly varied in common law as well as the civil law systems. Immediately, at least two meanings can be attributed to this term. First, it means a party is said to have established a prima facie case when he has satisfied his burden of producing



233. From the aforesaid discussion, we can conclude that the respondent-defendant has to establish a prima facie case of non-existence of valid arbitration agreement, wherein it is to be summarily portrayed that a party is entitled to such a finding. If a party cannot satisfy the court of the same on the basis of documents produced, and rather requires extensive examination of oral and documentary production,



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then the matter has to be necessarily referred to the Tribunal for full trial. Such limited jurisdiction vested with the court, is necessary at the pre-reference stage to appropriately balance the power of the Tribunal with judicial interference.

234. The amendment to the aforesaid provision was meant to cut the deadwood in extremely limited circumstances, wherein the respondent is able to ex facie portray non-existence of valid arbitration agreement, on the documents and the pleadings produced by the parties. The prima facie view, which started its existence under Section 45 through Shin-Etsu case [Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd., (2005) 7 SCC 234] , has been explicitly accommodated even under domestic arbitration by the 2015 Amendment with appropriate modifications.

238. At the cost of repetition, we note that Section 8 of the Act mandates that a matter should not (sic) be referred to an arbitration by a court of law unless it finds that prima facie there is no valid arbitration agreement. The negative language used in the section is required to be taken into consideration, while analysing the section. The court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above. Therefore, the rule for the court is "when in doubt, do refer".

239. Moreover, the amendment to Section 8 now rectifies the shortcomings pointed out in Chloro Controls case [Chloro Controls (India) (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] with respect to domestic arbitration. Jurisdictional issues concerning whether certain parties are bound by a particular arbitration, under group-company doctrine or good faith, etc., in a multi-party arbitration raises complicated factual questions, which are best left for the Tribunal to handle. The amendment to Section 8 on this front also indicates the legislative intention to further reduce the judicial interference at the stage of reference.



109. The wide scope of section 16 conferring power on arbitral Tribunal to rule on its own jurisdiction may be trifling tempting to the Tribunal to assume jurisdiction to implead non-signatory or third party to the arbitral proceedings on an expansive reading of the section. If such power is traceable to the Section without any modicum of doubt, the impleadment of the appellants herein can always be upheld by substituting the power exercised by the arbitral Tribunal under section 17 to that of Section 16 of the Act, rectifying the anomaly in the application of the provision of the A & C Act, 1996. But whether such power could be read into the section is the most relevant and pivotal consideration of this Court as there is no other provision that directs conferment of power of the Tribunal apart from section 17.

110. In examining the overarching issue engaging the legal minds, finding insufficient legal support, this Court has to do tight rope walking as that of a funambulist, balancing the discourse to reach a verdict on the virgin legal terrain. Although the Court is conscious of the progressive development of law in the recent years, transcending beyond the rigid construct of the provisions of the Act, by evolving "Group of Companies" doctrine, nonetheless the substratum and the bedrock on which the edifice (arbitral Tribunal) is conceptualised and established cannot be lost sight of, in favour of expediency.

111. The fundamental essence of referring a dispute to arbitration is consent between parties to the dispute. Such being the underlying principle, the Court could ill-afford to abandon the foundational architecture and embark upon an adventurous deconstruction and clothe the Tribunal with any power outside the framework of the Act. In the progressive times, a perceptive shift and change is essential, but in the name of expediency, the scheme of the Act, 1996, cannot be read or interpreted to the point of undermining the very essence of the concept of arbitration and the Act, solely with a view to hold that the Tribunal has inherent power by implication, for ordering impleadment of non-signatory. While interpreting the scheme of the A & C Act, 1996, on the aspect of power of impleadment of non-signatory to the arbitral proceedings by the Tribunal, in the realm of the private law remedies, the court need to be circumspect and wary. The arbitral Tribunal is not a creature of the statute in the sense that the Tribunal as contemplated in the Act is not in any institutional form. It owes its existence only on a reference by the Court under the statute. The Tribunal in its circumscribed transitional existence owes its birth and extinction by operation of the provisions by the A & C Act, 1996. In that legal context the interpretation of the statutory scheme ought to be within its strict contours of the Act.



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112. No doubt, lately the Hon'ble Supreme Court heralded and opened up new vistas by propounding 'Group of Companies' doctrine paving way for adding non-signatory as party in the arbitration proceedings in consideration of international awards with to reference to section 45 of the A & C Act 1996 (Chloro Controls India (P) Ltd.) 2013(1) SCC 641. The doctrine subsequently applied in domestic arbitration as well by later decisions of the Courts as discussed supra. By amending Section 8(1) in 2016, the statute enjoined upon the Courts the power to add non-signatory in the domestic arbitrations as well. After the said amendment and the slew of decisions rendered in the recent past could leave no room for any doubt that today a non-signatory to the arbitration agreement can be party to the arbitration if in the opinion of the Court such course could avoid multiplicity of claims, litigations, a timely expeditious comprehensive resolution of the dispute among all the parties connected thereto.

113. The Courts have travelled from a narrow, constricted and pedantic judicial outlook of the past to a liberal judicial disposition, adopting latitudinarian approach to be in tune with and stay relevant in the contemporary business world and transactions. Having explicated the emerging legal scenario on the subject matter, the lurking legal concern which is yet to attain pellucidity free from obscurity in the opinion of the Court, is the availability of power to order impleadment of third party non-signatory by arbitral Tribunal even within the framework of the exceptional circumstances as propounded by the Courts and in terms of the scheme of the A & C Act 1996.

114. In order to reach clarity on the subject, it is imperative to refer to a few case laws of very recent origin touching upon the core area of concern which have not been cited before this Court in this proceedings. However, before advertent to the case laws, it is very useful to refer to an essay written on the topic on Perspective- Extension of Arbitration Agreements to Non-signatories - A Global Perspective reported in 5 IJAL 35 (2016). The essay analytically traced the march of law both on the international and the national arenas. A reference to excerpts from the essay by the authors would throw light on the nucleus of the issue under consideration.

I. Introduction

Founded on the principle of l'autonomie de la volonté, arbitration law finds its sanction in the consent of parties. This is so much so that the Supreme Court of Texas has described "consent" as the "first principle" of arbitration. This consent is found in the arbitration agreement entered into by the parties.



The importance of consent in arbitration proceedings may be gauged by the adumbration of the United States ["U.S."] Supreme Court in *Stolt-Nielsen v. Animal Feeds International Corpn.*² wherein it stated that arbitration "is a matter of consent, not coercion". Accordingly, when interpreting an arbitration agreement, efforts must be made to give effect to the parties' common intention rather than being restricted to the literal wordings used in the agreement. Further, arbitration agreements are to be interpreted in good faith. Therefore, to ascertain and respect the common intention of the parties, the consequences of the commitments the parties may be considered as having been reasonably and legitimately envisaged.⁴ While there are numerous impediments that may arise as regards the enforcement of arbitration agreements, the focus of this article is on the enforceability of arbitration agreements on non-signatories.

- a. The formalistic requirements of a valid and binding arbitration agreement as per (a) the New York Convention on the Recognition and Enforcement of Foreign arbitral Awards, 1958 [the "NYC"]; and (b) UNCITRAL Model Law on International Commercial Arbitration, 1985 [the "Model Law"];
- b. The position taken by national courts with respect to the enforcement of arbitration agreements as against non-signatories;
- c. The enforcement of awards where non-signatories have been joined to the proceedings;
- d. The position of 'third party beneficiaries' with respect to arbitration agreements; and
- e. The position of third parties during the conduct of arbitral proceedings.

The Indian law pertaining to the position of non-signatories has evolved drastically over the years. The Arbitration & Conciliation Act, 1996 [the "Act"]



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which governs arbitrations in India has recently undergone significant changes in view of the Arbitration & Conciliation (Amendment) Act, 2015 [the "Amendment Act"]. The authors will first discuss the arbitration law as it stood prior to the Amendment Act and then deal with the Amendment Act and its implications.

Section 2(1)(h) of the Act defines a "party" as "a party to an arbitration agreement". Section 8 of the Act also empowers courts to refer parties to arbitration where a valid arbitration agreement between the parties exists, in the realm of domestic arbitration. The definition of an arbitration agreement under Section 7 of the Act, in turn, mirrors that of the Model Law. Section 7 reads as follows:

1. In this Part, 'arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
2. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
3. An arbitration agreement shall be in writing.
4. An arbitration agreement is in writing if it is contained in-
 - a. a document signed by the parties;
 - b. an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or
 - c. an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.
5. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

Much like the Model Law, therefore, an arbitration agreement may extend to a non-signatory but it would have to be formalized by non-conventional means, i.e. other than in writing. The Supreme Court of India considered the position of non-



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signatories to arbitration agreements for the first time in *Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya*²⁸ In that case, Sukanya Holdings attempted to enforce an arbitration agreement against inter alia non-signatories by filing an application under Section 8 of the Act before the Bombay High Court. However, in view of the fact that not all the parties were signatories to the arbitration agreement, the Bombay High Court rejected the application. While doing so, the Court remarked that arbitration was a viable option only as against some of the parties and the Act did not confer any power on the judiciary to add non-signatories to arbitration agreements. Sukanya Holdings then preferred an appeal against the order of the Bombay High Court before the Supreme Court of India. This appeal was dismissed and it was held that "[where], however, a suit is commenced – "as to a matter" which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of S. 8."

Consistent with *Sukanya Holdings*³⁰ the Supreme Court of India has declined to appoint an arbitrator under Section 11 of the Act where a non-signatory was proposed to be added to the arbitration proceedings in *Indowind Energy Ltd. v. Wescare (India) Ltd.*³¹ The judgment of the Supreme Court was notwithstanding that the non-signatory was an alter-ego of the signatory and they shared a registered office. Applying strict rules of construction to various provisions of the Act, the Supreme Court held that the existence of an arbitration agreement between the parties to the dispute and covering the dispute was fundamental to the invocation of arbitration. The Supreme Court further held that an arbitration agreement will only satisfy the 'writing' requirement if it is contained in a document signed by the parties, in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, in an exchange of statements of claim and defence in which the existence of an arbitration agreement is alleged and not denied or in a contract between the parties which incorporates by reference another document containing an arbitration clause. The Supreme Court did not, therefore provide any leeway to the parties to extend the



A Division Bench of the Supreme Court, however, remedied the injustice caused by the Sumitomo case in Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc. The main consideration before the Supreme Court in Chloro Controls was to define the ambit of Section 45 of the Act and to determine whether a composite reference to arbitration under Section 45 was permissible under multiple arbitration agreements (some of which contain an arbitration clause) and where there is no identity of parties. At the outset the Supreme Court noted that the wording employed in Section 45 of the Act was on the same lines as that in Article II of the NYC and at a substantial variance to the wording of Section 8 of the Act. This is so, since both Section 45 and Article II of the NYC permit reference upon a request being made by a party or "any person" claiming "through or under" it whereas Section 8 merely refers to a party simpliciter. The use of the term "any person" was construed as evincing the intention of the legislature to broaden the scope of Section 45. Further the Supreme Court stressed that it was mandatory for courts to make a reference as requested, subject only to the arbitration agreement being agreement "null and void, inoperative or incapable of being performed" owing to the use of the word "shall" in Section 45.



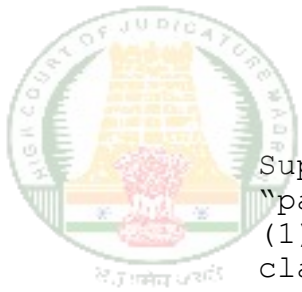
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To tackle the involvement of multiple parties and multiple contracts, the Supreme Court analyzed the case of Abu Dhabi Gas Liquefaction Co. Ltd. v. Eastern Bechtel Corpn. Where separate agreements (containing incompatible arbitration clauses) had been executed with a contractor and a subcontractor, and disputes arose between both the agreements, the Abu Dhabi Gas Liquefaction Co. instituted separate actions against each of the contractor and the sub-contractor. When both the disputes came before the English Court of Appeal, Lord Denning remarked on the imminent possibility of the two Tribunals arriving at incompatible conclusions and stated that "...it is most undesirable that there should be inconsistent findings by two separate arbitrators on virtually the selfsame question, such as causation. It is very desirable that everything should be done to avoid such a circumstance". The Supreme Court reiterated the need to avoid multiplicity of litigation and the application of the principle of 'one - stop action'. Turning then to the language employed in Section 44 of the Act (as also Article 1(3) of the NYC), which qualifies all "differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India" as amenable to arbitration, the Supreme Court further expanded the scope of arbitration agreements.

In essence, the Chloro Controls case is a high watermark of judicial insistence in the sphere of extension of arbitration agreements to non-signatories. The Supreme Court, applying the group of companies doctrine, examined the proximity of the relationship between the parties. It was recognized that even though multiple agreements had been entered into, they all formed part of one composite transaction and the performance of one was intrinsically linked to the others. It was for these reasons that the Supreme Court permitted a single reference to arbitration. However, while doing so the Supreme Court also added the caveat that each case would have to be decided on its peculiar factual matrix and no straitjacket formula could be arrived at.

The subsequent Amendment Act, which substantially amends the arbitration regime in India and is aimed at reformation of the Indian arbitration law at par with global standards to ensure an effective, speedy mechanism to resolve disputes, is noteworthy.

In relation to non-signatories, taking heed from the



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Supreme Court in Chloro Controls the wording "party to an arbitration agreement" under Section 8 (1) of the Act was amended to include any party claiming through or under such party to an arbitration agreement. Section 8(1) now provides:

8. Power to refer parties to arbitration where there is an arbitration agreement. –

(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.

[...]

Thus now, an arbitration agreement may extend to non-signatories too in domestic or Indian seated international arbitrations if they are claiming through or under a signatory.

VII. Conclusion

Much can be said about the position of national legislations as regards the position of non-signatories to arbitration agreements, but for the present suffice it to say that a general trend is emerging in favor of extending arbitration agreements to non-signatories. The only bar to such extension is that the parties must have intended it to be so and that an arbitration agreement was concluded by the parties either expressly or impliedly.

Much of the uncertainty behind the reluctance of courts allowing non-signatories to be joined to arbitration proceedings can be traced to their having resort to a strict approach to interpret the arbitration agreement. As the Supreme Court of India observed in *Enercon (India) Ltd. v. Enercon GMBH*⁷² "courts have to adopt a pragmatic approach and not a pedantic or technical approach while interpreting or construing



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an arbitration agreement or arbitration clause.". The Supreme Court, relying upon a gamut of Indian as well as foreign cases, concluded that courts must arrive at an interpretation which gives effect to the parties' intention to arbitrate, rather than one that defeats it. While the opinion of courts cannot be forcibly harmonized, it is imperative that an approach conducive to arbitration is adopted. This is largely necessitated to ensure that the rights of parties (who may be non-signatories) who have obtained an award in their favour, possibly against non-signatories, are not defeated at the enforcement stage. One way in which this conflict could be avoided would be if there was an international instrument governing the position of non-signatories to arbitration agreements. Having said that, national courts would also have to maintain a precarious balance between not getting embroiled in interpreting an arbitration agreement in a formalistic and technical way and importing consent to arbitrate where, in fact, none existed. After all, "like consummated romance, arbitration rests on consent"⁷³, and such consent must be evident whether in the arbitration agreement or by the conduct of the parties.

The above write up anatomised the relevant provisions of the Act and the fundamental concept of arbitration, as evolved over the years and authoritatively concluded that arbitration agreement may extend to non-signatories too, today. However, the article has also cautioned that the Courts have to maintain a precarious balance of not going overboard while adopting a liberal construct of the arbitration agreement, not importing consent to arbitrate when factually none existed. The article concluded with a aphorism "Like consummated romance, arbitration rests on consent". Truly re-enforcing the substratum of the concept of arbitration.

115. As far as the latest case laws are concerned, the following decisions have dealt with the subject relating to the impleadment of non-signatory to arbitration proceedings. The first of the decisions is reported in 2021 SCC Online Delhi 1279 (Amazon COM NV Investment Holdings LLC v. Future Coupons Private Limited and Ors.), considered the very same issue that is under critical lens of this Court in the present appeals and the Court held that impleadment by the arbitral Tribunal is permissible. The questions framed and the reasons of the Court are extracted hereunder.



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3. Respondent No. 2 has raised two objections. The first objection is that there is no arbitration agreement between the petitioner and respondent No. 2; and the Emergency Arbitrator has misapplied the concept of Group of Companies doctrine to implead respondent No. 2. According to respondent No. 2, the Group of Companies doctrine applies only in proceedings under Section 8 of the Arbitration and Conciliation Act for transfer of proceedings pending in Court to arbitration where the plaintiff claims through a person who is a party to an arbitration agreement. According to respondent No. 2, Group of Companies doctrine cannot be invoked to implead respondent No. 2.

.....

20. Future Retail Limited (respondent No. 2) raised an objection before the Emergency Arbitrator that respondent No. 2 was not signatory to the FCPL - SHA, and therefore, cannot be drawn into the arbitration proceedings. The learned Arbitrator rejected this objection after a detailed analysis of the submissions. Relevant portions of the interim order are reproduced hereunder:

.....

B. Indian Law on a Tribunal's Jurisdiction over Non-Signatories

111. Two distinct issues arise in analysing FRL's jurisdictional objection. First, is it essential under Indian law for an arbitration agreement to be in writing? Second, are only signatories, invariably, the proper parties to an arbitration agreement?

112. The Supreme Court of India in Chloro Controls India Private Ltd. v. Severn Trent Water Purification Inc. (2013) 1 SCC 641 ("Chloro") noted that:

[o]nce it is determined that a valid arbitration agreement exists, it is a different step to establish which parties are bound by it [and that] The third parties, who are not explicitly mentioned in an arbitration agreement made in writing, may enter into its *ratione persone* scope.

113. The Respondents accept that Section 25.2.1 of the FCPL SHA constitutes a valid arbitration agreement. The



issue that arises is whether FRL is bound by that arbitration agreement in Section 25.2.1 of the FCPL SHA, and, therefore, de jure a "party" to this arbitration under Indian law.

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114. FRL initially relied heavily on the decision rendered by a two-judge bench of the Supreme Court of India in *Indowind Energy Ltd. v. Wescare (India) Limited* (2010) 5 SCC 306 ("Indowind").

115. However, Indian law has made consequential strides since that decision. Non-signatories may now be bound by an arbitration agreement if the circumstances compellingly show that it was the mutual intention of all the parties to bind both signatories to the arbitration agreement as well as certain non-signatory entities.

In *Chloro*, a three-judge bench of the Supreme Court of India held that a "non-signatory or third party could be subjected to arbitration without their prior consent, but this would be in exceptional cases."

116. As the Claimant points out, in *Cheran Properties Ltd. v. Kasturi and Sons Ltd.* (2018) 16 SCC 413 ("Cheran"), another three-judge bench of the Supreme Court of India more recently emphasised that the Section 7 requirement of the Indian Arbitration Act 1996 that an arbitration agreement must be in writing, does not exclude the possibility of binding third parties who may not be signatories to an agreement between two contracting entities. After specifically considering the earlier judgment in *Indowind*, it noted that the law has evolved. The Court explicitly noted "that in certain situations, an arbitration agreement between two or more parties may operate to bind other parties as well."

117. *MTNL v. Canara Bank* 2019 SCC OnLine SC 995 ("MTNL"), a decision of a two-judge bench of the Supreme Court of India, given in 2019, reaffirmed that a "non-signatory can be bound by an arbitration agreement on the basis of the Group of Companies doctrine, where the conduct of the parties evidences a clear intention of the parties to bind both the signatory as well as the non-signatory parties."



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118. The jurisprudence developed by the Supreme Court on the issues of non-signatories to an arbitration agreement is consistent with the definition of the term "party" under the Indian Arbitration Act 1996. Under Section 2(1)(h) of the Indian Arbitration Act 1996, a 'party' is defined as a 'party to the arbitration agreement' and, crucially, not as a 'signatory' to the arbitration agreement. In *Govind Rubber Ltd. v. Louis Dreyfus Commodities Asia Private Ltd.* (2015) 13 SCC 477, the Supreme Court reiterated the importance of this distinction and emphasized that "in order to constitute an arbitration agreement, it need not be signed by all the parties."

.....

2. Analysing the Submissions

130. Over the course of the last decade, the Supreme Court has conspicuously been at the forefront of a growing international consensus on how and when arbitral Tribunals might legitimately exercise jurisdiction over intimately related parties involved in closely connected transactions. This is a sensible and pragmatic approach as it centralises in a single forum all the relevant parties that are intimately connected to the disputed transaction. It allows affiliated entities who have been intimately involved in negotiations and the performance of contracts to be subjected to and/or benefit from the presence of an arbitration clause entered into by another affiliate. This saves time and costs, hinders dilatory tactics, and precludes conflicting findings that may arise from satellite litigation in multiple forums. As a matter of business common-sense, it stands to reason that affiliated commercial parties would ordinarily intend that intertwined disputes with a counterparty be resolved in one forum, for reasons of efficiency and certainty.

131. In the three seminal decisions mentioned above, the Supreme Court set out the criteria that would satisfy a consent-based enquiry that seeks to ascertain whether a non-signatory ought to be brought within the scope of an arbitration clause it has not expressly acceded to. In the watershed decision of *Chloro*, the Supreme Court ruled:

73. A non-signatory or a third party could be subjected to arbitration without their prior consent, but this



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would only be in exceptional cases. The court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without the aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object, and collectively having bearing on the dispute. Besides all this, the court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed.

...

76. The Court will have to examine such pleas with greater caution and by definite reference to the language of the contract and intention of the parties. In the case of composite transactions and multiple agreements, it may again be possible to invoke such principle in accepting the pleas of non-signatory parties for reference to arbitration. Where the agreements are consequential and in the nature of a follow-up to the principal or mother agreement, the latter containing the arbitration agreement and such agreements being so intrinsically intermingled or interdependent that it is their composite performance which shall discharge the parties of their respective mutual obligations and performances, this would be sufficient indicator of intent of the parties to refer signatory as well as non-signatory parties to arbitration. The principle of "composite performance" would have to be gathered from the conjoint reading of the principal and supplementary agreements on the one hand and the explicit intention of the parties and the attendant circumstances on the other.

...

78. In India, the law has been construed more liberally, towards accepting incorporation by reference. In *Vessel M.V. Baltic Confidence v. State Trading Corpn. of India Ltd.*, the Court was considering the question as to whether the arbitration clause in a charter party agreement was incorporated by reference in the bill of lading and what the intention of the parties to the bill of lading was. The primary document



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was the bill of lading, which, if read in the manner provided in the incorporation clause thereof, would include the arbitration clause of the charter party agreement. The Court observed that while ascertaining the intention of the parties, attempt should be made to give meaning and effect to the incorporation clause and not to invalidate or frustrate it by giving it a literal, pedantic and technical reading.

(Emphasis supplied)

132. In *Cheran*, the Supreme Court held (per Dr. Chandrachud (sic) SCJ):

23. As the law has evolved, it has recognised that modern business transactions are often effectuated through multiple layers and agreements. There may be transactions within a group of companies. The circumstances in which they have entered into them may reflect an intention to bind both signatory and non-signatory entities within the same group. In holding a non-signatory bound by an arbitration agreement, the court approaches the matter by attributing to the transactions a meaning consistent with the business sense which was intended to be ascribed to them. Therefore, factors such as the relationship of a non-signatory to a party which is a signatory to the agreement, the commonality of subject-matter and the composite nature of the transaction weigh in the balance. The group of companies doctrine is essentially intended to facilitate the fulfilment of a mutually held intent between the parties, where the circumstances indicate that the intent was to bind both signatories and nonsignatories. The effort is to find the true essence of the business arrangement and to unravel from a layered structure of commercial arrangements, an intent to bind someone who is not formally a signatory but has assumed the obligation to be bound by the actions of a signatory.

...

25. Does the requirement, as in Section 7, that an arbitration agreement be in writing exclude the possibility of binding third parties who may not be signatories to an agreement between two contracting entities? The evolving body of academic literature as well as adjudicatory trends indicate that in certain situations, an arbitration agreement between two or more parties may operate to bind other parties as well.

...



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27. Gary B. Born in his treatise on International Commercial Arbitration indicates that:

The principal legal bases for holding that a non-signatory is bound (and benefited) by an arbitration agreement ... include both purely consensual theories (e.g., agency, assumption, assignment) and non- & consensual theories (e.g. estoppel, alter ego).

Explaining the application of the alter ego principle in arbitration, Born notes:

Authorities from virtually all jurisdictions hold that a party who has not assented to a contract containing an arbitration clause may nonetheless be bound by the clause if that party is an 'alter ego' of an entity that did execute, or was otherwise a party to, the agreement. This is a significant, but exceptional, departure from the fundamental principle ... that each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate rights and liabilities.

28. Explaining group of companies doctrine, Born states:

the doctrine provides that a non-signatory may be bound by an arbitration agreement where a group of companies exists and the parties have engaged in conduct (such as negotiation or performance of the relevant contract) or made statements indicating the intention assessed objectively and in good faith, that the non-signatory be bound and benefited by the relevant contracts."

While the alter ego principle is a rule of law which disregards the effects of incorporation or separate legal personality, in contrast the group of companies doctrine is a means of identifying the intentions of parties and does not disturb the legal personality of the entities in question. In other words:

"the group of companies doctrine is akin to principles of agency or implied consent, whereby the corporate affiliations among distinct legal entities provide the foundation for concluding that they were intended to be parties to an agreement, notwithstanding their formal status as non-signatories."

[emphasis in italics and underlined added]

133. More recently, just last year, the Supreme Court in MTNL further clarified the position:

10.3 A non-signatory can be bound by an arbitration agreement on the basis of the "Group of Companies"



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doctrine, where the conduct of the parties evidences a clear intention of the parties to bind both the signatory as well as the non-signatory parties.

Courts and Tribunals have invoked this doctrine to join a non-signatory member of the group, if they are satisfied that the non-signatory company was by reference to the common intention of the parties, a necessary party to the contract.

10.4

The 'Group of Companies' doctrine has been invoked by courts and Tribunals in arbitrations, where an arbitration agreement is entered into by one of the companies in the group; and the non-signatory affiliate, or sister, or parent concern, is held to be bound by the arbitration agreement, if the facts and circumstances of the case demonstrate that it was the mutual intention of all parties to bind both the signatories and the non-signatory affiliates in the group.

The doctrine provides that a non-signatory may be bound by an arbitration agreement where the parent or holding company, or a member of the group of companies is a signatory to the arbitration agreement and the non-signatory entity on the group has been engaged in the negotiation or performance of the commercial contract, or made statements indicating its intention to be bound by the contract, the non-signatory will also be bound and benefitted by the relevant contracts.

The circumstances in which the 'Group of Companies' Doctrine could be invoked to bind the non-signatory affiliate of a parent company, or inclusion of a third party to an arbitration, if there is a direct relationship between the party which is a signatory to the arbitration agreement; direct commonality of the subject matter; the composite nature of the transaction between the parties.

A 'composite transaction' refers to a transaction which is inter-linked in nature; or, where the performance of the agreement may not be feasible without the aid, execution, and performance of the supplementary or the ancillary agreement, for achieving the common object, and collectively having a bearing on the dispute.

....

10.9. It will be a futile effort to decide the disputes only between MTNL and Canara Bank, in the absence of CANFINA, since undisputedly, the original transaction emanated from a transaction between MTNL and CANFINA -



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the original purchaser of the Bonds. The disputes arose on the cancellation of the Bonds by MTNL on the ground that the entire consideration was not paid.

There is a clear and direct nexus between the issuance of the Bonds, its subsequent transfer by CANFINA to Canara Bank, and the cancellation by MTNL, which has led to disputes between the three parties.

Therefore, CANFINA is undoubtedly a necessary and proper party to the arbitration proceedings.

10.10. Given the tri-partite (sic) nature of the transaction, there can be a final resolution of the disputes, only if all three parties are joined in the arbitration proceedings, to finally resolve the disputes which have been pending for over 26 years now.

[emphasis in italics and bold italics added]

134. It is evident from the passages cited above that the Supreme Court has adopted a broad common sense and pragmatic approach in formulating this criteria. The minutiae of the terms of the subject contracts, even though not insignificant, should not constrain an adjudicatory body from determining which parties are within the scope of the contested arbitration clause. All the circumstances are to be considered when there is a composite transaction involving affiliated entities who are intimately involved in the same transaction.

135. It is clearly not enough that the non-signatory party whom a claimant seeks to include in arbitration proceedings is from the same group of companies or an affiliate. It is only in exceptional cases, where there exists the closest of connections between the parties as well as an indivisibility of the transaction(s) in question, that a non-signatory ought to be included in an arbitration. This requires a consent-based enquiry to ascertain the existence and degree of relational intimacy as well as the presence of an indivisible community of interests to resolve the dispute through a single common modality.

.....

163. Summary of Principles laid down by the Supreme Court on the Group of Companies doctrine

163.1 As the law has evolved, it has recognised that modern business transactions are often effectuated through multiple layers and agreements. There may be transactions within a Group of Companies. The circumstances in which they have entered into them may



163.2 The Group of Companies doctrine is essentially intended to facilitate the fulfilment of a mutually held intent between the parties, where the circumstances indicate that the intent was to bind both signatories and non-signatories. The effort is to find the true essence of the business arrangement and to unravel from a layered structure of commercial arrangements, an intent to bind someone who is not formally a signatory but has assumed the obligation to be bound by the actions of a signatory.

163.4 The Group of Companies doctrine will bind a non-signatory entity where an arbitration agreement is entered into by a company, being one within a group of companies, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates.

163.6 Direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object



and collectively having bearing on the dispute. Besides all this, the Court has to examine whether a composite reference of such parties would serve the ends of justice.

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163.7 Where the agreements are consequential and in the nature of a follow-up to the principal or mother agreement, the latter containing the arbitration agreement and such agreements being so intrinsically intermingled or interdependent that it is their composite performance which shall discharge the parties of their respective mutual obligations and performances, this would be a sufficient indicator of intent of the parties to refer signatory as well as non-signatory parties to arbitration. The principle of "composite performance" would have to be gathered from the conjoint reading of the principal and supplementary agreements on the one hand and the explicit intention of the parties and the attendant circumstances on the other.

163.8 While ascertaining the intention of the parties, attempt should be made to give meaning and effect to the incorporation clause and not to invalidate or frustrate it by giving it a literal, pedantic and technical reading.

163.9 Tests laid down by the Supreme Court to bind a non-signatory of an arbitration agreement on the basis of Group of Companies doctrine:

163.9.1 The conduct of the parties reflect a clear intention of the parties to bind both the signatory as well as the non-signatory parties.

163.9.2 The non-signatory company is a necessary party with reference to the common intention of the parties.

163.9.3 The non-signatory entity of the group has been engaged in the negotiation or performance of the contract.

163.9.4 The non-signatory entity of the group has made statements indicating its intention to be bound by the contract.



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163.9.5 A direct relationship between the signatory to the arbitration agreement and the non-signatory entity of the group; direct commonality of the subject-matter and composite nature of transaction between the parties.

163.9.6 The performance of the agreement may not be feasible without the aid, execution and performance of the supplementary or ancillary agreement for achieving the common object.

163.9.7 There is tight group structure with strong organizational and financial links so as to constitute a single economic unit or a single economic reality.

163.9.8 The funds of one company are used to financially support or restructure other members of the group.

163.9.9 The composite reference of disputes of fresh parties would serve the ends of justice.

.....

184. With respect to the Group of Companies doctrine applied by the Emergency Arbitrator, the respondents have urged that the Group of Companies doctrine applies only to Section 8 of the Arbitration and Conciliation Act, when the Court has to transfer the proceedings to Arbitrator. This submission of the respondent is contrary to the well settled law laid down by the Supreme Court. In *Cheran Properties (supra)*, the Supreme Court invoked Group of Companies doctrine to enforce an award against an entity which was neither a signatory to the arbitration agreement nor a party in the arbitration proceedings, meaning thereby, even if the Emergency Arbitrator had not impleaded respondent No. 2, the interim order of the Emergency Arbitrator is enforceable against respondent No. 2 before this Court.

185. The law relating to the Group of Companies doctrine is well settled by the Supreme Court which is binding on all the parties. In that view of the matter, raising a plea contrary to the well settled law is a very serious matter and as it creates confusion in the administration of justice and shall undermine the law



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laid down by the Supreme Court. In *Nidhi Kaushik v. Union of India*, (2013) 203 DLT 722, BHEL raised pleas contrary to the well settled law by the Supreme Court. In *NDMC v. Prominent Hotels Limited*, (2015) 222 DLT 706, the petitioner raised pleas contrary to the well settled law declared by the Supreme Court. In both these cases, this Court held the conduct of the litigants to be contemptuous and the action was initiated against the litigants. Reference be made to paras 13, 24 and 26.2 of the Division Bench judgment of this Court in *Nidhi Kaushik (supra)*.

116. As could be seen above, the Delhi High Court has extensively dealt with the issue with reference to the emerging legal principle on the subject matter. In para 163 extracted supra, summary of the principles evolved by the Hon'ble Supreme Court on the "Group of Companies" doctrine has been comprehensively elucidated. The High Court with reference to the facts of that case has upheld the impleading of non-signatory therein by the Emergency Arbitrator on the basis of the "Group of Companies" doctrine. In that case, a contention was raised that "Group of Companies" doctrine applies only to Section 8 proceedings, when the Court has to transfer the proceedings to arbitrator. The Court however appeared to have not been impressed with the said important contention.

117. The above ruling of the High Court may appear to be an answer to the challenge in the appeals. But on perusing the entire judgment, this Court finds the complete focus of the Court was with reference to the principal objection raised therein whether non-signatory can be made a party to the arbitration proceedings in the teeth of the well settled 'Group of Companies' doctrine. The Court's attention centered around the application of the said doctrine and it found fault with the objection being raised contrary to the well settled law by the Hon'ble Supreme Court. The Court dismissed the objection holding that the same creates confusion in the administration of justice and the application of the "Group of Companies" doctrine is now well settled. But the Court, despite a very relevant and pointed contention raised that the doctrine can have application only in Section 8 proceedings has not chosen to address the same with reference to the power and jurisdiction of the Tribunal to apply the doctrine. The Court did not go as far as tracing the source of power of the Tribunal within the scheme of the A & C Act, 1996 for impleading a third party to the proceedings.

118. But the pivotal question raised here is the power and jurisdiction to order impleadment which finds no definite answer in the above judgment or for that matter in the entire



legal landscape, pointing towards any authoritative judicial pronouncement.

119. It is interesting to learn that the above judgment of the Delhi High Court eventually landed on the lap of the Hon'ble Supreme Court in Civil Appeal Nos.4492-4493 of 2021. The Hon'ble Supreme Court in its decision dated 06.08.2021 did not go into the validity of the impleadment ordered by the Emergency Arbitrator in that case as the issue placed for consideration was in relation to the interpretation of Section 17 of the A & C Act, 1996. In the entire judgment of the Hon'ble Supreme Court, not a reference could be found as to any arguments being advanced on the availability of power to the arbitrator under the provisions of A & C Act, 1996 for impleadment of non-signatory in the arbitral proceedings, nor the Supreme Court specifically dealt with the issue on its own, either.

120. These is one more decision on the issue rendered by the Gujarat High Court dated 28.09.2018 in Special Civil Application No.5694 of 2018 (Imc Limited vs Board Of Trustees Of Deendayal Port Trust). The Division Bench of the High Court agreed with the single Judge order, finding no infirmity in the impleadment of the parties to the arbitration proceedings by the Tribunal. The relevant portions of the factual narrative, the observations and the ruling of the Court are extracted hereunder.

2. The factual matrix of the case which relates to filing of this appeal, in brief, is as under:

2.1 The 1st respondent Kandla Port Trust (renamed as Deendayal Port Trust - referred to as "the DPT" hereinafter) is a Major Port constituted under Section 3A of the Major Port Trusts Act, 1963. Vide Resolution 08.12.2005, 1st respondent - Trust has decided to develop Berth Nos.13 to 16 by private participation on Build, Operate and Transfer ("BOT" basis). Acting on the Resolution, notice inviting tenders was published inviting bids from the prospective parties for the respective berths in two-stage process for selection. Request for Qualification provided the eligibility criteria for enabling a prospective bidder to participate in the process for the said project, while awarding of concession was to be evaluated on the financial bids of the prospective bidders. The prospective bidders were expected to evaluate the feasibility of facilities and the project before placing the bid.

2.2 Pursuant to notice inviting tenders, the appellant - M/s.IMC Limited submitted its bid for



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that the Application deserves to be allowed. Accordingly, the application allowed. Reasons would follow.

2. As a consequence of the impleadment having been allowed as above, the claimant seeks leave of the Tribunal for moving an Application to amend the statement of claim. Let the Application be filed within one week from today. The present respondent may file reply/ objections within a week thereafter.

3. The Tribunal would meet on 12.04.2018, at 11:30 AM for hearing and deciding the applicatino for amendment."

Thereafter, reasons are placed on record by order dated 26.03.2018. Paragraphs 22 to 25 of the order read as under:

.....

2.6 The appellant-Company, which has responded to Request for Qualification ("RFQ") and Request for Proposal ("RFP"), has filed the Special Civil Application under Articles 226 and 227 of the Constitution of India with the prayer, inter alia, that an appropriate Writ, order or direction may be issued for quashing and setting aside the order dated 14.03.2018 (with the reasons as recorded on 26.03.2018) passed by the learned arbitral Tribunal on various grounds.

2.7 In the Special Civil Application, mainly it was the case of the appellant herein that the impugned order was passed by the learned arbitral Tribunal without issuing any prior notice and opportunity and as such, same was passed in violation of the principles of natural justice. It was also the case of the appellant that there was no arbitration agreement between the appellant - Company and the 1st respondent - DPT and no notice was issued under Section 21 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Arbitration Act" for short). Further, it was also the case of the appellant that the plea of the 1st respondent - DPT that the appellant is an alter ego of respondent No.2 was considered and accepted and order of impleadment was ordered without any basis. It was also the case of the appellant that no case was made out for lifting the corporate veil and all the documents relating to bid, namely RFQ and RFP constituted prelude to a contract



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and the learned arbitral Tribunal has committed an error by looking into such documents and ordering impleadment of the appellant as party-respondent in the arbitral proceedings. As such, it was the case of the appellant that the order impugned in the petition is erroneous and suffers from grave infirmities, resulting in irreparable harm and prejudice caused to the appellant, as such, there is no alternative remedy except to question the same by way of a writ petition.

2.8 The aforesaid petition was taken up for hearing at the stage of admission by the learned Single Judge and the 1st respondent - DPT has contested the matter. In the defence to contest the relief sought for in the petition, it was the case of the 1st respondent that the appellant - Company was qualified applicant for participation in the bid, as per the terms of the RFQ, as such, it was issued RFP and a Letter of Award for developing 15th Multi Purpose Cargo Berth was issued by the 1st respondent to the appellant - IMC which was accepted by the IMC. It was also the case of the 1st respondent that the 2nd respondent - JRE is a Special Purpose Vehicle which is incorporated as per the terms and conditions of the bid and if all the terms and conditions of the Concession Agreement were considered, coupled with the terms and conditions of RFQ and RFP, it is clear that the appellant is an alter ego of the 2nd respondent Company. The petition was also defended on the ground that a Special Civil Application itself is not maintainable under Article 226 of the Constitution of India as the learned arbitral Tribunal is constituted pursuant to the terms of the Agreement, as such, in absence of any public functions which are being discharged by the learned arbitral Tribunal, no petition can be maintained under Articles 226 or 227 of the Constitution of India against an order passed by the learned arbitral Tribunal.

2.9 Considering the rival submissions made on behalf of the parties and material placed on record, the learned Single Judge has held that the appellant is a primary bidder who has taken up the project and who has been awarded the contract and thereafter the 2nd respondent - JRE is created as a Special Purpose Vehicle and the appellant is, in fact, an alter ego of the 2nd respondent. It is further held that corporate veil could be lifted or not has to be considered by the Tribunal keeping in mind the underlying object and purpose of the Arbitration Act. The learned Single Judge has also held that even though Concession



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Agreement may not have been signed by the appellant, it would not make any change so far as the impleadment of the petitioner is concerned and it cannot pose itself as a third party merely because it is not a signatory to the agreement. Placing reliance on the judgments of Hon'ble Supreme court in the case of Chloro Controls India Private Limited v. Severn Trent Water Purification Inc. And Others reported in (2013)1 SCC 641 and also in the case of A. Ayyasamy v. A. Paramasivam And Others reported in (2016)10 SCC 386, the learned Single Judge has held that the word 'party' in the agreement is to be considered in broader concept or by understanding the lifting of corporate veil. Further, the learned Single Judge, while holding that the Arbitration Act has been enacted to provide a mechanism of framework to settle the disputes and any narrow or restricted interpretation which frustrates the object cannot be accepted, has rejected the plea of the appellant. At the same time, the learned Single Judge has held that petition under Articles 226 and 227 of the Constitution of India is maintainable against the orders passed by the learned arbitral Tribunal. By not accepting the plea of the appellant that the order passed by the learned arbitral Tribunal is in violation of principles of natural justice and without issuing notice as contemplated under Section 21 of the Arbitration Act, the learned Single Judge has dismissed the petition. However, the learned Single Judge has observed that the observations made are only for the purpose of deciding the petition prima-facie and all the contentions are left open to be considered by the learned arbitral Tribunal.

.....

13. Reverting to the facts of the case on hand, it is to be noticed that the order passed by the learned arbitral Tribunal clearly records that opinion expressed is prima-facie and subject to objections and remedies available under the Arbitration Act to the impleaded respondent, i.e. the appellant herein. If the appellant claims that it is not a party to the agreement, as such it cannot be impleaded as party respondent in the arbitration proceedings, it is always open for it to move an application under Section 16 of the Arbitration Act to rule on its jurisdiction. In view of such remedy and further remedies available under the law, by ordering impleadment, we are of the opinion that no prejudice is caused to the appellant. Whether notice is required



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to be issued to a party before ordering impleadment, or not, is a matter which depends on facts and circumstances of each case. If a strong case is made out for impleadment, it is always open for the Courts and Tribunals to order impleadment and to give an opportunity before deciding the main claim. In that view of the matter and having gone through the case law on the subject as referred above, we are of the view that the order of the learned arbitral Tribunal cannot be said to be not in conformity with law merely on the ground that appellant was not issued notice before passing the order of its impleadment. Even the learned Single Judge has also rightly rejected the plea of the appellant for quashing the order of the learned arbitral Tribunal on the aforesaid ground.

121. From the above extracted portions, it could be seen that the challenge before the High Court principally was on its merits that the impleadment was ordered by the Tribunal without any basis. Further contention is that there was no prior notice or opportunity was given or afforded and the impleadment was ordered in violation of the principles of natural justice etc. However, the central theme of this judicial discussion was not part of the consideration before the High Court. The above decisions are referred to in order to highlight the fact that Courts did not have any problem of the arbitral Tribunal ordering impleadment of non-signatory as parties to the arbitral proceedings presumably on the basis of the 'Group of Companies' doctrine. But again none of the legal precedents appear to have focussed steadfastly on the momentous issue of availability of the power to the Tribunal within the frame work of the Act. Ostensibly, the Courts appear to have taken it for granted that such power is inherently available, in the absence of any strong opposition raised therein, questioning the jurisdiction and the power of the Tribunal with reference to the Act, 1996.

122. In the face of the fundamental jurisdictional question being raised inter alia on behalf of the appellants herein, this Court has already dealt with the scope of Section 17 of the Act. The section after amendment in 2016 has become a mirror image of Section 9 of the Act. It may therefore be plausible to argue that the arbitral Tribunal is vested with all the powers and jurisdiction enjoyed by the Courts under Section 9 of the A & C Act, 1996. After the amended Act 2016, the scope of Section 17 has considerably been widened, conferring the same power as enjoined upon the Courts under section 9. But did amendment to Section 17 make any quintessence change as to the fundamental character and status of the arbitral Tribunal to the extent of conferring the power on the Tribunal to implead non-



signatory/third parties in arbitration proceedings? The answer could only be in the negative.

123. As concluded earlier in the judgment, the scope and the ambit of Section 17 are to be understood within the contours of its explicit language. After the amendment, the role of the referral courts at the threshold stage has been limited to prima facie consideration and in such consideration any doubt arises then, simply relegate as the doctrine goes "when in doubt do refer". In order to avoid flooding of applications before the Courts under section 9, amendment to section 17 became necessary in keeping with the UNCITRAL Model Law and adopting the rule of priority in favour of the Arbitration. But it does not automatically follow that arbitral Tribunal can also exercise the residual or inherent power exclusively vest in the Courts. Therefore, it is to be held that even after widening of the scope of Section 17, the Tribunal cannot said to be vested with the power of impleadment of third party/non-signatory.

124. Now coming to the most crucial consideration of the Court on the competence of the Tribunal is Section 16. This section was introduced after the Original Act, 1940 was replaced by the present 1996 Act. The disability suffered by the arbitration earlier was rectified and the Tribunal henceforth is clothed with the power to rule on its own jurisdiction. The evolution of the principles of competence-competence has been statutorily recognised in Section 16. The effect of the section are two fold. One, it saved the precious time of the Courts at the initial look- referral stage and all forms of challenge are referred to the Tribunal to rule, including the testing of the validity of arbitration agreement. A peculiar jurisdiction conferred upon the Tribunal to minimise the time spent on arbitration related challenges before the Courts at the pre-referral stage.

125. The conferment of power on the Tribunal of ruling on its own jurisdiction, is to advance the cause of arbitration in order to avoid the same being stultified by the vested interests. In the said legal and the statutory backdrop, it is once again plausible to contend that when the Tribunal can rule on its own jurisdiction, the power to implead non-signatory/third party may well come within the sweep of the principle competence-competence. Ruling on its own jurisdiction presupposes existence of the Tribunal in the first place. The Tribunal owes its existence through operation of sections 8, 9 or 11 of the A & C Act, 1996. The power to rule on its own jurisdiction is a post facto contingency or eventuality. Only as a legal consequence of the reference, the Tribunal is given a life (jurisdiction) either defective or valid to rule on it. It



can preside over its own destiny only with reference to the "reference" and not rule on non-reference.

126. In cases of impleadment of non-signatory/ third party by the Tribunal the original reference by the Court in terms of Sections 8, 9 or 11 gets enlarged by adding more parties who were not party/ parties to the reference. If such power is to be read anywhere in the whole scheme of Act as it stands today, the very concept of 'reference' to arbitration loses its sanctity. As long as the Tribunal does not enjoy any status of institution both in its form and substance, the power either patent or residual enjoyed by the Courts in terms of the provisions of the Act, cannot said to be enjoined upon the Tribunal. The arbitral Tribunal in the existing framework is authorised to rule on its jurisdiction but it cannot create a jurisdiction for itself. In substance, the exercise of power of impleadment of non-signatory/third party by the Tribunal would amount to vary the terms of the reference itself. Such overreach is antithetical to the concept and transitional edifice of arbitral Tribunal as envisaged in the scheme of the Act. By no liberal stretch of legal standards, ephemeral Tribunal can be said to enjoy any residual power, which power can only stated to be the attribute of a permanent judicial institution. Being created for a specific assignment and purpose, the Tribunal cannot said to have any inherent or implied power which could be read into the scheme of A & C Act, 1996.

127. A very careful reading of the Chapter IV and Section 16, the competence to rule on its own jurisdiction stems from the reference made by the judicial authority/Court under sections 8, 9 and 11 of the Act, as the case may be. It is legally possible for the arbitrator to hold and conclude that it has no jurisdiction over the matter and refuse to arbitrate i.e., in respect of a particular reference, dispute. But as far as the dispute arising between 'A' party and a third party, though with reference to the same contractual agreement, the arbitral Tribunal cannot be said to be having any legal existence at all. As far as such a dispute is concerned, the arbitral Tribunal is still born and not acquired the jurisdiction in the first place to rule on its own jurisdiction. In the conceptional framework, the arbitral Tribunal is not even a creature of the Statute for it assume the power in the absence of specific provision in the Act, clothing it with the authority. The arbitral Tribunal is a void mechanism and non-existent, unless and until the Courts bring its existence in the eye of law on a reference and the Court can also write its obituary as well, terminating its mandate in terms of the scheme of the Act.



128. This Court is unable to fathom out any section which can even remotely said to be conferring the power of impleadment on the arbitral Tribunal. In fact as rightly contended by the learned counsel for the appellants herein, there is no residuary power vested in the arbitral Tribunal to implead the third party to the arbitration. In fact, such a power has never been contemplated in the Act at all, pre or post amendment. The Tribunal owes its creation only to the reference by the judicial authority/court under sections 8, 9 or under section 11 of the Act. Once, the arbitral Tribunal comes into existence on the terms of reference, such terms of reference cannot be expanded or elongated during the course of the arbitration. There is a subtle distinction between ruling on its own referred jurisdiction after reference and conferring expanded or non-existent jurisdiction upon itself by exercise of the assumed power of impleadment.

129. Such power cannot be construed as incidental to the powers that are enjoined upon the Tribunal in the Scheme of A & C Act, 1996, for the essential reason that the underlying concept of arbitration is 'consent'. Whether there is explicit or implicit consent in terms of 2(1) (h) and Section 7 of the Act is for the Courts to rule on a prima facie consideration first, while exercising its jurisdiction under Section 8, 9 or 11 at the referral stage. In the event of non-signatory is referred to the arbitration on such consideration, the Tribunal gets an opportunity to apply the doctrine competence-competence in terms of Section 16. Any decision of the Tribunal is subject to appeal to the Court, as per Section 37. The competence bestowed upon the Tribunal to render a decision even on the fundamental plea of validity of its jurisdiction and its exercise of jurisdiction or exercise of the scope of the authority as provided in sub sections 2 and 3 of the Section 16 must be with reference to the terms of the arbitration agreement qua parties and not outside the arbitration agreement. But on the other hand, the consideration whether a non-signatory to the arbitration agreement could be added in the arbitral proceedings obviously falls outside the expressed terms of the agreement and the prima facie ruling is contingent as being part of such consideration at the pre-referral stage.

130. The last but not the least, it is relevant to mention here, regarding a decision of the learned Judge of this Court which was relied on by the learned counsel for the appellants. The decision reported in 2020(5) MLJ 198 (V.G.Santhosam and Ors. vs. Shanthi Gnanasekaran and Ors.) wherein the learned Judge has clearly held by striking the right chord that arbitral Tribunal cannot said to be enjoying inherent power as in the case of the Courts. The learned Judge in para 101 of the judgment has also held that there is no express or implied provision traceable to



the Act conferring upon the Tribunal such power to implead a third party. However while holding as such, he also concluded that in the event of necessity for effective adjudication of the dispute, an arbitrator has to follow the principle laid down by the Hon'ble Supreme Court in Chloro Controls India (P) Ltd. The succinct findings of the learned Judge as found in paragraphs 99 to 102 are extracted hereunder.

99. The spirit of the order passed by the Arbitrator with reference to the Arbitration Act is to be considered by this Court. The above findings would reveal that the Arbitrator has made an initiation C.M.A.Nos.4465, 4467 to 4469 of 2019 to decide the legal rights of the parties, including the rights of the first respondent. The Arbitrator in express terms held that the impleadment of party, provisions contained in the Code of Civil Procedure through Order 1, Rule 10 gives a wide power to a Court and in our context, the same must apply to an Arbitral Tribunal. Such a conclusion arrived by the Arbitral Tribunal is undoubtedly an exercise of inherent power, which is impermissible in law. The power which is not contemplated under the Arbitration Act, cannot be exercised by the Arbitral Tribunal. The power being statutory in character, the inherent power is not vested. While-so, the Arbitrator cannot invoke the provisions of the Code of Civil Procedure for the purpose of impleading a third person into the arbitral proceedings and he is bound to be strict with reference to the contracted Arbitration Agreement as well as the parties to the Arbitration Agreement and the adjudication must be within the parameters of the disputes raised between the parties to the Arbitration Agreement.

100. The decision of the Hon'ble Supreme Court of India in the case of Chloro Controls India (P) Ltd, cited supra, has got a restricted implication, as in the opening paragraph itself, the Apex Court, clarified the scope of widening of arbitral proceedings. The C.M.A.Nos.4465, 4467 to 4469 of 2019 Supreme court in unambiguous terms held that a third party cannot be impleaded as a party to the arbitral proceedings. Only on exceptional circumstances, where there is multiple, multi-party agreements with intrinsically interlinked causes of action, more so, where performance of ancillary agreements is substantially dependent upon effective execution of the principal agreement. Thus, there must be a link between the Principal Arbitration Agreement and an



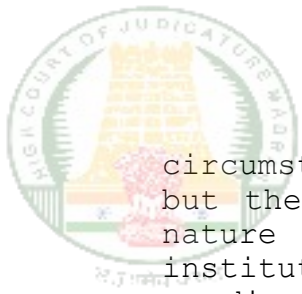
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ancillary agreement if any. The circumstances mostly would arise in business transactions between the Multinational Companies in international arbitration proceedings under Section 45 of the Arbitration act. Thus, such exceptional circumstances is a rare occasion as far as the domestic Arbitration Agreements are concerned. But however, the parties, who are filing such an application must establish such intrinsically interlinked causes of action for the purpose of participating in the arbitral adjudication.

101. There is no express provision available for impleadment of a third party in the Arbitration Act. Even there is no implied provision, which is traceable under the Act. In the absence of any provision when the Arbitrator is impleading a person for an effective adjudication of the disputes under the Arbitration Act, then C.M.A.Nos.4465, 4467 to 4469 of 2019 the principles laid down by the Supreme Court in the case of Chloro Controls India (P) Ltd, cited supra, is to be followed.

102. In the order impugned, the Arbitrator arrived a conclusion that the impleadment of the first respondent will help to secure a comprehensive adjudication of the extent to which the heirs of the parents, who were partners during the respective lifetime could claim right or not. Such a broad exercise of power invoked by the Arbitrator for the purpose of determining the civil rights of a person is beyond the scope of the provisions of the Arbitration Act. If the Arbitrator is appointed under the Arbitration Act is allowed to decide the civil rights of a person, who is otherwise not a party to the Arbitration Agreement, then the Arbitrator would be exercising the inherent power conferred to the Civil Court, which is not contemplated.

131. Although the learned Judge has rightly held that arbitral Tribunal does not enjoy inherent power but eventually a latitude is provided to the arbitral Tribunal towards impleadment of third party in certain circumstances as indicated in para 101 extracted above. Once it is categorically held that the Tribunal cannot said to have inherent power like the Courts, the power of impleadment cannot also said to be conferred upon the Tribunal on the basis of judge made law, in the absence of any trace of such power in the entire scheme of the Act. If the Tribunal could order impleadment of third party on certain



circumstances, though illustrated by the Honble Supreme Court, but the circumstances, again depend on each reference and the nature of dispute qua parties. The arbitral Tribunal sans institutional edifice, cannot be clothed with open ended leeway or discretion to implead third party, as that would pave way for unfettered, undefined exercise of power by the Tribunal, paving way for vagaries to creep into the decision making process in the course of the arbitration.

132. An arbitrator may not necessarily be a Judge with legal experience, endowed with professional competence. Any individual can be appointed as arbitrator on the basis of consent of parties. In such scenario powers exercisable by the Tribunal ought to be well defined and circumscribed by the Act itself. Till that time, it is only the Courts that enjoy residuary and inherent power, which can take the initial call on impleadment of non-signatory as party to the arbitral proceedings.

133. In the conspectus of the elongated judicial discourse, this Court, finds on merits that the appellants herein are necessary and proper parties to the arbitral proceedings. But in the absence of any trace of power being vested in the arbitral Tribunal in the scheme of the A & C Act, 1996, to implead a non-signatory/ third party to the arbitration, this Court is constrained to hold that the arbitral Tribunal's decision though well founded on the facts and materials, cannot be countenanced in law. Therefore, the C.M.As. are allowed and the impleadment orders in all the I.As dated 05.01.2021 are hereby set aside.

134. While allowing the C.M.As, this Court ought not to lose sight of the fact that the State Corporations are stated to be reeling under grave financial strain and are unable to withstand any protracted litigations in respect of the claim made against them in the pending arbitral proceedings. In the said circumstances, a memo has been filed and the contents of the same have also been extracted supra in the preamble portion of the judgment. Considering the depleted financial resources of all the State Corporations, it is open to the State Corporations to go ahead with defending their claim against the claimant for the present and request the Tribunal for expeditious completion of the proceedings or else it can seek an amicable settlement to avoid being enmeshed in the litigation for long, resulting in further depletion of its limited resources.

135. In the event of proceeding with the arbitration, the learned arbitral Tribunal is requested to complete the proceedings as expeditiously as possible as it deems fit in respect of the claim by the claimant as against the respondent



State Corporations. As regards the counter claim is concerned, such right is sought to be reserved by the State Corporations vide their memo dated 08.10.2021. It is open to the Corporations to take a decision to press for the counter claim or to await further outcome in the pending arbitration proceedings.

136. Before parting with these appeals, after the amendment to section 8(1) and the universal acceptance of the "Group of Companies" doctrine an express provision could be inserted in the existing A & C Act, 1996 conferring power on the arbitral Tribunal to implead non-signatory/third party to arbitral proceedings in a given circumstance. In any event as it stands today any order of the Tribunal passed in terms of Section 16 or Section 17 is appealable under Section 37 of the Act. The parties affected by any decision of the Tribunal in this regard have a remedy before the competent court. By bringing an express provision in the Act could be in tune with the evolving liberal legal standards adopted by the Courts in the realm of arbitration. The legal uncertainty on this cardinal issue has been hanging fire for some time giving rise to divergent views. A suitable amendment will set at rest the conflict of legal opinions on this vital issue.

137. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar

True Copy//

Sub Assistant Registrar

vsi
TO

The Justice R.Banumathi,
Former Supreme Court Judge, Sole Arbitrator,
No.C.20, Defence Colony,
New Delhi - 110 024.

+3ccs to Mr.Srinath Sridevan, Advocate, S.R.No.7153
+2ccs to Mr.D.Raghu, Advocate, S.R.Nos.7123, 7124
+9ccs to Mr.K.Moorthy, Advocate, S.R.Nos.7645 to 7649,
7650 to 7651, 7652
+2ccs to Mr.K.Karthiresan, Advocate, S.R.Nos.7227, 7229

C.M.A.Nos.408, 701, 702, 858,
859, 861, 862, 890 & 892 of 2021

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