



* IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 03.02.2022

% Judgment delivered on: 07.02.2022

+ **FAO(OS) (COMM) 2/2021 and CM APPL. 173/2021 & 2166/2021**

EVEREADY INDUSTRIES INDIA LTD. Appellant

Through Mr. Darius Khambata, Sr. Adv. with
Mr. Padam Khaitan, Mr. Jeevan
Ballav Panda, Ms. Shalini Sati
Prasad, Mr. Satish Padhi, Ms. Meher
Tandon, Mr. Gaurav Sharma and
Mr. Pheroze F. Mehta, Advs.

versus

KKR INDIA FINANCIAL SERVICES LIMITED
& ANR

..... Respondents

Through Mr. Neeraj Kishan Kaul & Mr. Akhil
Sibal, Sr. Advs. with Mr.
Yashvardhan, Mr. Murtaza Somjee,
Ms. Smita Kant, Ms. Kritika Nagpal,
Ms. Bhavya Bhatia, Ms. Anwesha
Dasgupta, Ms. Vatsala Khandelwal,
Mr. Shantanu Parashar, Advs. for
Respondent No. 1 and 2.
Mr. Sanjoy Ghose with Mr. Rhishabh
Jetley, Mr. Sumedh Rishi Advs. for
R-3 to 6 & 9.

+ **FAO(OS) (COMM) 5/2021 and CM APPL. 1055/2021, 5959/2021
& 6031/2021**

MCLEOD RUSSEL PVT. LTD.

..... Appellant

Through Mr. Sandeep Sethi, Sr. Adv. with
Mr. Kumar Shashank, Mr. Padam
Khaitan, Mr. Jeevan Ballav Panda,



Ms. Shalini Sati Prasad, Mr. Satish Padhi, Ms. Meher Tandon, Mr. Gaurav Sharma, Mr. Sidhant Kumar, and Mr. Aviral Kapoor, Advs.

versus

KKR INDIA FINANCIAL SERVICES LIMITED
& ANR.

..... Respondents

Through Mr. Neeraj Kishan Kaul & Mr. Akhil Sibal, Senior Advocates, Mr. Yashvardhan, Mr. Murtaza Somjee, Ms. Smita Kant, Ms. Kritika Nagpal, Ms. Bhavya Bhatia, Ms. Anwesha Dasgupta, Ms. Vatsala Khandelwal, Mr. Shantanu Parashar, Advocates for Respondent No. 1 and 2
Mr. Sanjoy Ghose with Mr. Rhishabh Jetley, Mr. Sumedh Rishi Advs for R-3 to 6 & 9.
Mr. P. Chidambaram, Sr. Adv. with Mr. Anand Shankar Jha & Mr. Arpit Gupta, Advs. for RBL Bank in CM APPL. 5959/2021 & CM APPL. 6031/2021

+ **FAO(OS) (COMM) 6/2021 and CM APPL. 1059/2021**

MCNALLY BHARAT ENGINEERING
COMPANY LIMITED

..... Appellant

Through Mr. Jayant Mehta with Mr. Padam Khaitan, Mr. Jeevan Ballav, Ms. Shalini Sati Prasad, Mr. Satish Padi, Ms. Meher Tandon and Mr. Gaurav Sharma, Advs.

versus

KKR INDIA FINANCIAL SERVICES LIMITED



& ANR.

..... Respondents

Through Mr. Neeraj Kishan Kaul & Mr. Akhil Sibal, Sr. Advs., Mr. Yashvardhan, Mr. Murtaza Somjee, Ms. Smita Kant, Ms. Kritika Nagpal, Ms. Bhavya Bhatia, Ms. Anwesha Dasgupta, Ms. Vatsala Khandelwal, Mr. Shantanu Parashar, Advs. for Respondent No. 1 and 2
Mr. Sanjoy Ghose with Mr. Rhishabh Jetley, Mr. Sumedh Rishi Advs. for R-3 to 6 & 9.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MS. JUSTICE REKHA PALLI

J U D G M E N T

VIPIN SANGHI, J.

1. The Appellants have preferred the present appeals under section 37 Arbitration and Conciliation Act, 1996 to assail the order dated 23.11.2020 passed by the learned single Judge in O.M.P (I) (COMM) 459/2019 under section 9 of the Arbitration and Conciliation Act. The Appellants – who were the Respondent Nos. 5 to 7 in the aforesaid OMP, had preferred applications seeking vacation of *ex-parte ad-interim* order of injunction granted in favor of the Respondents herein – Petitioners in the O.M.P., vide order dated 13.12.2019 passed by the learned Single Judge, which was decided by the common impugned order.

2. We had heard detailed submissions of learned Counsels in all these appeals, and reserved the judgment on 07.04.2021. However, on account of the large volume of the case, and due to heavy rush of work, the preparation



and pronouncement of the judgment got delayed. Though, we took copious notes, and also called for the written submissions by the parties, which had been filed, looking to the passage of time, we considered it appropriate to list the matter to enable the counsels to refresh us with an outline of the submissions advanced by them. Consequently, vide our order dated 31.01.2022, we directed the listing of the appeals on 03.02.2022, with advance notice to them for the purpose of listing the matters, so that they are ready to proceed with the hearing. Learned senior counsels for the parties, accordingly, refreshed us by providing an outline of their submissions advanced, at length, earlier. After hearing the same, we again reserved judgment on 03.02.2022.

3. The brief facts leading up to present appeals are as follows:

- (i) The Appellants in the present appeals are Mc Nally Bharat Engineering Company Limited (MBECL) (Appellant in FAO(OS) (COMM) 6/2021), McLeod Russel India Limited (MRIL) (Appellant in FAO(OS) (COMM) 5/2021), and Eveready Industries India Limited (EIL) (Appellant in FAO(OS) (COMM) 2/2021), who were impleaded as respondent Nos.5 - 7 in the Section 9 petition respectively.
- (ii) The Respondent No.1 is a non-banking financial Company in the business of providing loans and financial advances.
- (iii) Respondent No. 2 is a company registered under the Companies Act, 1956 which is also registered as a debenture trustee with Securities Exchange Board of India, and acts as a security trustee on behalf of the Respondent No. 1.



- (iv) The Respondent No. 1 entered into a Facility Agreement Dated September 27, 2017 ("Facility Agreement" herein referred as FA) with Williamson Magor & Company Limited ("Borrower No. 1"), Williamson Financial Services Limited ("Borrower No. 2"), Mr Aditya Khaitan ("Guarantor") and Mr Amritanshu Khaitan ("Guarantor") and Babcock Borsig Limited ("Obligor").
- (v) Under the said FA, a sum of INR 100,00,00,000.00 (Indian Rupees One Hundred Crore only), each was provided to the Borrowers.
- (vi) As per the FA, the credit facilities were guaranteed by an irrevocable and unconditional personal guarantee by way of a Deed of Personal Guarantee dated September 26, 2017 (**'Deed of Personal Guarantee'** for short), executed by the Guarantors in favour of Respondent No. 2, whereby they had undertaken to pay the outstanding amounts and discharge all liabilities of the borrowers under the FA. In addition, the Guarantors had provided indemnity to the Respondents against all losses and claims etc.
- (vii) On account of failure of the Borrowers, the Guarantors, and the Obligor to discharge their liability to repay the said loans, the Respondent No.1 invoked the jurisdiction of this Court under Section 9 of the Arbitration and Conciliation Act, as there was an arbitration agreement in the FA, to seek a restraint against the Borrowers, Guarantors, Obligor and the Appellants herein, from dealing with their assets, on the premise that, apart from



the Borrowers, Guarantors and Obligor, the Appellants – described in the FA as Reference Entities (RE), were also liable to be enjoined from dealing with their assets, as they are group companies. Respondent No. 1 sought to invoke the Group Companies Doctrine to reach out to the Appellants – REs. By the impugned order, the Ld. Single Judge found merit in this submission of respondent No.1 and, consequently, enjoined the Respondents in the O.M.P, including the three Appellants in these appeals.

- (viii) It was the case of the Respondents in the petition filed under Section 9 of the Arbitration and Conciliation Act, 1996 ('Act', for short) that the credit facility under the FA was advanced to borrowers after due verification of the credit worthiness of the group companies as a whole, including the Appellants (Respondent No. 5-7 in the section 9 Petition)
- (ix) The borrowers were required to create multiple securities according to the timeline stipulated in the agreement, to ensure collateral cover of the loan outstanding, by way of pledge over the equity shares of McLeod Russel India Limited and/or Eveready Industries India Limited and/or create security – by way of mortgage over properties acceptable to the Respondent No.1.
- (x) It was stated by the Respondents that the Guarantors and the Promoter Group were barred from selling, transferring, or disposing off any shares of Appellants herein, without the prior consent of the Respondents.



- (xi) It was also stated that there was serious capital reduction in the aggregate shareholding of the promotor group in the Appellants, breaching multiple clauses related to encumbrance of shares, which were held as security against the loan.
- (xii) It was alleged that the Guarantors had failed to discharge the various liabilities towards the Respondent No. 1. Vide the Order dated 13.12.2019 the Learned Single Judge had restrained, inter alia, the Appellants as under:

(a) restrained from selling, transferring, alienating, disposing, assigning, dealing or encumbering or creating third party rights on their assets, till the next date of hearing.

(b) restrained from carrying out any change in its capital structure, or any Corporate or debt restructuring, till the next date of hearing; and

(c) directed to file an affidavit providing the details of their tangible or intangible assets held by them as on 31.03.2019 as well as on 30.09.2019, before the next date of hearing.

- (xiii) Subsequently, vide the Impugned Order dated 23.11.2020, the Learned Single Judge dismissed the application filed on behalf of the Appellants for vacation of the *interim* injunction.

4. The present appeals are filed, praying for setting aside the order dated 23.11.2020 passed by the Ld. Single Judge, to the extent that the Appellants were restrained from selling, transferring, alienating, disposing, assigning, dealing or encumbering or creating third party rights on its assets, and



restraining the Appellants from carrying out any change in their capital structure, or any corporate or debt restructuring, during pendency of the arbitral proceedings, and for granting of stay on the operation of the order dated 13.12.2019 to that extent.

Submissions on behalf of the Appellants

- (i) Learned Senior Counsels on behalf of the Appellants Mr. D.J Khambata, Mr. Sandeep Sethi and Mr. Jayant Mehta submit that the Appellants in the present appeal do not have any privity of contract with the Respondent – Lenders, and they have no legally binding obligation or liability qua repayment of the facility, as they are not a party to the FA, nor beneficiaries of the amounts borrowed under the FA. They submit that the Court had no jurisdiction, while dealing with the petition under Section 9 of the Arbitration and Conciliation Act, 1996 to pass any injunctive order against them, who are strangers to the FA and, consequently, the Arbitration Agreement. They have placed reliance on the definitions of a **Guarantor [Clause 1.1.1 (mm)], Obligor [Clause 1.1.1(ccc)], Pledgor [Clause 1.1.1 (III`)], Security Provider [Clause 1.1.1(bbbb)] and a Reference Entity [Clause 1.1.1 (sss)]** contained in FA. The Appellants are only described as Reference Entities with no obligations, whatsoever, under the FA.
- (ii) They further submit that the FA does not provide for any enforcement against the Reference Entities, nor the promoter group as a whole. All liabilities for repayment of the loan facility have been only fastened on the Borrowers, Guarantors and Obligers in their personal capacities. They further place reliance on the **Interpretation clause**



1.2 (a)(i), 1.2 (c); Repayment Clause 4.1 – which casts obligation of repayment of the principal amount by the Borrowers; Security Clause 5.1-5.6; Representation & warranties and Enforcement obligations listed in Clause 6.1 and 6.1.3; Various Affirmative, Negative and Information Covenants as per Clause 7.1-7.3, and Clause 9.6.1 which provides complete Indemnity to the Lenders.

- (iii) They further submit that the intention of the parties must be gathered from the express words used in the FA. The FA should be interpreted giving the actual meaning to the words contained in the contract. Reliance is placed on *Central Bank of India Ltd. v. Hartford Fire Insurance Co. Ltd*, AIR 1965 SC 1288 and *Rajasthan State Industrial Development & Investment Corporation v. Diamond & Gem Development Corporation Ltd. (2013) 5 SCC 470*
- (iv) Ld. Senior Counsels further submit that the injunction granted by the Ld. Single Judge is beyond the scope of the section 9 petition, and the injunction could have been granted, only in respect of the ‘encumbered assets’ as defined under **Clause 1.1.1 (x)** of the FA, and not qua the assets of the Appellants. The invocation of the Group Company Doctrine is vehemently contested by them. The assets of the Appellants do not form the subject matter of the FA, and could have only been reached, if the corporate veil was pierced, which was not even attempted by the Ld. Single Judge.
- (v) Ld. Counsels submit that the Ld. Single Judge has erred in invoking of the Group Company Doctrine. In support of this submission, it is argued that:



(a) Firstly, the grounds cited in the impugned order are not sufficient for the invocation of the Group Companies Doctrine:-

- i. As the Appellant is not a party to the FA, rather it is a stranger to the agreement;
- ii. The Appellant was not involved in the negotiations of the FA. The discussions cited in the impugned order were with respect to another distinct loan facility sought to be granted to the Appellant, which never fructified;
- iii. There is no existence of a tight group structure, or an indication that the Appellants and the borrowers function as a single economic entity

(b) Secondly, the Appellants have been wrongly held as controlled entities of the Borrowers, Guarantors, Obligors, Promoter group as, neither the Borrowers, nor Guarantors, nor the Obligors, nor the Promoter group held more than 50% of the equity shares of the Appellants on the date of execution of the FA, nor on the date of the impugned order. The Appellants also do not fall under the definition of “Controlled Entity” as per clause 1.1.1 (q) of the FA, as:-

- (i) The Borrowers, Guarantors, Obligors or Promoter group do not have the power to appoint more than half the members of the Board of Directors;
- (ii) Any member of the Appellant’s Promoter Group or its Managing Director cannot necessarily be held to have control over the company. The individual Directors/ Managing Directors, as per the Articles of Association of



the Appellants, are subjected to the control of the Board of Directors, and do not have the power to enter into agreements, or undertake liabilities on behalf of the Appellants. Rather, the guarantees extended by Mr. Aditya Khaitan and Mr. Amritanshu Khaitan were completely personal in nature.

- (iii) The Emails relied upon by the Ld. Single Judge do not show any role or involvement of the Appellants, nor depict any liabilities under-taken by the Appellants qua the facilities. All information that was provided to the Guarantors upon their requests, was already existing in the public domain and the use of the common domain email was merely a prevalent industry practice.
- (iv) The actions of the Directors/ Managing Director, detrimental to the interest of the shareholders of the Company, are not valid in law, as they breach the fiduciary duties of the Directors. Therefore, they do not bind the appellant companies:
- (v) The Appellant companies being public companies, with large number of shareholders, have their own personality, which cannot be held as the alter ego of the individual persons involved.
- (vi) The Appellants have further stated that the company EIL was undergoing restructuring, and a consortium was considering different restructuring plans when the injunctions came on. This has caused grave difficulties



for the Appellant EIIL, who is a stranger to the FA. They are not able to raise any fund/ working capital for meeting their day-to-day requirement, despite options being available to them, as EIIL is unable to create/ modify any security. They have relied on *State Bank Of India Vs Ericsson India Pvt. Ltd*, (2018) 16 SCC 617.

- (c) Thirdly, the test propounded in *Chloro Controls India v Sereven Trent Water Purification*, (2013) 1 SCC 641 had been wrongly applied in the facts of the present case. They place reliance on *Gatx India Pvt. Ltd v Arshiya Rail Infrastructure Limited*, 2014 SCC Online Del 4181.

Submissions on behalf of the Respondents

5. On the other hand, Ld. Senior Counsels Mr. N.K Kaul and Mr. Akhil Sibal appearing on behalf of the Respondents sought to defend the impugned order, contending that Learned Single Judge has rightly dismissed the applications of the Appellants seeking vacation of the Order dated 13.12.2019. They submitted that:

- (i) The Appellants are intricately and intrinsically connected to the FA by which the respondent No. 1 and 2 extended the loan facility. The loans under the FA were extended to the borrowers after due verification of the credit worthiness of the group companies, as a whole, which included the three Appellant companies. The borrowers are shareholding companies in the Williamson Magor group, possessing no assets of their own, and they existed merely for the purposes of raising funds for their group companies. The Facility was granted to them only because the Williamson Magor Group – as a



whole, came forward through its pivotal individuals viz. Mr. Aditya Khaitan and Mr. Amritanshu Khaitan – the Guarantors, who are in effective control of the management of the group companies – including the Appellants.

- (ii) The primary purpose of availing the loan was to finance the debt of one of the Appellants MRIL. This has been explicitly mentioned in the FA in **End Use clause 2.3 (a)(i)** and the Chartered Accountant's Certificate.
- (iii) The Ld. Single Judge has rightly found the Appellants to be security providers defined as (i) Pledger; (ii) Any other person 'creating security' under the security documents, as they were to create security on various assets and properties as per Clauses dealing with security, namely, **Clauses 5.1 (e), 5.8, 5.9, 5.10, 5.11 and 5.12 of the FA.** Additionally, one of the Appellants, MBECL executed the pledge agreement which was a security document under the FA as per **clause 1.1.1(xxx)**, which also included all documents executed pursuant to clause 5.
- (iv) The Appellants were rightly held as Obligors as per clause **1.1.1(ccc)**, which define 'Obligors' as Borrowers, Security Provider and Guarantors
- (v) The FA includes specific clauses relating to the Appellants, and imposes considerable duties and liabilities on them, which were essential for performance of the agreement either as a promoter group company, Reference Entity, Security Provider, or Obligors. All critical clauses, such as Event of Default, Requirement to maintain a



certain EBITDA ratio, End Use etc. are related specifically to the Appellants, as it was on their strength that the Facility was extended.

- (vi) Reliance is placed on a tabulation. The description of the parties in this tabulation is as per the memo of parties of the O.M.P. It has submitted, that the tabulation clearly brings out how – under the Clauses of the FA, the Appellants – who were described as Reference Entities in the FA, qualify as “Promoter Group Companies”, and “Obligors” – as defined in the FA. The tabulation also, by reference to the clauses of the FA, shows that obligation was cast on the Appellants to create security, in order to secure the Facility. The various Representations and Warranties offered under the FA qua the Appellants have also been highlighted. Other covenants relating to the Reference Entities have also been highlighted, to claim that the Facility/ Loan was advanced to the borrowers – part of the Promoter Group Companies, with obligation which, *inter alia*, related to and bound the Appellants – Reference Entities. The tabulation is reproduced herein:

S.N o.	Clause No.	Reference	Implication
I. FACILITY WAS FOR BENEFIT OF RESPONDENT NO. 6			
1.	2.3 read with C.A. Certificate @ Pg. No. 269	2.3 END USE (a) The Borrowers shall apply the amounts borrowed by it under the Facility in accordance with Applicable Law for the purpose of meeting the following costs:	One of the uses of the facility was repayment of existing loans / advances extended by R-6 to R-1 and R-2 and infusion



		(i) Repayment of the existing loans/ advances extended by <u>MRIL</u> to the Borrowers or infusion of proceeds into <u>MRIL</u> solely for the purpose of reduction of debt	of funds into R-6 thus, making it a beneficiary of loan.
2.	2.1	<u>FACILITY</u> Subject to the terms of this Agreement, the Lenders make available to Borrower 1 an INR term loan facility in an aggregate being Rs. 100,00,00,000 (Rupees One Hundred Crores only) and Borrower 2 an INR term loan facility in an aggregate being Rs. 100,00,00,000 (Rupees One Hundred Crores only) (collectively referred to as “ <u>Facility</u> ”) for the Tenor. The Facility may be drawn down by the Borrowers within the relevant Availability Period in accordance with the terms and conditions of this Agreement in one or more tranches.	
3.	7.1.11	<u>End-Use</u> The proceeds of the Facility shall at all times be utilised for the purposes as mentioned in clause 2.3 of this Agreement.	
II. RESPONDENTS NO. 5-7 ARE PROMOTER GROUP			



COMPANIES			
4.	1.1.1.(p)	“Control” (including, with correlative meaning, the terms “controlled by” and “under common control with”) of a Person means (a) ownership of more than 50% (Fifty per cent) of the equity shares, voting rights or other ownership interests of such Person; or (b) the power to appoint more than half of the members of the board of directors; or (c) <u>the power to direct the management or policies of a Person, whether through the ownership of voting rights, power to appoint directors or similar governing body of such Person, or through contractual or other arrangements.</u>	• A combined reading of these clauses makes it clear that Respondent No. 5-7 are part of Promoter Group as these are entities controlled by the Guarantors. • Respondent No. 3 and 4 are Managing Director of and Director of R-6 respectively and vice-versa in case of Respondent No.7 and therefore, have power to direct management or policies of these companies through the ownership of voting rights, power to appoint



		directors or similar governing body or through contractual or other arrangements. • Further R-1 to R-4 are promoter group of Respondent No. 5-7 and therefore, in a position to exercise control over the policies of management. • Shareholding pattern of the Respondent No. 5 [@117-121, Vol. 1 of P's Docs.] shows that Respondents No. 4, 1, 2, 6 & 8 are part of "Promoter Group" • Shareholding pattern of the Respondent
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			No. 7 [@ 122-127, Vol. 1 of P's Docs.] shows that Respondents No. 3, 4, 1, 2, 6 & 8 are part of "Promoter Group" • Shareholding pattern of the Respondent No. 2 [@ 128-131, Vol-1 of P's Docs.] shows that Respondents No. 4, 6, & 1 are part of "Promoter Group" • Shareholding pattern of the Respondent No. 6 [@ 136-139, Vol-1 of P's Docs.] shows that Respondents No. 3, 4, 1, 2, 8, & 7 are part of "Promoter Group"
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5.	1.1.1(q)	“ Controlled Entity ” in relation to any Person(s), is any other Person on whom such first Person exercises Control.	●
6.	1.1.1.(oo o)	“Promoter Group” shall mean: Each of the Guarantors (i) Kilburn Engineering Limited; (ii) Babcock Borsig Limited; (iii) Bishnauth Investments Limited; (iv) Woodside Park Limited; (v) Ichamati Investments Limited; (vi) United Machine Co. Limited; (vii) Zen Industrial Services Limited; (viii) Nitya Holdings & Properties Limited; (ix) Dufflaghur Investments Limited; and (x) <u>Any other Controlled Entity of the Guarantor(s)</u>	●
III. RESPONDENTS NO. 5 TO 7 ARE “REFERENCE ENTITIES”			
7.	1.1.1.(ss s)	“Reference Entity” shall mean (i) <u>McNally Bharat Engineering Company Limited</u>, a public listed company incorporated in India and validly existing as a	Respondents No. 5 to 7 are Reference Entities, which also form part of Promoter Group and have



		company for the purposes of Companies Act 2013 with its registered office at Four Mangoe Lane, Surendra Mohan Ghosh Sarani, Kolkata- 700001 and corporate identification number L45202WB1961PLC025181 (“MBECL”); (ii) <u>McLeod Russel India Limited</u>, a company incorporated in India and validly existing as a company for the purposes of Companies Act 2013 with its registered office at Four Mangoe Lane, Surendra Mohan Ghosh Sarani, Kolkata-700001 and corporate identification number L51109WB1998PLC087076 (“MRIL”); and (iii) <u>Eveready Industries India Limited</u>, a company incorporated in India and validly existing as a company for the purposes of Companies Act 2013 with its registered office at 1, Middleton Street, Kolkata-700071 and corporate identification number L31402WB1934PLC007993 (“EIIL”).	undertaken various obligations under the Facility Agreement
8.	1.1.1(rrr)	“Reference Controlled Entities” shall mean the Controlled Entities of the Reference Entity, the Borrowers,	



		the Guarantors and/or the Obligors.	
IV. RESPONDENTS NO. 5 TO 7 ARE “OBLIGORS”			
9.	1.1.1(cc c)	“ Obligors ” shall mean the Borrowers, the <u>Security Providers</u> and the Guarantors	A combined reading of these clauses establishes that the Respondents 5 to 7 are Obligors as they are Security Providers, who had to create Security on the various assets and properties as noted in Clause 5 of the Facility Agreement.
10.	1.1.1(bb bb)	“ Security Provider ” shall mean (i) the Pledgors; and (ii) any other person creating Security under the Security Documents	
11.	1.1.1(aa aa)	“ Security ” shall mean the security interests created on the various assets and properties as noted in <u>clause 5 hereof</u> .	
12.	1.1.1(xx x)	“ Security Documents ” shall mean each of the agreement or deed or document (each as amended from time to time) executed by any of the Borrowers, the Guarantors and the Obligors for the benefit of	



	the Lenders and/or the Identified Lenders or any of them for creation and perfection of Security or guarantee as required in terms of clause 5 hereof, including but not limited to the following: (i) this Agreement; (ii) Security Trustee Agreement dated September 27, 2017 between Williamson Magor & Co. Limited as Borrower 1, Williamson Financial Services Limited, as Borrower 2 and Lenders. (iii) Hypothecation Deed to be executed between the Parties; (iv) Pledge Agreement dated September 27, 2017 between Williamson Magor & Co. Limited, Williamson Financial Services Limited, Babcock Borsig Limited and KKR India Financial Services Private Limited; (v) Personal Guarantees dated September 26, 2017.issued by Mr. Aditya Khaitan and Mr. Amritanshu Khaitan in	
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		favour of; (vi) Demand Promissory Note dated September 27, 2017 issued by Borrower 1 and Borrower 2 in favour of the Security Trustee; (vii) Letter of Continuity of Demand Promissory Note dated September 24th, 2017 issued by Borrower 1 and Borrower 2 in favour of the Security Trustee; and (viii) <u>Security document to be executed pursuant to the provisions of Clause 5 of this Agreement.</u> (ix) any declarations, certificates, powers of attorney and/or other document designated as such by the Security Trustee or the Lenders in terms of Financing Documents or executed by the Borrowers, the Guarantors and/or the Obligors with the Lenders and/or the Security Trustee;	
13.	1.1.1(ee)	“Financing Documents” means this Agreement, any inter creditor agreement, each of the Security Documents, the	



		Security Trustee Agreement, and any other agreement or deed or document executed by any of the <u>Borrowers, the Guarantors and the Obligors for the benefit of the Identified Lenders or any of them.</u>	
V. GUARANTORS			
14.	1.1.1(m m) read with Schedule 1	Guarantor	Respondent no. 3 and 4 are guarantors and therefore, Respondent No. 5-7 are part of promoter group for them being controlled by the Respondent No.3 and 4 in terms of Cl. 1.1.1(ooo)(x)
VI. SECURITY TO BE CREATED BY RESPONDENT NO. 5 TO 7			
15.	5.1 (e)	The Loans and all Loan Outstanding Amounts, including all Cash Interest, Default Interest, Redemption Interest all and any other costs, charges, expenses, fees or amounts payable to any of the Lenders and/or the Security Trustee under the Financing Documents and all other obligations and undertakings of the Borrowers,	A Letter of comfort was to be issued by R-6 as part of Security.



		the Guarantors and the Obligors under the Financing Documents shall be secured by: (a) to (d) XXXX (e) <u>A letter of comfort to be issued by MRIL in a form acceptable to the Lenders.</u>	
16.	5.8	The Borrower shall ensure that within a period of 18 months from the first Disbursement Date, Security is created by way of pledge over equity shares of MRIL and/or EIL and/or mortgage by way of a mortgage over properties acceptable by Lenders (“New Security”). The New Security shall be created to ensure that the Collateral Cover for the Loan Outstanding Amounts shall be at least 1.5x	Security was to be created by R-6 & R-7 in terms of these clauses in order to keep the Petitioners secured. Therefore, it was on their strength that the loan was extended by Petitioners to R-1 & R-2. <u>Notes:</u> 1. As on 31.03.2019, the Respondents failed to create the “New Security” and failed to ensure that the collateral cover over the new security is at least 1.5 times of the



			loan outstanding amount as stipulated in Clause 5.8. 2. As on 30.09.2019, the Respondents failed to ensure that the collateral cover over the new security is increased to 2.0 times of the loan outstanding amount as stipulated in Clause 5.9.
17.	5.9	On or before expiry of 24 months from the first Disbursement Date, the Borrower shall ensure that Collateral Cover over the New Security is increased to 2.0X of the Loan Outstanding Amount	
18.	5.10	Upon the breach of Collateral Cover as provided in Clause 5.8 or 5.9 above, the Borrower and/or Promoter Group shall provide incremental shares as pledge (“Top-up Shares”), within 5 Business Days, so that the Collateral Cover is maintained as per Clause 5.8 or	



		5.9 above.	
19.	5.11	Borrower and/or Promoter Group shall have the option of providing cash collateral in lieu of Top-up Shares, in which case, the cash collateral provided shall be adjusted against the Loan Outstanding Amount	
20.	5.12	Collateral Cover to be in the form of mortgage over real estate properties acceptable to the Lender and/or equity shares of MRIL / EIL	
21.	1.1.1(ee)	“ Overall Rate ” shall mean an IRR of 16 % per annum. At the time the minimum Collateral Cover of the Security Interest created by the Promoter Group and Reference Entity/ Borrowers reaches 1.5x, an IRR of 14.5%per annum; or if the minimum Collateral Cover of the Security Interest created by the Promoter Group and Reference Entity/ Borrowers reaches 2.0x, an IRR of 12.5% per annum	
VII. REPRESENTATIONS & WARRANTIES MADE QUA CORPORATE STRUCTURE OF RESPONDENTS 5 TO 7 AS REFERENCE ENTITIES			
22.	6.1.2 (d) and (e)	6.1.2 Corporate (a) XXX (b) XXX	Since the facility availed by R-1 & R-2 was granted



		(c) XXX (d) As on the date of execution of this Agreement and the first Disbursement Date, the shareholding of the <u>Reference Entity</u>, Borrowers and the Obligors is as provided in <u>Schedule 6.1.2(d) (Shareholding Pattern)</u> hereof. (e) The <u>Reference Entity</u>, Promoter Group, Borrowers and/or the Obligors or any of their directors do not appear on the RBI's list of defaulters and ECGC's caution list.	on the strength of R-5 to 7, it was imperative that certain corporate structure is maintained by R-5 to R-7. Hence, these representations and warranties qua the corporate structure of R-5 to R-7 were provided by the Respondents.
VIII. REPRESENTATIONS & WARRANTIES MADE QUA ENFORCEABLE OBLIGATIONS OF RESPONDENTS 5 TO 7 AS REFERENCE ENTITIES			
23.	6.1.3	6.1.3 Enforceable Obligations (a) XXX (b) XXX. (c) XXX (d) No event or occurrence which could be said to have a Material Adverse Effect on the <u>Reference Entity</u>, the Borrowers, the Guarantors or the Obligors or on their	Since the facility availed by R-1 & R-2 was granted on the strength of R-5 to 7, it was imperative that these representations and warranties qua enforceable obligations qua R-



		respective businesses or assets exists or is reasonably likely to exist. (e) to (f) XXX (g) The operations of the <u>Reference Entity</u>, Borrowers, the Guarantors and the Obligors are conducted in compliance with all Applicable Laws and the Borrowers, the Guarantors and/or the Obligors have not received any notice or other communication from any court, tribunal, arbitrator, governmental agency or regulatory body with respect to an alleged, actual or potential violation and/or failure to comply with any Applicable Laws.	5 to R-7 were provided by the Respondents.
IX. REPRESENTATIONS & WARRANTIES MADE QUAEGL PROCEEDINGS AGAINST OBLIGATIONS OF RESPONDENTS 5 TO 7 AS REFERENCE ENTITIES			
24.	6.1.4	<u>6.1.4 Legal Proceedings</u> There are no Legal Proceedings pending or threatened, or any written notices received by the <u>Reference Entity</u>, the Borrowers, the Guarantors and/or the Obligors which would result into any Legal Proceedings, in India or any other jurisdiction (a) against the	Since the facility availed by R-1 & R-2 was granted on the strength of R-5 to 7, it was imperative that the R-5 to R-7 were not faced with legal proceedings either pending or



		Reference Entity, the Borrowers, the Guarantors and/or the Obligors, (b) any properties or rights of the Borrowers, the Guarantors and/or the Obligors, (c) relating to businesses or operations of the Borrowers, the Guarantors and/or the Obligors, or (d) regarding the legality or enforceability or effectiveness or validity or performance of any of the Financing Documents and/or any of the Clearances that have been obtained, and (e) that would prevent the exercise and the enforcement by each of the Lenders and the Security Trustee of their respective rights under the Financing Documents to which they are a party or the remedies in respect of thereof.	threatened. Any such pendency of legal proceedings would have material impact on loan provided by the Petitioners. Hence, the Respondents provided the representations & warranties in these terms.
X. REPRESENTATIONS & WARRANTIES MADE QUA ACCOUNTS OF RESPONDENTS 5 TO 7 AS REFERENCE ENTITIES			
25.	6.1.5	<u>6.1.5 Accounts</u> (a) The books of accounts of the <u>Reference Entity</u> , Borrowers and Obligors have been properly maintained in accordance with Applicable Law. (b) The accounts of the <u>Reference Entity</u> ,	Since the facility availed by R-1 & R-2 was granted on the strength of R-5 to 7, it was imperative that the R-5 to R-7 maintained their Accounts in the



		Borrowers and Obligors have been prepared using GAAP, applied on a consistent basis; and are true and fair and disclose all liabilities (whether actual or contingent). (c) There are no known unaccounted liabilities of the <u>Reference Entity</u>, Borrowers and the Obligors except to the extent disclosed in the latest financial statements of the Reference Entity, Borrowers and the Obligors. The Reference Entity, Borrowers and/or the Obligors do not have any (i) material claims against them, (ii) material liabilities or (iii) Indebtedness, whether direct, indirect, contingent, absolute, accrued or otherwise, nor is there any condition, fact or circumstance that will create such claim, obligation, liability or Indebtedness, except as required to reflect the transactions contemplated	manner provided herein. Hence, the Respondents provided the representations & warranties in these terms.
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		by this Agreement. (d) There have been no change in the financial or operational position of the <u>Reference Entity</u>, Borrowers and/or the Obligors which has caused or could reasonably be expected to cause any Material Adverse Effect. (e) The <u>Reference Entity</u>, Borrowers and the Obligors which are companies maintain systems of internal accounting controls sufficient to provide reasonable assurance that (i) transactions are executed in accordance with management's general or specific authorisations, (ii) transactions are recorded as necessary to permit preparation of financial statements in conformity with GAAP, (iii) access to assets is permitted only in accordance with management's general or specific Clearance, and	
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		(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences. (f) The <u>Reference Entity</u>, Borrowers and the Obligors have made and kept books, records and accounts which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of assets of such entity and provide a sufficient basis for the preparation of its respective financial statements in accordance with applicable GAAP.	
XI. REPRESENTATIONS & WARRANTIES MADE QUA INSOLVENCY OF RESPONDENTS 5 TO 7 AS REFERENCE ENTITIES			
26.	6.1.8	<u>6.1.8 Insolvency</u> (a) The <u>Reference Entity</u>, Borrowers, the Guarantors and/or the Obligors are not insolvent or unable to pay their debts, and none of their creditors has	Since the facility availed by R-1 & R-2 was granted on the strength of R-5 to 7, it was imperative that the R-5 to R-7 were



		presented any petition, application or other proceedings for any administration order, creditors' voluntary arrangement or similar relief by which their affairs, business or business assets are managed by a Person appointed for the purpose by a court, governmental agency or similar body, or by any creditor or by the entity itself nor has any such order or relief been granted or appointment made. (b) No order has been made, no petition or application presented, no resolution passed and no meeting convened for the purpose of winding-up/insolvency of the Reference Entity, Borrowers, the Guarantors and/or the Obligors or whereby their assets are to be distributed to creditors or shareholders or other contributories nor have they received written notice of any receiver	not faced with any event of insolvency. Any such event of insolvency would have material impact on loan provided by the Petitioners. Hence, the Respondents provided the representations & warranties in these terms.
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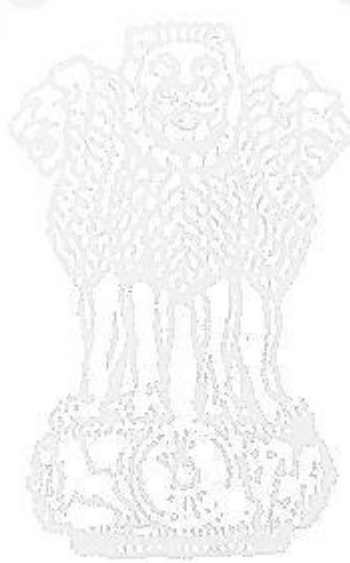


		(including an administrative receiver), liquidator, trustee, administrator, supervisor, nominee, custodian or similar official having been appointed in respect of the whole or any part of their businesses or assets.	
XII. REPRESENTATIONS & WARRANTIES MADE QUA INSURANCE POLICIES TO BE MAINTAINED BY RESPONDENTS 5 TO 7 AS REFERENCE ENTITIES			
27.	6.1.10	<u>6.1.10 Insurance</u> All insurance contracts/policies required or advisable in relation to the businesses and operations of the <u>Reference Entity</u> , Borrowers, the Guarantors and the Obligors and/or in terms of the Financing Documents have been put in place at the times and in the manner required herein and are, as contemplated herein, in full force and effect, and the Borrowers, the Guarantors and the Obligors have complied with all their obligations under the insurance contracts/policies and no event or circumstances has occurred nor has there been any omission to disclose a fact which in any	Since the facility availed by R-1 & R-2 was granted on the strength of R-5 to 7, it was imperative that the R-5 to R-7 maintained the insurance policies in the manner provided herein. Hence, the Respondents provided the representations & warranties in these terms.



		such case would entitle any insurer to avoid or otherwise reduce its liability thereunder to less than the amount provided in the relevant policy and insurance coverage provided by such insurance. The Borrowers, the Guarantors and the Obligors have not defaulted in payment of any premium in relation to any insurance contract/policy procured by them. The Borrowers, the Guarantors and the Obligors shall provide the Security Trustee copies of cover notes of the insurance contracts procured by them.	
XIII. OTHER REPRESENTATIONS & WARRANTIES MADE QUA RESPONDENTS 5 TO 7 AS REFERENCE ENTITIES			
28.	6.1.12	6.1.12 Others (a) No event has occurred that has caused or is capable of causing, a Material Adverse Effect. (b) None of, the directors and/or the promoters of, the <u>Reference Entity</u>, Borrowers, the Guarantors and/or Obligors, have been barred from accessing the capital markets by the Securities and Exchange Board of	Since the facility availed by R-1 & R-2 was granted on the strength of R-5 to 7, it was imperative that the R-5 to R-7 did not cause any Material Adverse Effect in the manner provided herein. Hence, the Respondents provided the



		India nor are the shares of any of the Reference Entity, Borrowers, the Guarantors and / or Obligors (if they are listed) been suspended from trading. HIGH COURT OF  न्यायमेव जयते	representations & warranties in these terms. A bare perusal of terms in Clause 6 such as: ➤ non-inclusion in the RBI's defaulter's list; ➤ no events constituting Material Adverse Effect on R-5 to R-7; ➤ no pendency of legal proceedings against R-5 to R-7; ➤ maintenance of books of accounts of R-5 to R-7 in a particular manner; ➤ no insolvency proceedings against R-5 to R-7 shows that R-5 to R-7 were part of this transaction
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		and are duly bound by these clauses. The fact that R-3 and R-4 had the power and authority to control the shareholding of R-5 to R-7 shows that these companies are controlled by R-3 and R-4. Lastly, a combined reading of all these clauses clearly indicate that R-5 to R-7 have important and crucial role in this loan transaction. All critical clauses relate to them. The purpose of these clauses is to secure the Petitioners. Therefore, if the
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			order dated 13.12.2019 is vacated then the Petitioners will be left empty handed despite admitted dues of Rs. 293 Crores (Approx.) as R-1 to R-4 have no assets of its own to secure the Petitioners.
29.	1.1.1 (bbb)	“Material Adverse Effect” shall mean the effect or consequence of an event, circumstance, occurrence or condition which, in the sole opinion of the Lenders, has caused, as of any date of determination, or could be expected to cause, a material and adverse effect on: (i) the financial condition, carrying of business, operations, assets or prospects of any of the Borrowers, the Guarantors and/or the Obligors and/or the Reference Entity; (ii) the ability of the Borrowers, the Guarantors or any Obligor to perform or comply with its obligations	



		under any of the Financing Documents or in relation to the Identified Debt; (iii) the legality, validity, binding nature or enforceability of any of the Financing Documents (including the ability of any Finance Parties to enforce any of its remedies under the Financing Documents); or (iv) the validity, legality or enforceability of any Security expressed to be created pursuant to any Financing Documents or on the priority and ranking of any of that Security.	
XIV. AFFIRMATIVE COVENANTS OF RESPONDENTS NO. 5 TO 7 AS REFERENCE ENTITIES			
30.	7.1	<u>7.1.1 Inspection and Compliance</u> (a) xxx (b) The Borrowers and Guarantors shall ensure that the <u>Reference Entity</u> does not at any time become a private limited company, except with the consent of the Majority Lenders and subject to any changes to the	Since the facility availed by R-1 & R-2 was granted on the strength of R-5 to 7, it was imperative that the R-5 to R-7 do not change their corporate structure by becoming a private limited company. Further,



		Security Documents required by the Lenders and/or the Security Trustee having been made to their satisfaction. <u>7.1.2 Books of accounts</u> The Borrowers and the Guarantors undertake in respect of the <u>Reference Entity</u>, the Borrowers, the Guarantors and the Obligor: (a) to keep such adequate accounting and control systems, management information systems, books of account, and other records as are required to be maintained under Applicable Law and such accounts as are adequate to reflect truly and fairly the financial condition and results of operations in conformity with GAAP consistently applied and all requirements of Applicable Law. (b) to ensure that its financial statements for each financial year give a true and fair view of the state of affairs of the Person in	R-5 to R-7 were required to present the true state of affairs by maintaining their and filing etc. of their books of accounts in the manner provided herein.
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		respect of whom such statement has been prepared in each case in accordance with GAAP consistently applied. (c) to ensure its audited financial statements for each financial year are prepared promptly and in any case within 45 (forty five) days of the end of each such financial year and in preparation of such financial statements apply all accounting policies in a consistent manner in accordance with GAAP. (d) to file all relevant tax returns within the time permitted by the authorities.	
XV. NEGATIVE COVENANTS OF RESPONDENTS			
31.	7.2	7.2.3 The Borrowers, the Guarantors and the Promoter Group shall not: (a) issue any fresh equity or preference shares or any other instruments convertible into equity or preference shares by the Reference Entity; (b) sell, transfer or dispose off or allow any of the	At the time of filing of this petition, the aggregate shareholding of the Promoter Group (i) in Respondent No. 6 has reduced from 49% to 27% (of the entire share



		entities listed in <u>Schedule 6.1.2(d) (Shareholding Pattern)</u> hereof to sell, transfer or dispose off the shareholding in Borrowers which are companies, save and except as maybe permitted under this Agreement.; (c) sell, transfer or dispose off shares any of the Reference Entities held by the Promoter Group without prior consent of the Lenders.	capital) and (ii) in Respondent No. 7 has reduced from 44% to 31.1% (of the entire share capital).
32.	7.2.4	The Guarantors and the Promoter Group shall at all times hold shares aggregating to a value of INR 750,00,00,000 of Eveready & McLeod Russell free and clear from Encumbrance.	As of 30.09.2019, the aggregate value of unencumbered shares of Respondent No. 6 & 7 is INR 16 crores as opposed to INR 750 crores. This is primarily because of the fact that the aggregate number of shares unencumbered since the entry into the Facility Agreement has



			drastically reduced (i) in respect of R-6 from 3.9 crores unencumbered shares to mere 10 lakh unencumbered shares; (ii) in respect of R-7 from 2.02 crores unencumbered shares to mere 35 lakh unencumbered shares. This has further been affected by a sharp drop in the share prices
33.	7.2.6	7.2.6 The Guarantors and the Promoter Group shall not Encumber any shares held by the Guarantors and the Promoter Group in the Reference Entities save and except as disclosed by the Promoter Group as on the date of this Agreement or as provided under this Agreement or as required to be Encumbered as “top-up” shares in accordance with the provisions of existing security creation arrangements.	The aggregate number of shares encumbered since the entry into the Facility Agreement significantly increased from (i) in respect of R-6, 14.3% to 26.5%; and (ii) in respect of R-7, 16.3% to 26.3% (in each case of the entire



			share capital). Therefore, the entire shareholding of the Promoter Group is now pledged (almost 98% in Respondent No. 6 and 85% in respondent No. 7, as percentage of the shareholding held by them).
XVI. INFORMATION COVENANTS OF RESPONDENTS			
34.	7.3.3	The Borrowers shall provide 'MIS reports' in respect of the Reference Entity, Borrowers, the Guarantors and the Obligors containing details and in a form as required by the Lenders, to the Lenders within 15 (fifteen) calendar days of the end of every Fiscal Quarter.	Obligation to provide MIS reports, unaudited and audited financial statements at the end of every quarter and compliance certificate showing compliances by R-5 to R-7 was only due to the fact that the Facility Agreement was extended basis their financial



			strength. Further, the Petitioners have produced emails showing compliance of these terms by R-6 & R-7, thus establishing that these respondents fulfilled their obligations under the Facility Agreement by undertaking to be bound by the terms of the Facility Agreement.
35.	7.3.4	The Borrowers shall deliver unaudited financial statements (standalone and consolidated) in respect of the Reference Entity, Borrowers, the Guarantors and the Obligors for each financial quarter to the Lenders within 15 (fifteen) calendar days of the end of each financial quarter and the audited financial statements (standalone and consolidated) and signed annual reports in respect of the Reference Entity,	



		Borrowers, the Guarantors and the Obligors to the Lenders within 45 (forty five) calendar days of the end of each financial year.					
36.	7.3.5 read with Schedule 1.1.1 (n) [Point 4]	The Borrowers shall provide Compliance Certificate (based such to be provided by an Authorized Officer who is a Director in respect of the Reference Entity, Borrowers, the Guarantors and the Obligors within: (a) 15 (fifteen) calendar days of the end of every Fiscal Quarter based on the unaudited financial statements, and (b) 45 (forty five) calendar days of the end of each financial year.					
XVII. FINANCIAL COVENANTS OF RESPONDENTS							
37.	7.4	7.4.1 Each of the Borrower shall at all times comply with the following on a consolidated basis: (a) Gross Primary Debt to LTM EBITDA Ratio: In respect of MRIL, Gross Primary Debt to LTM EBITDA Ratio shall be less than or equal to the ratio set out in respect of the periods below <table border="1"> <tr> <td>Covenant</td><td>From</td><td>From</td><td>From</td></tr> </table>	Covenant	From	From	From	Obligation to maintain a certain percentage of EBITDA ratio of R-6 and R-7 shows that their financial strength was crucial for securing the dues of the Petitioners. Further, the Petitioners have produced emails
Covenant	From	From	From				

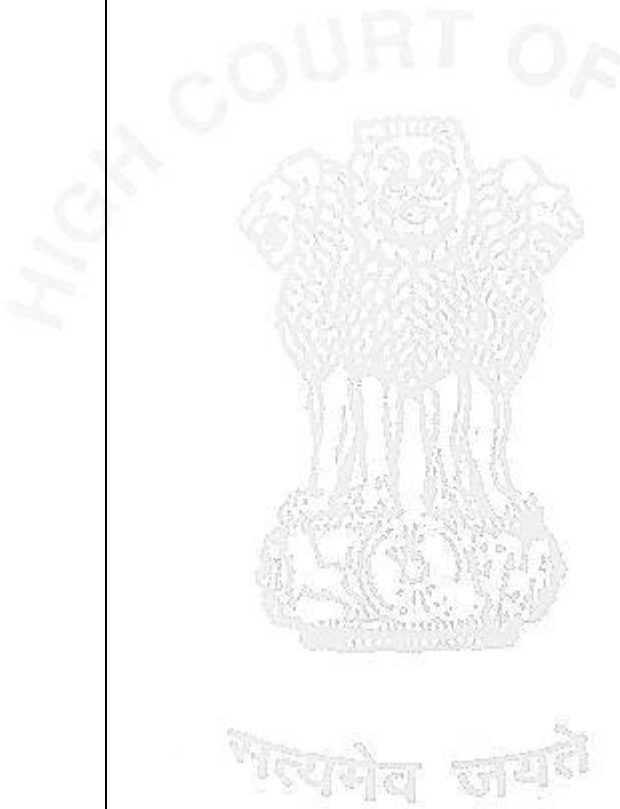


				Sep tem ber 30, 201 7 till Dec em ber 31, 201 7	Jan uary 1, 2018 till Mar ch 31, 2018	Apr il 1, 201 9 till repa yme nt	showing compliance of these terms by R-6 & R-7, thus establishing that these respondents fulfilled their obligations under the Facility Agreement by undertaking to be bound by the terms of the Facility Agreement.
			Gross Primary Debt to LTM EBITDA Ratio for precedin g 12 months(1)	8.7 5	3.5	3.0	
			(b)Gross Primary Debt to LTM EBITDA Ratio: In respect of EIL, Gross Primary Debt to LTM EBITDA Ratio shall be shall be less than or equal to the ratio set out in respect of the periods below				



		<table><tr><td>Covenant</td><td>From September 30, 2017 till repayment</td></tr><tr><td>Gross Primary Debt to LTM EBITDA Ratio for preceding 12 months(1)</td><td>2.25</td></tr></table> (1) Note: LTM EBITDA for preceding 12 months shall be based on (i) the audited financial statements of the Issuer, in case of the evaluation being for the end of the Financial Year, and (ii) the limited reviewed financial statements, in any other case. Such Gross Primary Debt to LTM EBITDA Ratio to be tested at the end of every Fiscal Quarter	Covenant	From September 30, 2017 till repayment	Gross Primary Debt to LTM EBITDA Ratio for preceding 12 months(1)	2.25	
Covenant	From September 30, 2017 till repayment						
Gross Primary Debt to LTM EBITDA Ratio for preceding 12 months(1)	2.25						
XVIII. EVENTS OF DEFAULT							
38.	8 read with Schedule	Events of Default and Consequences 8.1 Each of the events or circumstances set out in	Clause 3 of Schedule 1.1.1(z) provides various situations qua R-5				



	1.1.1(z)	<u>Schedule 1.1.1(z) (Events of Default)</u> is an event of default (“Event of Default”). 	to R-7, which would amount to events of default. Further, certain actions of R-5 to R-7 can also trigger events of default. The aforesaid unequivocally and unambiguously establishes that R-5 to R-7 were intrinsically connected with the performance of the Facility Agreement on part of the Respondents and failure in performance of these obligations by R-5 to R-7 would entail event of default.
39.	8.4.1(d) read with Schedule 1.1.1(z)	Acceleration and other consequence of default	



40.	Schedule 1.1.1(z)	Schedule 1.1.1(z) Events of Default 3. Cross Default (a) Any of the <u>Reference Entity</u>, Borrowers, the Guarantors and/or the Obligors failing to pay its debts or Indebtedness to any Person as they fall due or suspends or threatens to suspend making payments (whether principal or interest) with respect to any of its debts or any notice received by the <u>Reference Entity</u>, Borrowers, the Guarantors and/or Obligors regarding, or commencement by any lender or creditor of, any enforcement action on any security made available/guarantee provided by the <u>Reference Entity</u>, Borrowers, the Guarantors and/or the Obligors. (b) Any of the Reference Controlled Entities failing to pay its debts or Indebtedness to any Person as they fall due or	
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		suspends or threatens to suspend making payments (whether principal or interest) with respect to any of its debts or any notice received by any of the Reference Controlled Entities regarding, or commencement by any lender or creditor of, any enforcement action on any security made available/guarantee provided by any of the Reference Controlled Entities. (c) Any of the <u>Reference Entity</u>, Borrowers, the Guarantors and/or the Obligors fail to comply with or breach the terms of any document (other than Financing Documents, the default in respect of which is provided in paragraphs 1 and 2 above) relating to any Indebtedness of such <u>Reference Entity</u>, Borrowers, the Guarantors and/or the Obligors and such non-compliance or breach entitles the	
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		counterparties/creditors of the <u>Reference Entity</u>, Borrowers, the Guarantors and/or Obligors to accelerate the outstanding amounts due to them or to take any enforcement action against the <u>Reference Entity</u>, Borrowers, the Guarantors and/or the Obligors and/or their assets or commence any liquidation, bankruptcy or winding up proceedings. (d) Any of the Reference Controlled Entities fail to comply with or breach the terms of any document (other than Financing Documents, the default in respect of which is provided in paragraphs 1 and 2 above) relating to any Indebtedness of such Reference Controlled Entity and such non-compliance or breach entitles the counterparties/creditors of any of the Reference Controlled Entities to accelerate the outstanding	
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		amounts due to them or to take any enforcement action against any of the Reference Controlled Entities and/or their assets or commence any liquidation, bankruptcy or winding up proceedings. (e) Any Person exercises a lien or set-off against any of the Borrowers, the Guarantors and/or the Obligors or any of their assets. (f) Failure by the <u>Reference Entity</u>, Borrowers, the Guarantors and/or the Obligors to pay one or more amounts due under any judgments or decrees which shall have been entered against the <u>Reference Entity</u>, the Borrowers, the Guarantors or any Obligors. 4. <u>Winding Up, Nationalization, Receiver</u> (a) Any of the <u>Reference Entity</u>, Borrowers, the Guarantors or the Obligors commencing/taking steps to initiate a voluntary	
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		winding up or restructuring or insolvency process under any applicable bankruptcy, insolvency, winding up or other similar Applicable Laws now or hereafter in effect; or (b) a petition is presented, or a meeting is convened for the purpose of considering a resolution, or any steps are taken, for making an administration order against or for the <u>Reference Entity</u>'s, Borrowers', the Guarantors' and/or the Obligors' winding up; or (c) Any of the <u>Reference Entity</u>, Borrowers, the Guarantors and/or the Obligors consents to the entry of an order for relief in an involuntary proceeding under any such Applicable Law, or consents to the appointment or taking possession of itself or its assets by a receiver, liquidator, assignee (or	
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		similar official). (b) If an involuntary proceeding against the <u>Reference Entity</u>, Borrower, the Guarantors and/or the Obligors has been admitted under any applicable bankruptcy, insolvency, winding up or other similar Applicable Law now or hereafter in effect, or any notice from any Person is received by the <u>Reference Entity</u>, Borrowers, the Guarantors and/or the Obligors in relation to the institution/proposed institution of proceedings of winding-up, liquidation, dissolution, condemnation etc. against the <u>Reference Entity</u>, Borrowers, the Guarantors or any Obligor. (c) Any death, insolvency or any other incapacity of the Guarantors and/or Obligors who are individuals. (d) Any order is made for the dissolution, liquidation, winding-up or termination	
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		of the <u>Reference Entity</u>, Borrowers, the Guarantors or any of the Obligors or for the winding up or liquidation of their affairs. (e) Any notice is received by the <u>Reference Entity</u>, Borrowers, the Guarantors or any of the Obligors from any Governmental Authority in relation to the institution/proposed institution of proceedings of nationalisation, condemnation etc. against the <u>Reference Entity</u>, Borrowers, the Guarantors or any Obligor. (f) Any Governmental Authority having condemned, nationalized, seized, or otherwise expropriated all or any part of the assets of any of the <u>Reference Entity</u>, Borrowers, the Guarantors or Obligors or having assumed custody or control of its business or operations or having taken any action that would prevent it or its officers	
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		from carrying on its business or operations or a substantial part thereof. (g) Any proceeding or other action is ordered or admitted by any Governmental Authority/courts/tribunals for the appointment of a receiver, liquidator, assignee (or similar official) for any part of property or assets of the <u>Reference Entity</u>, Borrowers, the Guarantors or Obligors or an execution, attachment or restraint has been levied by a court/tribunal or any Governmental Authority on all or any part of the assets of any of the <u>Reference Entity</u>, Borrowers, the Guarantors or Obligors. (h) Any of the <u>Reference Entity</u>, Borrowers, the Guarantors and/or the Obligors is declared as sick under the Applicable Law or is, in the reasonable apprehension of the Lenders and/or the	
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		Security Trustee, likely to be declared as sick under Applicable Law. 5. Security (a) Failure by the Borrowers, the Guarantors and/or the Obligors, as applicable, in creation of Security Interest to the satisfaction of the Lenders within the period stipulated in the Financing Documents. (b) Notwithstanding anything contained in the Financing Documents, any of the Financing Documents once executed and delivered fail to provide the Security Interests, rights, title, remedies, powers or privileges intended to be created thereby (including the priority intended to be created thereby), or such Security Interest failing to have the priority contemplated under the Financing Documents, or the Security Interest purported to be created thereby being jeopardized or endangered in any	
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		manner whatsoever, or any other obligations purported to be secured thereby or any part thereof being disaffirmed by or on behalf of any of the Borrowers, the Guarantors or the Obligors or any other party thereto. (c) The occurrence of any event affecting the Security or in the event of the title of any Borrowers, the Guarantors and/or Obligor to any portion of the Security being challenged or in the event any Security or part thereof or any Security Document fails to constitute a valid and perfected first ranking charge or ceases to be in full force and effect or Borrowers, the Guarantors and/or Obligor under any Security Document has repudiated or revoked or is likely to repudiate or revoke such Security. (d) If the whole or any part of the Security is sold,	
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		Encumbered or Transferred or otherwise disposed off without the consent of the Lenders. 6. <u>Other Default</u> (a) Failure by the entities listed in Schedule 6.1.2(d) (Shareholding Pattern) hereof to maintain and retain management control over the <u>Reference Entity</u>, the Borrowers, the Guarantors and/or the Obligors and/or failure to maintain their respective shareholding in the Borrowers, the Guarantors and the Obligors. (b) The <u>Reference Entity</u>, Borrowers, the Guarantors and/or any of the Obligors ceasing or makes a declaration/announcement /notification to cease to carry on its business. (c) Any license, clearance, approval or authorisation material in relation to the business of any of the <u>Reference Entity</u>, Borrowers, the Guarantors and/or any of the Obligors	
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		is revoked, withdrawn, terminated or suspended. (d) Any Material Adverse Effect. (e) Any insurance contracted or taken by the Borrowers is not, or ceases to be, in full force and effect at any time when it is required to be in effect or any insurance is avoided; or (b) any insurer or re-insurer avoids or suspends or becomes entitled to avoid or suspend, any insurance or any claim under it or otherwise reduce its liability under any insurance; or (c) any insurer of any insurance is not bound, or ceases to be bound, to meet its obligations in full or in part under any insurance. (f) Any Legal Proceeding shall have been instituted against the <u>Reference Entity</u>, Borrowers, the Guarantors or any of the Obligors which is of a value of more than INR 10,00,000. (g) Any material assets of the	
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		<u>Reference Entity</u>, Borrowers, the Guarantors and/or Obligor are destroyed in any substantial manner, whether due to a force majeure event or otherwise. (h) The liabilities of the <u>Reference Entity</u>, Borrowers, the Guarantors and/or the Obligors are more than their respective assets or the networth of the <u>Reference Entity</u>, Borrowers, the Guarantors and/or the Obligors is eroded or becomes negative or zero. (i) The Borrowers using the Facility or any part thereof for any purpose other than for which the Facility was sanctioned. (j) The <u>Reference Entity</u>, Borrowers, the Guarantors and/or the Obligors or any of their directors appearing on the RBI's list of defaulters and ECGC's caution list. (k) Any of the directors and/or the promoters of	
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		the <u>Reference Entity</u>, Borrowers, the Guarantors and/or Obligors, being barred from accessing the capital markets by the Securities and Exchange Board of India or the shares of any of the <u>Reference Entity</u>, Borrowers, the Guarantors and / or Obligors (if they are listed) been suspended from trading. (1) The Guarantors ceasing to be a directors of the Borrowers.	
41.	11.10 (a)	11.10 Remedies and Waivers (a) No failure to exercise, nor any delay in exercising, on the part of any Lender and/or Security Trustee, any right or remedy under the Financing Documents shall operate as a waiver, nor shall any single or partial exercise of any right or remedy prevent any further or other exercise or the exercise of any other right or remedy. The rights and remedies provided in this Agreement are cumulative and not exclusive of any rights or remedies provided by Applicable Law.	• Clause 11.10 clearly states that non exercise of any right under the facility agreement by the Petitioners would not amount to waiver. • The notices [Point 5 @ Pg. No. 310 and 313 and point 4 @ Pg. No. 316 and 318] expressly states that it is



			without prejudice to the rights and remedies available under the agreement.
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- (vii) It was further submitted that the Appellants are “Controlled Entities” of the Guarantors, as the Guarantors control the policies and management affairs of the Appellant companies through ownership and Voting Rights, and have the power to appoint Directors, or a similar governing body.
- (viii) The Guarantors – Aditya Khaitan and Amritanshu Khaitan, along with the father of Aditya Khaitan – Late Shri. Brij Mohan Khaitan, are Promoters of the Appellants. They are also Directors/Managing Directors of EIL and MRL interchangeably. Thus, they are clearly in a position to exercise control over the Appellants.
- (ix) Amongst the various obligations that have been undertaken by the Guarantors, a significant one is that they shall not change the corporate structure of the Appellants, and ensure they do not become private companies. This itself shows that they were in position to direct the policies of the Appellants and had control over them.
- (x) Furthermore, the Guarantors have assumed specific financial, accounting, and reporting obligations in context of the Appellants, and have even fulfilled these obligations, which clearly show their direct control over the Appellants.



- (xi) The Promoters of the Appellants have strong family ties, and together held 44% of the shares in EIL at the time of the execution of the FA. The family held similar shareholding in the other Appellants.
- (xii) Further, the shareholding patterns of EIL, MBECL and MRIL as elaborated in the above table clearly indicate that the Williamson Magor & Company Limited ("Borrower No. 1"), Williamson Financial Services Limited ("Borrower No. 2"), Mr Aditya Khaitan ("Guarantor") and Mr Amritanshu Khaitan ("Guarantor") form part of the promoter group.
- (xiii) Clause 1.1.1 (ooo) defines Promoter Group to include any "Controlled Entities" of the Guarantors. Since the guarantors' exercise control over the management and policies of the Appellants, they are a part of the promoter group.
- (xiv) The FA was executed by the Guarantors as Directors of the Appellants. As per section 2(54), 2(69) of the Companies Act, which defines Managing Director and Promoters, the Promoters and Guarantors exercise control over the Appellants. Any person dealing with a company's Director, would ultimately presume and expect that they would have the required authority to act for the company and, by virtue of the doctrine of indoor management, the company would be bound but the actions of its officers. They have placed reliance on ***Abaskar Construction(P) Ltd v. Devi Dutt, MANU/DE/2641/2014***
- (xv) The intention to bind the Appellants under the FA is clear, and they have duly bound themselves to it. Learned senior counsels for the Respondents have drawn our attention towards the detailed clauses which cover all conceivable aspects like maintaining a particular



corporate structure, accounting and reporting obligations, maintaining a particular level of EBITDA ratio, financial position, event of default etc. as elaborated in rows at Sl. Nos. 22 to 40 of the above table. They have submitted that such detailed clauses with respect to the Appellants have been intentionally put in the FA, as it was the only security available to the Lenders for effecting recoveries in case of default.

- (xvi) Further reliance has been placed on the various e-mails exchanged between the parties involved, as elaborated below:
- (i) Email dated 05.11.2018 – 06.11.2018 where, the Senior Vice President Finance – EIIL under the domain name of EIIL provided Detailed financial Model/Business plan and other information related to EIIL and Details of Overseas assets of MRIL, to the representative of the Respondent. The guarantors have marked in the mail using domain names of both EIIL and MRIL, while the subject of the mail is ‘Group Info -Williamson’.
 - (ii) Emails dated 30.03.2018, 27.06.2018-28.06.2018. Where the manager of Williamson Magor & Co. Ltd, while writing under the domain name of MRIL, have provided the details related to the interest payment towards the facility and the required information regarding computation of consolidated Debt/ EBITDA ratios & LTM Debt / EBITDA ratios of both EIIL and MRIL respectively to the Respondent’s representative for their quarterly compliances.
 - (iii) Emails dated 24.01.2019 sent by Mr. Sanjay Nayyar was addressed to the guarantors Mr. Aditiya Khaitan and Amritanshu Khaitan, who were using the domain names of EIIL and MRIL



respectively. The subject of the mail read ‘Williamson Magor group’ and the email read as:

“Dear Aditya, Amritanshu,

As you are aware that we had given the facility of Rs.200 crores to your promoter hold cos. in Sep’17 with PG’s and in good faith. It has been brought to my notice that this is facility has multiple covenant breaches (primarily on account of excess leverage in McLeod Russel & Eveready and non-maintenance of min. unencumbered shareholding of Rs.750 crores) which were informed to us only on post facto basis which is completely unacceptable. Further, I understand that the aforesaid credit facility needs to be secured by 1.5x cover (Principal + Accreted Interest) in the form of pledge of shares of Eveready & McLeod Russel not later than 31st March’19 and thereafter at 2.0x level by 30th Sep’19.

Please give us a plan to rectify the aforesaid breaches at the earliest and ensure to provide us the security within the agreed time line.”

(iv) The mail was duly acknowledged by the guarantor Mr. Aditiya Khaitan on the same day, where they requested to meet the Respondents and discuss future plans. The reply reads as follows:

“Thank you for your mail and I have noted the concerns you have put out. Our intention has been to ensure that the entire amount is repaid and we have already put some actions in play



which your team is fully aware of. I would like to come across to meet you and explain the plan and request if you could give me a time early next week.

Kind regards.”

- (v) This email was followed by another email by Mr. Sanjay Nayyar to the guarantors on 14.02.2019, which reads as:

“Dear Aditya, Amritanshu,

Thank you for coming over & meeting us last week. We’ve since then discussed your requirement for incremental funding at the holdco. level to take care of certain short-term maturities at the operating co. level and we are unable to progress at this juncture.

Incrementally, we have an RBI inspection coming up, and we would need to comply with the security creation requirement in the existing facility first, and would appreciate if you could prioritize creating the requisite security (1.5x cover in the form of pledge over Eveready & McLeod Russel shares) against our facility of Rs.200 crores + accreted interest latest by 31st March ’19.

Request if you could accordingly organize to create security within the aforesaid timeline.”

- (vi) This mail was followed up by an official of the Respondent, vide a mail dated 18.02.2019 which read as follows:

“Dear Sir,



Refer mail below. Request if you could organize to create the security for us at the earliest considering we are not in a position to take up the new deal.

Also, I've been chasing with your teams for submission of compliance certificates, request you to submit the corrected compliance certificate (for June'18 & Sep'18 quarters) and also for Dec'18 quarter immediately (trust the results would have been declared). Refer attached mail for all the pendency pl.

This is to be done on an urgent basis please.”

(vii) The reply to this mail was provided the same day by an official of the Appellants from the email I. D. K.K.Beheti@mcloedrussel.com, which read as:

“Compliance certificates will be sent to you in next two days.”

(xvii) The Respondents submit that at no point of time the Appellants have denied their co-extensive liabilities under the FA. Rather, they have provided the required information which would, otherwise, have been their proprietary and the Appellants would have denied the said information to the Respondent if they had no concern with the FA. The Appellants have cooperated towards the performance of the FA. The Guarantors, Appellants and their respective officers such as CFO, Manager were writing for each other from the official email Ids of EIIL and MRIL, giving financial and other information, as the facility was extended for the entire group entity as a single economic unit; for the benefit of the entire group entity, and; there was a clear mutual



intention of the parties – including the Appellants, to be bound by the agreement.

(xviii) Based on the above factual discussion, the Respondents further contend that this is a fit case to invoke the group companies' doctrine to bind the aforesaid non-signatory Appellants, and hence orders have rightly been passed against the Appellants under section 9 to preserve the subject matter of the final arbitration. Reliance has been placed by the Respondents on *Garware Wall Ropes Ltd V. Coastal Marine Constructions & Engg Ltd.*, (2019) 9 SCC 209, *Mayavati Trading (p) Ltd V. Pradyut Deb Burman*, (2019) 8 SCC 714, *Uttarakhand Purv Sainik Kalyan Nigam Ltd V. Northern Coal Field Ltd.*, (2020) 2 SCC 455.

Discussion

6. We may first discuss the legal background and foundation of the Group Companies Doctrine.

6.1. The group companies' doctrine was propounded in the case of *Dow Chemicals v. Isover Saint Gobain ICC Case No. 4131*, YCA 1984.

7. Based on this English principle, the Supreme Court introduced and applied the doctrine in the Indian context in *Chloro Controls India v. Sereven Trent Water Purification*, (2013) 1 SCC 641. In this case, the doctrine was applied with reference to enforcement of a foreign award under section 45 of the Act. The court held:

“103. Various legal basis may be applied to bind a non-signatory to an arbitration agreement.

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.” (emphasis supplied)

8. The court recognized the nature of modern business transactions which are carried out through multiple agreements creating intrinsically related transactions between the parties within a corporate group, and formulated the test for determining the applicability of the doctrine as follows:

*“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’ (Twenty Third Edition)**].*

*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 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.

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 inter-mingled or inter-dependent 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.” (emphasis supplied)

7.2 This doctrine was followed and applied in the case of *Cheran Properties Ltd. V. Kasturi& Sons Ltd. (2018) 16 SCC 413*. Here the doctrine was applied in the context of a domestic arbitration to enforce an award against a non-signatory. The court further explained the scope of the doctrine:

“23...The exercise while applying the doctrine is to determine whether there existed an intention 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.

7.3 The Court, while rejecting the constricted interpretation advanced by the Appellant, held:

“34.... Dr Singhvi urged that in Chloro Controls there was a joint venture agreement; the mother or parent agreement contained an arbitration clause and though the ancillary agreements did not contain an arbitration agreement, they could not have been performed in the absence of the mother agreement. The submission proceeds on a constricted interpretation of the Chloro Controls dictum. The principle which underlies Chloro Controls is that an arbitration agreement which is entered into by a company within a group of companies may bind non- signatory affiliates, if the circumstances are such as to demonstrate the mutual intention of the parties to bind both signatories and non-signatories. In applying the doctrine, the law seeks to enforce the common intention of the parties, where circumstances indicate that both signatories and non-signatories were intended to be bound.”



7.4 In *Mahanagar Telephone Nigam Ltd V. Canara Bank*, (2019) SCC Online SC 995, the Supreme Court while noticing the above principles, also established the test of ‘single economic entity’ or ‘single economic reality’. The relevant discussion is as follows:

“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.

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 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.



*10.7 The Group of Companies Doctrine has also been invoked in cases where **there is a tight group structure with strong organizational and financial 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 re-structure other members of the group.***” (emphasis supplied)

9. Having discussed the relevant legal principle and the developments around it, we now proceed to examine the FA and the correspondence put forth:

- a) The Facility was extended to the Borrowers for repayments of existing loans/ debt reduction of MRIL – the Appellant in FAO(OS)(COMM) 5/2021.
- b) As per clause 2.3, MRIL is also referred to as a Reference Entity in the FA. If the submissions of the Appellants were to be accepted, it would mean that the actual beneficiary under the FA owes no obligation to either repay, or secure the facility. This itself defeats the arguments of the Appellants.
- c) “Control” is referred in the F.A. as the power to direct management and policies (as per clause 1.1.1 (p)), and any entity controlled by a person exercising control is referred as a “Controlled Entity”. As per clause 1.1.1 (ooo) of the F.A., the Promoter Group shall include any entity controlled by the guarantors.



- d) The expression “Guarantors” is defined in Clause 1.1.1(mm) of the FA to mean “*the Persons set out in Part A of Schedule (Guarantors, Obligors, Lenders and Notice Details) and shall include their respective heirs, executors, administrators, successors and permitted assignees*” Schedule 1 of the FA, in Part A enlists the names of guarantors as Mr Aditya Khaitan and Mr Amritanshu Khaitan. Therefore, any controlled entity of either of these guarantors would qualify as being covered by expression Promoter Group. In this regard, one may look to the definition of the expression.
- e) The position on record is that in September, 2017 when the facility was extended by the respondents, Mr. Brij Mohan Khaitan was the Chairman of the appellant MRIL. Mr. Aditya Khaitan – a defined guarantor and son of Mr. Brij Mohan Khaitan, was the Vice Chairman and Managing Director and Mr. Amritanshu Khaitan – the other defined guarantor, who is also the nephew of Mr. Brij Mohan Khaitan, was the other Director of MRIL. The position in 2019-20 was that Mr. Aditya Khaitan is the Chairman and Managing Director of MRIL and Mr. Amritanshu Khaitan is a Director. Section 2(54) of the Companies Act defines the expression “Managing Director”, and by virtue of being the Managing Director, the incumbent is “*entrusted with substantial powers of the Management of the affairs of the Company*”. The expression “Promoter” is defined in Section 2(69) of the Companies Act to



mean a person, inter alia, “has control over the affairs of the Company, directly or indirectly whether as a Shareholder, Director or otherwise; or” “in accordance with whose advice, directions or instructions the Board of Directors of the Company is accustomed to act:” As pointed out by Mr. Kaul, the position is the same when it comes to the other 2 appellants, namely EIL and MBECL. In EIL, in the year 2017-18 Mr. Brij Mohan Khaitan was the Chairman, Mr. Aditya Khaitan was the Vice Chairman, non-executive and Mr. Amritanshu Khaitan was a Director. In the year 2019-20, Mr. Aditya Khaitan was the Chairman, and Mr. Amritanshu Khaitan was the Managing Director. In the third appellant namely, MBECL, in the year 2017-18, Mr. Aditya Khaitan was the Chairman, and Mr. Amritanshu Khaitan was the Director. In January, 2021, Mr. Aditya Khaitan was the Chairman of MBECL. Thus, the submission of Mr. Kaul that the appellants were also a part of the Promoter Group as defined in Clause 1.1.1(ooo), appears to be correct, inasmuch, as, the appellants were and are controlled entities of the guarantor(s).

- f) The Borrower companies and Guarantors, alongside their family, are part of the promoter group. The Guarantors – Mr. Aditya Khaitan and Mr. Amritanshu Khaitan, are Managing Directors/ Directors of EIL and MBECL respectively, and vice-versa. They share control over the Reference Entities due to their said positions, and the Reference Entities are, therefore,



Controlled Entities. Shareholding patterns as laid down in Schedule 6.1.2(d) of the FA clearly depict the borrower Companies, and Guarantor Mr. Amritanshu Khaitan, along with MRIL, as part of the promoter group of EIL. In this regard, we may also refer to the shareholding pattern of EIL- provided by the borrowers themselves, which shows that the 19 Promoters and Promoter Group shareholders held 44.05% shares in EIL. Williamson Magor & Company Limited – a borrower, Williamson Financial Services Limited – again a borrower, and Mcleod Russel India Ltd. (MRIL) held 23.40, 8.76 and 2.29 percent shares in EIL respectively. The relevant tabulation begins at page 1238 of FAO(OS)(COMM) 2/2021. Similarly, our attention has been drawn to the statement of shareholding pattern vis-à-vis Mcleod Russel India Ltd (MRIL) at pages 1252 and 1253 of the FAO(OS)(COMM) 2/ 2021, which shows that, inter alia, Williamson Magor & Company Limited, Williamson Financial Services Limited – the two borrowers, and Eveready Industries Ltd. (EIL) have been shown as Promoters/ belonging to the Promoter Group of Mcleod Russel India Ltd. (MRIL) Similar is the position with respect to McNally Bharat Engineering Company Ltd.(MBECL) At pages 1233-1234 of FAO(OS)(COMM) 2/2021, the summary of shareholding pattern of this company shows that the Promoters and Promoter Group holds 57.09% shares. The Promoter/ Promoter Group include, inter alia, Williamson Magor & Company Limited, Williamson Financial Services



Limited – the two borrowers and Mcleod Russel India Ltd.(MRIL) The statement regarding the shareholding pattern in Williamson Financial Services Limited is placed at pages 1244-1245 of FAO(OS)(COMM) 2/ 2021. The tabulation shows that the respondent borrowers themselves disclosed that the Promoters and Promoter Group held 61.59% of the shares. The Promoter/ Promoter Group include Mcleod Russel India Ltd.(MRIL) and Williamson Magor & Company Limited – one of the borrowers. Pertinently, the Khaitans are shown as the Promoters of all these companies.

- g) The borrower companies, both the guarantors and MRIL are part of the promoter group of MBECL. The borrowers and guarantors are also a part of the promoter group of MRIL. The first borrower Williamson Magor Co. Ltd (Borrower 1), Mr. Aditiya Khaitan (guarantor 1) and MRIL are Part of the promoter group of Williamson Financial Service (Borrower 2), and all three of the Appellants.
- h) “Security” is defined as the security interest that were created as per clause 5 of the FA. Further, all the documents which were executed pursuant to clause 5 are referred to as security documents under clause 1.1.1(xxx) of the FA. The person who creates these securities is referred to as security providers as per clause 1.1.1 (bbb). Pertinently, as per clause 1.1.1(ccc) all security providers, along with guarantors, are also Obligers.



- i) Under clause 5.1 (a) (e) of the FA, there were requirement to executing a first ranking and exclusive share pledge on pledged shares, which was to be created pursuant to the pledge agreement, which was to be effective on the first Disbursement Date, for securing the Loan Outstanding Amount and any monies payable in respect of this Facility. MRIL was to issue a letter of comfort in a form acceptable by the Lenders.
- j) As per Clauses 5.10, 5.11, 5.12, in case of a breach of collateral cover, the borrower or the promoter group was to provide incremental shares as pledge. They had an option of providing cash collateral in lieu of Top-Up Shares, in which case, the cash collateral would have been adjusted against the Outstanding Loan. Collateral Cover was to be in the form of mortgage over real estate properties acceptable to the Lender and/or equity shares of MRIL / EIL.
- k) Multiple representations and warranties were made by the borrowers and guarantors, and they were binding till the final settlement. These have been enlisted in clause 6 of the agreement. Significant number of these involved the Reference Entities as defined under Clause 1.1.1(sss). The Reference Entities are the three Appellants. Perusal of these clauses clearly indicate an intention to regulate and ensure the wellbeing of the financial health of these entities.
- l) As per Clause 6.1.2 (d) (which forms part of Clause 6 dealing with Representations and Warranties), the Share holding



pattern of the Reference Entries were provided. As per clause 7.2.3 (b) the Borrowers, Guarantors and Promoter Group were restrained from, inter alia, selling, transferring or disposing off, the shareholding in borrowers, save and expect as may be permitted under the F.A. Clause 7.2.3(c) casted a similar bar on selling, transferring, or disposing off shares of any Reference Entities held by the Promoter Group without prior consent of the lenders. The entities enlisted in Schedule 6.1.2(d) of the F.A. are the following:

SHAREHOLDING PATTERN AS ON 23RD SEPTEMBER 2017			
NAME OF SHAREHOLDER	NO. OF SHARES		PERCENTAGE
			%
Mr. BRIJ MOHAN KHAITAN JTLY. WILLIAMSOM MAGOR & CO. LIMITED FOUR MANGO E LANE, KOLKATA – 700001	1		0.0000
MR. T. R. SWAMINATHAN JTLY. WELLIAMSON MAGOR & CO. LIMITED	1		0.0000



MR. RAJEEV TAKRU <i>JTLY. WILLIAMSON MAGOR & CO. LIMITED</i>	<i>1</i>	<i>0.0000</i>
MR. KAMAL KISHORE BAHETI <i>JTLY. WILLIAMSON MAGOR & CO. LIMITED</i>	<i>2</i>	<i>0.0000</i>
MR. AMITABH GUHA SARKAR <i>JTLY. WILLIAMSON MAGOR & CO. LIMITED</i>	<i>1</i>	<i>0.0000</i>
WILLIAMSON MAGOR & CO. LIMITED <i>FOUR MANGOE LANE, KOLKATA – 700001</i>	<i>3690587</i>	<i>19.6369</i>
WILLIAMSON FINANCIAL SERVICES LIMITED <i>FOUR MANGOE LANE, KOLKATA – 700001</i>	<i>3626000</i>	<i>19.2463</i>



BORELLI TEA HOLDINGS LIMITED 79 HIGH STREET GREENHITHE KENT DA9 ONL UNITED KINGDOM	1299600		6.8981
UNITED MACHINE CO. LIMITED CIRCULAR COURT B.A.J.C. BOSE ROAD, KOLKATA – 700017	3753194		19.9214
ICHAMATI INVESTMENTS LIMITED CIRCULAR COURT B.A.J.C. ROSE ROAD, KOLKATA – 700017	3753193		19.9214
COSEPA FISCAL INDUSTRIES PRIVATE LIMITED 103 RUSTOM COURT BUILDING, GR. FLOOR OPP. PODAR HOSPITAL, WORLI DR. ANNIE BESANT ROAD, MUMBAI – 400018	2708420		14.3759
	18840000		100.0000

- m) Clause 7.2.3(c) barred the Borrowers, Guarantors and the Promoter Group from selling, transferring or disposing off the



shares of the Reference Entities held by the Promoter Group without prior consent of the lenders.

- n) As per Clause 6.1.2(e), the Reference Entities, Promoter Group, Borrowers and/ or obligors or any of their directors were obliged to ensure that they did not appear in the RBI 's list of defaulters and ECGS caution list. As per clause 6.1.3(a) the reference entities were to be protected from any material adverse effect, which includes the effect or consequence of an event, circumstance, occurrence or condition which, in the sole opinion of the lenders, has caused, as of any date of determination, or could be expected to cause, a material and adverse effect on, inter alia, the financial condition, carrying of business, operations, assets or prospects of any of the Borrowers, the Guarantors and/or the Obligors and/or the Reference Entity (See clause 1.1.1(bbb)(i))
- o) The operations of the Reference Entities as per Clause 6.1.3 (g) had to be in compliance with applicable laws. As per clause 6.1.4 there was a requirement that the reference entities did not have legal proceedings pending against them. As per clause 6.1.5, the account books of the entities had to be maintained in accordance with Standard International norms and practices, and there had to be a further assurance that there were no known unaccounted liabilities on them. No change in the financial or operational position of the Reference Entities were to be undertaken, that could cause material adverse effect. As



per clause 6.1.8, there was also a clear obligation to disclose if the Reference Entities were insolvent.

- p) Also in existence are the various covenants and undertaking w.r.t the Reference Entities enlisted in clause 7 (covenants and undertakings) of the FA. These impose specific obligations on the borrowers to maintain the corporate character of the Reference Entities.
- q) Clause 7.1.1 of the FA required the Reference Entities to – at no point of time before the final realization of the agreement, become private entities. Clause 7.1.2 required maintenance of transparency in the matter of maintenance of the accounts of the Reference Entities
- r) Guarantors and Promoter Group were obliged to hold shares aggregating to a value of 7,50,00,00,000 of EIL and MRIL, as per Clause 7.2.4 and also to ensure that they did not undertake or procure any incremental indebtedness. Under Clause 7.2.5, the Guarantors and the Promoter Group were barred from encumbering the shares held by them in the Reference Entities beyond the encumbrance disclosed in the F.A., except to top-up the existing security to the lenders under Clause 7.2.6.
- s) Clause 7.2.7 casted specific obligation on the Borrowers and the Guarantors to not undertake, and to ensure that the obligors do not undertake enumerated financial actions, or any action which have or continue to have a Material Adverse Effect.



- t) The borrowers were obliged to provide 'MIS reports' – as per clause 7.3.3, and Unaudited financial statements of, inter alia, the Reference Entities – as per clause 7.3.4. There was further a requirement to provide compliance certificates as per clause 7.3.5, inter alia, in respect of the Reference Entities.
- u) Further, the Event of Default which are set out in Schedule 1.1.1 (Z), provide various defaults are with respect to Reference Entities, including Winding Up, Nationalization, Receiver appointed and other defaults enumerated in Clause 6 of Schedule 1.1.1(z). In particular, Clause 6(a) of Schedule 1.1.1(z) contemplates an event of default, “ Failure by the entities listed in Schedule 6.1.2(d) (Shareholding Pattern) hereof to maintain and retain management control over the Reference Entity, the Borrowers, the Guarantors and/or the Obligor and/or failure to maintain their respective shareholding in the Borrowers, the Guarantors and the Obligor.”

10. We may observe that we have only cited some of the terms and conditions of the F.A., only to emphasis that the parties to the F.A. consciously sought to provide comfort and binding assurance to the lenders – so as to secure their loans, by binding the Reference Entities in every which way. The objective was to ensure transparency in the matter of management of, inter alia, the Reference Entities and to ensure that the working of the Reference Entities does not get adversely impacted. The F.A. is replete with obligations cast on the parties to it to ultimately ensure



that the worth of, inter alia, the Reference Entities are not eroded till the loans are repaid. Why would the Respondents/ Lenders have such overwhelming and all-pervasive concern over the health, business and activities of the Reference Entities, if they were not to be bound by the obligation of the borrowers & guarantors, and their assets were not to be available as security to enforce repayment of the loans/ facilities? Clearly, the intention of the parties was to bind the Reference Entities by the obligation cast on obligors under the FA. The facilities were granted to the borrowers primarily by showcasing the Reference Entities, as profit making and asset owning credible entities, and the Reference Entities also played along with the borrowers and guarantors – who have control over the affairs of the Reference Entities, and they sought to provide comfort to the Lenders/ Respondents by themselves entertaining their queries. The clear projection and representation of the Borrowers and Guarantors – which was also true, was that they, along with the Reference Entities and obligors formed a group. The intention of the parties was, thus, clearly to bind the Appellants/ Reference Entities with the obligations under the FA.

11. The Email exchanges put forth present a clear picture that the plea – that the Appellants are strangers to the agreement, is completely incorrect. The officers of the Appellants have, time and again, provided required information on behalf of the group. At no point did they claim that they were not aware of the FA, or that they were not obliged to disclose the information sought by the Respondents/ Lenders. Rather, they have aided in the performance of the agreement. The emails exchanged between the Officers of the Appellants, and the Lenders, make it amply clear that the Appellants had not just knowledge of the FA, they acknowledged their



obligations under the FA. Mr. Indranil Roy Choudhary Roy -who was the Joint CEO of Eveready Industries Ltd.(which is evident from the Report of EIL – relevant page 797 of FAO(OS)(COMM) 2/ 2021) was the one who sent the email dated 16.11.2018 to Roopak Jain, enclosing the financial model with all relevant assumptions. This was sent “As advised by Amritanshu.” The email exchanges, specially between 24.01.2019 to 18.02.2019, in relation to creation of security, clearly bring out the intention of the parties to bind not just the signatories to the FA, but also the three Reference Entities in relation to the obligations of the Borrowers, Guarantors, Obligors to repay the loans and, to that end, to keep the assets and securities of the Reference Entities unencumbered and valuable. The Respondents/ Lenders stated in their e-mail dated 14.02.2019 that they “*would appreciate if you could prioritize creating the requisite security (1.5x cover in the form of pledge over Eveready & McLeod Russel shares) against our facility of Rs.200 crores + accreted interest latest by 31st March’19.*”, towards fulfillment of the obligations of the Borrowers, Guarantors, Obligors. This e-mail has been acknowledged by the Appellants’ officers. In fact, in the reply dated 18.02.2019, there is no denial of any obligation. The information provided in these communications, cannot be regarded as information available in public domain. Rather, the information was provided towards fulfillment of various obligations under the FA. In any event, the issue is not whether the information fell in public domain, or not. The real issue is, how the Reference Entity conducted themselves, and why. After perusal of the emails, it is amply clear that the Appellants/ Reference Entities were intended by all parties – including the Appellants, to be bound by the FA. The overlapping shareholding patterns



qua the entire group; the holding of the pivotal positions in the Appellants by the Guarantors Mr. Aditya Khaitan and Mr. Amritanshu Khaitan, and; the aid provided by the officials of the Appellants towards performance of the FA, clearly depict a tight group structure. In our view, it would be too naive to hold otherwise. The answer to the question – whether the Respondents would have provided the loans to the Borrowers, if they did not have the security of assets and shareholding of the three Reference Entities, would be a plain “NO”. The parties to the FA are all commercial men. The FA shows that the Respondents/ Lenders heavily relied on the assets; shareholding in, and, the valuation of the Reference Entities. They bound down the Borrowers, Guarantors, Obligors and the Reference Entities to make sure, that there is no erosion of the worth or valuation of the assets/ shares of the Reference Entities, as that was their security in respect of the loans advanced. Otherwise, there was no purpose to prescribe the stringent conditions in the FA qua the Reference Entities.

12. We, therefore, reject the submission of the Appellants that the factors for invoking the Group Companies Doctrine did not exist in the present case. The Supreme Court has invoked the doctrine in different conditions and in relation to different subject matters, which has been discussed above. The invocation of the doctrine depends on the mutual intention of the parties to bind not only the parties to the agreement, but other entities as well, which form part of the group as a common economic entity.

13. The facts of the case demonstrate that the Facility extended by the Respondent Lenders was on the credit worthiness of the Appellants, who were conscious, and accepted the terms of the FA. As to the question, whether there is any liability on the Appellants qua the FA, is not the



question to be determined in the present appeal. The scope of the present appeal is restricted to the preservation of assets in aid of arbitration. The contention placed by the Appellants that their assets could be only reached after lifting the corporate veil, is misplaced. The two concepts are distinct from each other, and the application of these principles does not, necessarily, go hand in hand. Once the Group Companies Doctrine is applied, the non-signatory is also bound by the Arbitration agreement. All the other issues pertaining to jurisdiction, inter se rights and liabilities, etc., are for the Arbitral Tribunal to decide. The reason why the assets of the Appellants are liable to be preserved is, because it was the underlying financial strength of the Appellants, on the basis of which the loan was extended by the Lenders/ Respondents. The borrowers have no assets of their own, so it becomes imperative to protect these assets for the aid of the Arbitral tribunal. Our attention has also been drawn to the Independent Auditors Report of Mcleod Russel India Ltd, which forms part of the Annual Report of the said company for the year 2018-19 . The said report is telling on the manner the financial affairs of the said company are being managed by the management – which includes Mr. Aditya Khaitan as CMD and Mr. Amritansu Khaitan as the Director. The Independent Auditors have, inter alia, observed in this report:

““REPORT ON THE AUDIT OF THE CONSOLIDATED FINANCIAL STATEMENTS”

Adverse Opinion

We have audited the accompanying consolidated financial statements of Mcleod Russel India Limited (“the parent”) and its subsidiaries, (the Parent and its subsidiaries together referred to as “the Group”) which comprise the Consolidated



Balance Sheet as at 31 March, 2019, and the Consolidated Statement of Profit and Loss (including Other Comprehensive Income), the Consolidated Cash Flow Statement and the Consolidated Statement of Changes in Equity for the year then ended, and a summary of significant accounting policies and other explanatory information.

In our opinion and to the best of our information and according to the explanations given to us, and based on the consideration of reports of the other auditors on separate financial statements of the subsidiaries referred to in the Other Matters section below, due to the significance of the matters described in the Basis for Adverse Opinion section below, the aforesaid consolidated financial statements do not give the information required by the Companies Act, 2013 ("the Act") in the manner so required and also does not give a true and fair view in conformity with the Indian Accounting Standards prescribed under section 133 of the Act read with the Companies (Indian Accounting Standards) Rules, 2015, as amended ("Ind AS") and other accounting principles generally accepted in India, of the consolidated state of affairs of the Group as at 31 March, 2019, and their consolidated profit, their consolidated other comprehensive loss, their consolidated cash flow and their consolidated changes in equity for the year ended on that date.

Basis for Adverse Opinion

- (a) *During the years, the Parent had extended advances aggregating to Rs.84,175.00 lacs to certain promoter group companies, as capital advances. The promoter group companies to whom such advances were given have substantially lent these onward to another promoter group company. Of the total capital advances, Rs. 77,575.00 lacs was converted to inter-Corporate Deposits (ICD) as of 31 March, 2019. In this connection, we draw attention to paragraphs 1(a) and 1(b) under section 'Report on Other Legal and Regulatory Requirements' regarding the aforesaid ICDs that, In our opinion, is prejudicial to the interests of the Parent, and the initial recording of these amounts as capital advance was reflected only by book entries.*



- (b) As at 31 March, 2019 ICDs of Rs. 174,468.00 lacs given to promoter group companies and other companies [including Rs.77,575.00 lacs referred to in paragraph (a) above] and Rs. 7,702.52 lacs Interest accrued on such ICDs (net of provision of Rs. 8,509.40 lacs), respectively, are doubtful of recovery considering the financial condition of the promoter group companies and the other companies to whom these ICDs have been given. However, the Parent has not made any provision for the outstanding amounts recorded as ICDs and interest accrued thereon. Consequently, the non-current portion of loans and interest accrued thereon are overstated and loss for the year is understated by Rs. 182,170.52 lacs.
- (c) The aggregate amount of Rs. 174,468.00 lacs disclosed as ICDs outstanding as at 31 March, 2019 are in excess of limits on lending prescribed under section 186 to the Act by Rs. 61,156.16 lacs for which approval has not been obtained from the members of the Parent. Further, in view of the matter described in paragraph (o) below, we are unable to state if any of the promoter group companies are companies whose Board of Directors of Managing Director or Manager, whereof is accustomed to act in accordance with the directions of any director of the Parent, and therefore covered under section 185 of the Act and any non-compliance thereto.
- (d) The Parent has recognized Rs. 6,781.86 lacs as sundry income from one of the promoter group companies. In our opinion and according to the information obtained by us, the sundry income may have been funded to the said promoter group company through monies indirectly lent by the Parent as more fully described in paragraph (a) above or through ICDs granted and therefore may not have been actually realized. We also draw attention to paragraph 1(b) under section 'Report on Other Legal and Regulatory Requirements' where we have opined that the aforesaid interest income may have been reflected only by book entries and prejudicial to the interests of the Parent. However, considering the amount already quantified as a modification of the audit opinion in respect of outstanding balance of ICDs from these promoter group companies described in paragraph (b) above, this recognition of sundry



income will not have any further impact on the loss for the year.”

14. The view taken by the Learned Single Judge does not call for interference in the light of the aforesaid discussion, and in the light of the judgement of the Supreme Court in ***Wander Ltd. v. Antox India (P) Ltd.***, 1990 Supp SCC 727, wherein, the Supreme Court observed:-

“13. On a consideration of the matter, we are afraid, the appellate bench fell into error on two important propositions. The first is a misdirection in regard to the very scope and nature of the appeals before it and the limitations on the powers of the appellate court to substitute its own discretion in an appeal preferred against a discretionary order. The second pertains to the infirmities in the ratiocination as to the quality of Antox's alleged user of the trademark on which the passing-off action is founded. We shall deal with these two separately.

14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the



discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in Printers (Mysore) Private Ltd. v. Pothan Joseph [(1960) 3 SCR 713 : AIR 1960 SC 1156] : (SCR 721)

“... These principles are well established, but as has been observed by Viscount Simon in Charles Oseinton & Co. v. Jhanaton [1942 AC 130] ‘...the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case’.”

The appellate judgment does not seem to defer to this principle.”

15. Accordingly, the appeals are dismissed with costs quantified at Rs. 2 Lakhs each.

**(VIPIN SANGHI)
JUDGE**

**(REKHA PALLI)
JUDGE**

FEBRUARY 07, 2022