

(2020) 01 DEL CK 0092

In the Delhi High Court

Case No : Civil Suits (COMM) No. 528 Of 2019, Miscellaneous Application No. 13157, 15801 Of 2019

STCI Finance Ltd.

APPELLANT

Vs

Shreyas Kirti Lal Doshi & Anr

RESPONDENT

Date of Decision : 14-01-2020

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 7(5), 8, 8(2), 11, 16, 34, 45

Citation : (2020) 01 DEL CK 0092

Hon'ble Judges : V. Kameswar Rao, J

Bench : Single Bench

Advocate : Tanmay Mehta, Abhishek Agarwal, Abhinav, Jayant K. Mehta, Mihir Ashok Mody, Dhaval Mehrotra, Sudhanshu Sikka

Judgement

V. Kameswar Rao, J

I.A. 15801/2019

1. By this order, I shall decide the present application, filed by the defendants under Section 8 of the Arbitration and Conciliation Act, 1996 ("Act", for short) with the following prayers:

"(a) that the Hon'ble Court be pleased to refer the parties to the arbitration before the Learned Sole Arbitrator Mr. Justice Mukul Mudgal (Retd.) for adjudication of the matter under dispute, before whom the arbitral proceedings are already pending;

(b) that the Plaintiff may be directed to produce the originals of the documents executed by and/or between the Plaintiff, SIFPL and Applicants/Defendants, which are more particularly enlisted in paragraphs (4) and (7) above, before this Hon'ble Court in terms of Section 8(2) of the Act;

(c) cost for the present application be provided for; and

(d) such other just and equitable reliefs as this Hon'ble Court may deem fit and

proper under the facts and circumstances of the present case."

2. The suit has been filed by the plaintiff for recovery of an amount of Rs. 9,89,20,085/- as on May 5, 2019 along with pendente lite and future interest.

3. It is the case of the plaintiff / non-applicant in the plaint that M/s. Shrenuj Investments and Finance Pvt. Limited ("Borrower Company", for short), a company registered under the relevant provisions of the Companies Act, 1956, through defendant no.1 being its Director who manages its affairs, approached the plaintiff Company in and around June, 2012 for availing the loan facility of up to Rs. 15 Crores for the purpose of investment in its Group Companies against pledged and equity shares of M/s. Shrenuj and Co. Limited. The defendants are also promoters / Directors of M/s. Shrenuj and Co. Limited, which is engaged in the business of trading and manufacturing of diamond and diamond jewellery. The plaintiff Company, upon considering the request of the Borrower Company, vide sanction letter dated October 18, 2012, had sanctioned a loan to the tune of Rs. 15 Cr. for a period of 360 days with a rate of interest @ 14 % per annum with monthly rest and subject to the other terms and conditions stipulated. Pursuant thereto and after accepting the terms of the sanction letter, the plaintiff Company and Borrower Company executed and entered into a loan facility agreement dated October 19, 2012 ("Facility Agreement-I", for short). Loan facility availed by Borrower Company from Plaintiff based on Facility Agreement-I shall herein after be referred to as Loan Account-I.

4. The plaintiff Company disbursed an amount of Rs. 15 Cr. to the Borrower Company on October 22, 2012. The Borrower Company again approached the plaintiff Company with a request for an additional loan facility of up to Rs. 15 Cr. offering additional security, which was accordingly sanctioned for a period of 360 days with a rate of interest @ 14.50% per annum with monthly rest and subject to the other terms and conditions stipulated. The plaintiff Company and the Borrower Company executed and entered into the second loan facility agreement dated January 28, 2013 ("Facility Agreement-II", for short), on the terms and conditions stipulated therein. Loan facility availed by Borrower Company from Plaintiff based on Facility Agreement-II shall herein after be referred to as Loan Account-II. The plaintiff disbursed a sum of Rs. 15 Cr. to the Borrower Company on January 28, 2013 in their bank account through RTGS.

5. Defendant no.1 Shreyas Kirti Lal Doshi and Vishal Shreyas Doshi, defendant no. 2 are the Directors/promoters and guarantors of the Borrower Company with respect to loan facilities so availed from the plaintiff company. Defendant No.1 herein executed the Deed of Guarantee dated October 19, 2012 for Loan Account-I and Deed of Guarantee dated January 28, 2013 for Loan Account-II. Defendant no.2 herein, executed two separate Deeds of Guarantee dated March 14, 2013 in favour of the plaintiff to secure the Loan Accounts-I & II. The Borrower Company along with guarantors and pledgors of shares, including defendant nos. 1 and 2, executed declaration dated March 14, 2013, regarding providing of additional security. It is noted from the plaint that the plaintiff Company upon request of

the Borrower Company vide letter dated October 4, 2013 renewed the Loan Account-I for a period of one year, from the existing due date of October 17, 2013 up to October 17, 2014, at an enhanced rate of interest @ 15.50% per annum with monthly rest.

6. It is the case of the plaintiff Company that the Borrower Company along with defendant nos. 1 and 2 executed acknowledgement of debt and securities dated October 5, 2013, acknowledging the dues of Rs. 15 Cr. plus interest from October 1, 2013. It is also stated that the plaintiff Company vide letter dated January 15, 2014, upon the request of Borrower Company vide letter dated December 17, 2013, renewed the Loan Account-II for a period of one year, from the existing due date of January 23, 2014 to January 23, 2015, at an enhanced rate of interest @ 15.50 per annum with monthly rest.

7. It appears that the Borrower Company again approached the plaintiff Company vide letter dated January 9, 2015 and requested the plaintiff Company to provide an extension up to March 3, 2015 for repayment of outstanding amounts in Loan Accounts-I & II. The Borrower Company again approached the plaintiff Company seeking further extension vide letter dated April 15, 2015 and duly assured the plaintiff Company that the loan amounts of Loan Accounts-I & II shall be cleared in the second quarter in three equal monthly installments of Rs. 10 Cr. each, starting from July 2015 till September, 2015, along with interest, which was again agreed upon by the plaintiff Company.

8. It is the case of the plaintiff Company that the Borrower Company after June, 2015 stopped making any payments to the plaintiff Company under Loan Accounts-I and II, resulting in overdue interest outstanding /accumulating to Rs. 1,20,79,164/-(One Crore Twenty Lacs Seventy Nine Thousand One Hundred and Sixty Four) as on August 31, 2015. Demand Notice date September 5, 2015 was issued for clearing the interest dues, failing which it was intimated that the plaintiff Company would be enforcing the security. It is the case of the plaintiff Company that it was forced to invoke the pledge on shares pledged by Borrower Company and other pledgors, after giving due notice to the respective pledgors, owing to the failure on part of the Borrower Company to make payments as per the said demand notice. It is also stated, margin call notices were issued by plaintiff company pursuant to fall in asset cover, against Loan Accounts-I & II as on 17/11/2015, after invocation of pledged shares. Further, it is stated by the plaintiff that since the cheques issued by the Borrower Company for clearing outstanding amount with interest of Loan Account- I were returned unpaid, plaintiff Company went ahead to sell pledged shares to recover the amounts due under Loan Accounts-I & II.

9. It is the case of the plaintiff Company that after adjustments being made from the sale proceeds amounting to Rs. 26,91,52,419.69/- (Rupees Twenty Six Crores Ninety One Lacs Fifty Two Thousand Four Hundred and Nineteen and Sixty Nine Paise only) of the shares pledged and the payments amounting to Rs. 1,45,00,000/- (Rupees One Crore and Forty-Five Lacs only) made by the

Borrower Company between September 2015 and August 2016 along with other recovery/incidental charges, Loan Account-I was closed on February 02, 2016 and an amount of Rs. 11,67,06,908.69 (Rupees Eleven Crore Sixty-Seven Lakh Six Thousand Nine Hundred and Eight and Sixty-Nine Paise only) was available with the plaintiff Company to adjust against the amount outstanding in Loan Account - II. The Loan Account -II, thus had an outstanding amount of Rs. 8,70,15,642/-(Rupees Eight Crores Seventy Lacs Fifteen Thousand Six Hundred Forty-Two only) comprising of Rs. 5,85,13,784.07/-(Rupees Five Crore Eighty-Five Lacs Thirteen Thousand Seven Hundred and Eighty-Four only) towards principal and Rs. 2,85,01,858/- (Rupees Two Crores Eighty-Five Lacs One Thousand Eight Hundred and Fifty-Eight only) towards interest calculated as on November 28, 2018.

10. It is also noted that the plaintiff Company was constrained to issue demand / notice invoking arbitration dated December 11, 2018 against Borrower Company and defendant no.1 in the capacity of guarantor, demanding inter alia payment of Rs. 8,70,15,642/- towards the outstanding principal amount on receipt of the legal notice, to which no response has been issued.

11. It is a conceded fact that the plaintiff Company is proceeding against the Borrower Company in arbitration proceedings separately. The suit has been filed by the plaintiff Company against the applicants / defendants being guarantors.

12. This application has been filed by the applicants / defendants inter alia stating that they are the Directors of M/s. Shrenuj &Co. Limited as well as the Borrower Company. Apart from giving the details of loan payment and the documents executed, it is the case of the defendants /applicants in the application that the plaintiff Company has relied upon same documents in both the proceedings, i.e., before the learned Arbitrator and in these proceedings. The plaintiff's cause of action for filing the present proceedings is same, i.e., the alleged default on the part of Borrower Company to pay the alleged pending amounts under Loan Account-II. The plaintiff has based its claims in the arbitral proceedings inter alia upon the Deeds of Guarantee executed by the applicants / defendants. The said claims are based upon Facility Agreement-I and Facility Agreement-II read with other supporting documents executed in furtherance of Loan Account-I and Loan Account-II respectively.

13. It is the case of the applicants / defendants that on a reading of the plaint, it is manifestly evident that commonality of subject matter and the transactions under the Loan Account-I as well as the Loan Account-II including the Deeds of Guarantee, Share Pledge Agreements are composite in nature. Therefore, it is a fit and proper case for this court to pass appropriate directions under Section 8 of the Act referring all disputes between the parties to be decided conclusively by the learned Sole Arbitrator.

14. It is the case of the defendants / applicants so contended by Mr. Jayant Mehta, learned counsel that if the parties chose to determine for themselves that

they will have domestic forum for adjudication of disputes instead of referring to the jurisdiction of an ordinary Court, a prima facie duty is cast upon the Court to act upon such agreement by referring the same to arbitration under the Act. It is the case of the defendants / applicants that the plaintiff / non-applicant while agreeing to enter into arbitration agreements and relying upon the Deeds of Guarantee as well as Share Pledge Agreements, plaintiff Company very well knew what were the reasons for determining the questions by arbitration, and what were the reasons against it, and the plaintiff made it part of its mutual agreements with the Borrower Company as well as the applicants / defendants under the transaction documents that these questions / disputes shall be determined only by arbitration as can be implied by the pleading of the plaintiffs before this court as well as before the learned Sole Arbitrator. He has drawn my attention to the alleged documents, more specifically the arbitration clause in the Facility Agreements- I & II, to contend that the same encompasses any disputes or differences arising between the parties during the subsistence of the agreement or thereafter in connection with the validity, interpretation, termination, implementation or alleged breach of any provisions of the agreement regarding any question, such disputes / differences, shall be settled through the process of arbitration. He has drawn my attention to schedules of the Facility Agreements- I & II to contend that the schedules attached, refer to the Deed of Guarantee executed by the defendant no.1. According to him, the Share Pledge Agreements have been executed between the Borrower Company including the applicants / defendants and the plaintiff Company herein. His submission is that the cause of action for filing the present proceedings being the default on the part of the Borrower Company to pay the alleged pending amounts under the Loan Account-II and that since the plaintiff Company has based its claim under the arbitral proceedings inter alia upon the Deeds of Guarantee executed by the applicants / defendants herein, there is no reason why the parties herein need not to be relegated to the arbitration proceedings before the same Arbitrator adjudicating the said case. That apart, the claims of transactions under the Facility Agreements- I & II and other documents are composite in nature. In support of his submission, Mr. Mehta had relied upon the judgment of the Supreme Court in the case of Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification, 2013 1 SCC 641; to contend that in a dispute where the origin and the end of all is with the mother / principal agreement, the fact that a party was non-signatory to one or the other agreement may not be of much significance and that the intention of the parties to refer all disputes between them to arbitration is one of the determinative factors.

15. On the other hand Mr. Tanmay Mehta, learned counsel appearing for the non-applicant / plaintiff Company had drawn my attention to the reply to the application to contend that the parties to the agreement in the absence of any arbitration Clause cannot be referred to arbitration on the basis of a separate agreement containing arbitration Clause. He submitted that there is no dispute that the applicants / defendants are guarantors to the Facility Agreements- I & II

executed between the plaintiff Company and the Borrower Company. The Deeds of Guarantee were executed in favour of the plaintiff by defendant no. 1 on October 19, 2012 January 28, 2013 for Facility Agreements -I & II respectively and by Defendant no.2 on March 14, 2013 for both Facility Agreements- I & II. He also stated that since there being no arbitration Clause in the Deeds of Guarantee or any incorporation of the terms of Facility Agreements-I & II in the Deeds of guarantee, the arbitration Clause may not be read into the same. In fact, it is his submission that the defendants / applicants are non-signatory to the Facility Agreements- I & II and therefore may not be considered as parties to the arbitration agreement. In support of his submission he has relied upon the following judgments:

1. M.R. Engineers and Contractors v. Som Datt Builders Ltd. 2009 7 SCC 696;
2. S.N. Prasad, Hithek Industries Ltd. v. Monnet Finance Limited 2011 1 SCC 320;
3. SMS Tea Estates v. Chandmari Tea Company 2011 14 SCC 66;
4. Sunil Nanda v. L & T Finance 2014 SCC Online Del 1057;
5. STCI FINANCE Limited v. Sukhmani Technologies Pvt. Ltd. 235 (2016) DLT 150; and
6. MSTC Ltd. v. Omega Petro Products 2018 SCC Online Bom 487.

16. In substance, it is his submission that the plaintiff Company has initiated the arbitration proceedings against the Borrower Company on the basis of arbitration Clause laid down in the Facility Agreement-II. The Deeds of Guarantee being executed in the personal capacity and the Facility Agreement-II being signed by the defendants / applicants in their capacity as Directors of the borrower company and the claim before the arbitrator being with regard to the money so borrowed without invoking the Deeds of Guarantee (except placing the documents before the learned Arbitrator), the claim against the defendants/ applicants as guarantors in their personal capacity cannot be referred to the arbitration proceedings already initiated. In other words, it is his submission that the loan facility agreement covers only disputes arising out of the said agreement and does not encompass the Deeds of Guarantee and hence could not form part of the arbitration proceedings and the only remedy for the plaintiff is to seek execution of the terms of the Deeds of Guarantee.

17. Having heard the leaned counsel for the parties, there is no dispute to the fact that the arbitration Clause exists only in the Facility Agreement-II (similar clause exists in Facility Agreement-I as well) on the following terms:

"21.11 Jurisdiction / Arbitration

i) Jurisdiction:

Subject to the provisions of Clause 21.11 (ii) below, It has been agreed between the parties hereto that only tribunals of competent jurisdiction at New Delhi shall

have exclusive jurisdiction with respect to any suit, action or any other proceedings relating to this Agreement.

ii) Arbitration :

(a) If any dispute or difference arises between the Parties hereto during the subsistence of this Agreement or thereafter, in connection with the validity, interpretation, termination, implementation or alleged breach of any provision of this Agreement or regarding any question relating hereto the Parties hereto shall endeavor to settle such dispute or difference amicably. In the event that they are unable to agree to an amicable solution to the dispute or difference within a period of 30 (thirty) days, from rising of the dispute or difference, such dispute or difference shall be decided by a sole Arbitrator appointed by STCI. The cost of "arbitration shall be borne by the Borrower.

(b) The arbitration proceedings shall be governed by the provisions of (Indian) Arbitration and Conciliation Act, 1996. The place of the arbitration shall be New Delhi. The proceedings of arbitration shall be in the English language."

18. There is no arbitration Clause in the Deeds of Guarantee as executed by the applicants / defendants.

19. The plea of Mr. Jayant Mehta that the schedule of Facility Agreement-II refers to the Deed of Guarantee executed by the defendant no.1, is overlooking the fact that the clause 1.15 of the loan facility agreement defines "facility document" to include the following:

"1.15 "Facility Document" means each of the following

(a) Letter of Intent

(b) This Facility Agreement

(c) Share Pledge Agreement

(d) Demand Promissory Note

(e) Continuing Security Letter

(f) Irrevocable Power of Attorney from pledgors / Borrower

(g) Board Resolution

(h) Any other deed, document or writing as may be prescribed by STCI."

20. No where clause 1.15 refers to the Deed of Guarantee as a facility document. In any case, mere reference of Deed of Guarantee in the schedule to the Facility Agreement-II does not entail that the Deed of Guarantee having been separately executed shall form part of Facility Agreement-II. No doubt, the Deeds of Guarantee were to secure the loans availed by the Borrower Company of which the applicants / defendants may be the Directors, but the intention of the parties behind the execution of Deeds of Guarantee was that the applicants / defendants

in their personal capacity shall guarantee the loan facilities as given by the plaintiff Company to the Borrower Company. So, it necessarily follows that merely because the Facility Agreement-II encompasses an arbitration Clause, the same shall not also be applicable between the parties to the Deeds of Guarantee. The relationship between the parties shall be regulated strictly in accordance with the terms of Deeds of Guarantee and not in terms of Facility Agreement-II. This position can be seen from the judgment of the Supreme Court in the case of M.R. Engineers (Supra), wherein the issue involved was whether in accordance with Section 7(5) of the Act, an arbitration Clause contained in the main contract would stand incorporated by reference in sub-contract, where the sub-contract provided that "it shall be carried out on the terms and conditions as applicable to the main contract." It was held by the Supreme Court that the wording of Section 7(5) of the Act makes it clear that mere reference to a document would not have the effect of making arbitration Clause from the document, a part of the contract and that a reference to the document in the contract should be such that it shows the intention to incorporate the arbitration clause contained in the document into the contract. Since, there is nothing in the Deeds of Guarantee to show the intention of the parties, was to incorporate the arbitration Clause as contained in the Facility Agreement-II, it cannot be said that there is an arbitration agreement in the Deeds of Guarantee.

21. Identical issue arose for consideration before this court in the case of Sunil Nanda (supra), wherein the Court while dealing with an application under Section 34 of the Act, was concerned with the fact as to whether the guarantor for loan, who was not a party to the loan agreement containing arbitration clause, can be made party to the reference to arbitration qua dispute relating to re-payment of loan. This court held that since there was no arbitration Clause in the guarantee deed and the arbitration Clause existed only in the loan agreement, to which the guarantor was not a party, the arbitrator was erroneous in binding the guarantor in the award passed by him.

22. Similarly, in STCI Finance Ltd. (supra), in a matter involving the plaintiff Company herein as one of the parties, in an appeal filed against the order passed by the Arbitrator who disposed of the application filed under Section 16 of the Act filed by the respondents on the premise that except one, none of the respondents are bound by the arbitration agreement under the loan facility agreement, this court agreeing with the Arbitrator held that even though various other agreements were executed between the parties, loan facility agreement containing arbitration Clause existed only between the claimant/appellant and the borrower.

23. I may also point out that the Supreme Court in S.N. Prasad (supra) had rejected the contention of the Respondent therein that since the liability of the principal borrower and guarantor was joint and several and therefore the guarantor should also be compelled to join the arbitration proceedings even though they were not the signatories to the loan agreement which contained the

arbitration Clause. The relevant extract of the judgment is reproduced as under:

"21. The first respondent contended that the appellant having agreed to be a guarantor for the repayment of the loan, can not avoid arbitration by contending that he was not a signatory to the loan agreement containing the arbitration clause. It was submitted that the liability of the principal debtor and guarantors was joint and several and therefore there could be only one proceeding against all of them; and that if the contention of the appellant was accepted, it would necessitate two proceedings in regard to the same loan transaction and same cause of action, that is an arbitration proceedings against the borrower and one of its guarantors (respondents 2 and 3) and a separate suit against the other guarantor (appellant). It was further submitted that multiple proceedings may lead to divergent findings and results, leading to an anomalous situation."

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24. The apprehension of the first respondent that an anomalous situation may arise if there are two proceedings (one arbitration proceedings against the borrower and one guarantor and a suit against another guarantor), is not a relevant consideration as any such anomalous situation, if it arises, would be the own-making of the first respondent, as that is the consequence of its failure to require the appellant to join in the execution of the loan agreements. Having made only one of the guarantors to execute the loan agreements and having failed to get the appellant to execute the loan agreements, the first respondent cannot contend that the appellant who did not sign the loan agreements containing the arbitration clause should also be deemed to be a party to the arbitration and be bound by the awards. The issue is not one of convenience and expediency. The issue is whether there was an arbitration agreement with the appellant."

24. In SMS Tea Estates (supra), the Supreme Court held that even if multiple agreements have been entered into between parties; Arbitrator can only be appointed with regard to the disputes relating to agreement containing arbitration Clause. In this regard, I may refer to the relevant paragraph which reads as under:

"25 Before an Arbitrator can be appointed under Section 11 of the Act, the applicant should satisfy the learned Chief Justice or his designate that the arbitration agreement is available in regard to the contract/document in regard to which the dispute has arisen. For example if the parties had entered into two agreements and arbitration clause is found only in the first agreement and not in the second agreement, necessarily an arbitrator can be appointed only in regard to disputes relating to the first agreement and not in regard to any dispute relating to the second agreement.

xxx xxx xx"

On a perusal of the arbitration Clause of the Facility Agreement-II, it is clear that

the parties intended to refer those disputes to the arbitrator for adjudication which have arisen with regard to "this agreement", which is the loan facility agreement. It was not the intention of the parties that even the disputes with regard to Deeds of Guarantee shall also be referred to arbitration.

25. Mr. Tanmay Mehta, learned counsel appearing for the plaintiff is justified in relying upon the judgment of the Bombay High Court in MSTC Limited (supra), wherein the court relying upon M.R. Engineers (supra) and the STCI Finance (supra) has held that the main loan agreement and the deed of guarantee although linked, are independent contracts, and thus the arbitration Clause of the main contract / loan agreement needs to be specifically incorporated. The relevant paragraphs are reproduced as under:

"10 xxx xxx xxx

Every contract of guarantee, therefore, by definition must make a reference to the main agreement, the promise whereunder is sought to be performed or the liability whereunder is sought to be discharged under the contract of guarantee. By making a mere reference to such contract, the contract of guarantee cannot be said to either incorporate the terms of the main contract or particularly incorporate the arbitration agreement contained thereunder. We are bound by the decision of the Supreme Court in the case of M.R. Engineers and unless the three conditions laid down in that case, namely, (i) clear reference to the document contained in the arbitration clause, (ii) such reference indicating an intention to incorporate the arbitration clause, and (iii) the arbitration clause being appropriate or capable of being applied in respect of all disputes under the referring contract and not being repugnant to any term of that contract, are satisfied, there is no warrant for treating the arbitration clause in the referred document as having been incorporated into the referring contract. The proposition laid down by the Supreme Court in M.R. Engineers was once again affirmed by the Supreme Court in the case of Duro Felguera S.A. (supra).

11. The learned Single Judge of Delhi High Court in the case of Canbank Financial Services Ltd. can also accordingly be treated as having been impliedly overruled and the law stated therein as not good law after the judgment of the Supreme Court in the case of M.R. Engineers. Anyway, Canbank case is distinguished by the Delhi High Court itself later in STCI Finance Ltd. v. Sukhmani Technologies Pvt. Ltd.⁹ This later decision was rendered after considering the cases of Chloro Controls as well as M.R. Engineers and S.N. Prasad (supra). The Delhi High Court in STCI Finance held that an agreement to stand as a surety for due performance of the contract between the principal debtor and the lender, although linked to the principal contract, is nonetheless an independent contract and unless the arbitration agreement contained in the principal contract is specifically incorporated in the agreement of surety by a specific reference, the surety cannot be said to be bound by the arbitration agreement contained in the main contract."

26. In so far as the judgment relied upon by Mr. Jayant Mehta in Chloro Controls India Pvt. Ltd. (supra) is concerned, the Supreme was concerned with the facts, wherein there was a joint venture agreement interlinked with other supplementary agreements and parties having complex corporate structure qua reference to arbitration under Section 45 of the Act, the Court held that a non-signatory can be referred to arbitration without prior consent if the transaction is of a composite nature where the performance of the principal or the mother agreement may not be feasible without the aid, execution and performance of supplementary agreement or ancillary agreements for achieving the common object, and collectively having a bearing on the dispute. The Judgment is clearly distinguishable on facts. In fact, I find that in STCI Finance (Supra) the Court has distinguished the judgment of Chloro Controls (supra) in the following manner:

"29. The decision in the case of Chloro Controls (I) P. Ltd.(supra) must also be understood in the context as explained by the Supreme Court. In that case, the Court had held that a non-signatory or a third party could be subjected to arbitration without their prior consent but this would only be in exceptional cases. It would be essential for the Court to ascertain that there was a clear intention of the parties - both the signatory as well as non- signatory - to resolve the disputes by arbitration. The Supreme Court further explained that the Court would examine the exceptions on the touchstone of the 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.

30. The Court had further explained that a transaction would be of a composite nature where performance of a mother agreement would not be feasible without aid and performance of supplementary or ancillary agreements. Above all, the Court had emphasised that the intention of the parties to refer all disputes between all parties to the Arbitral Tribunal would be one of the determinative factors.

31. The question whether an arbitration clause could be extended to a non-signatory has arisen mainly in the context of a non-signatory party "claiming" through or under a signatory party. In this context, the Courts have expanded the scope of an arbitration agreement to also include non- signatories and have held that non-signatories claiming through or under a signatory could compel the other signatory party to arbitrate the subject disputes. This is quite different from a signatory proceeding against a non- signatory by claiming the non-signatory to be connected with the transaction with the non-claimant signatory party. In the former case, there is no dispute that the person being proceeded against in arbitration has consented that the subject disputes be decided by the arbitration. In such cases, the Courts would stretch to ensure that such party does not avoid its contractual commitment to have the subject disputes decided by arbitration. By seeking a reference to arbitration, either under Section 45, 11 or 8 of the Act, a non-signatory party has voluntarily committed, to have the subject disputes decided by Arbitration. Thus, the fundamental condition of

consent of both parties is met. However, compelling a non-signatory to subject itself to a claim in arbitration is significantly more difficult. In such cases, the Courts must come to a clear conclusion that the non-signatory party has agreed to arbitration."

27. I agree with the distinction drawn by the court.

28. In view of the above, I am of the view that the present application filed by the defendant nos. 1 and 2 is totally misconceived and is liable to be dismissed. Ordered accordingly. No costs.

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29. List before learned Joint Registrar, for completion of pleadings on 20th January, 2020