IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: May 22, 2023

\+ ARB.P. 26/2022

A.ES ENGINEERS PRIVATE LIMITED ..... Petitioner
Through: Ms. Sonam Gupta, Mr. Devansh Arya, Mr. Saumay Kapoor and Ms. Bahuli Sharma, Advs.

versus

UGRO CAPITAL LIMITED & ANR. ..... Respondents
Through: Dr. Amit George, Mr. Nitesh Mehra, Mr. Amol Acharya, Ms. Anumeha Singhai, Ms. Rayadurgam and Mrs. Hitakshi Mehra, Advs. for R-1
Ms. Ekta Rai and Mr. Aadil Khan, Adv. for R-2

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

1. The petitioner has filed the present Petition under Section 11 (6) of the Arbitration and Conciliation Act, 1996 ('Act of 1996', for short) seeking appointment of a three-member Arbitral Tribunal to adjudicate disputes between the petitioner and the respondents.

2. The petitioner is a small enterprise, registered under the Micro, Small and Medium Enterprises Development Act, 2006, and is engaged in the business of manufacturing and supplying cast iron products such as crane parts casting, tractor parts castings and other

motor parts.

3. The respondent No. 1, M/s. UGRO Capital Limited, is a Non-Banking Financial Company (NBFC) within the meaning of the Reserve Bank of India Act, 1934.

4. The respondent No. 2, M/s. Kiran Udyog Pvt. Ltd, is a company involved in the business of manufacturing and marketing automobile components globally. The petitioner would supply its products to respondent No.2, which would be utilized by respondent No.2, in manufacturing of automobile components and parts.

5. The case of the petitioner is that the petitioner and the respondent No.2 had business relationship in early 2019, whereby the petitioner supplied goods to the respondent No. 2, against which the respondent No. 2, directly released payments. In early 2019, the respondent No.2 began defaulting on its payments to the petitioner, due to the augmenting outstanding dues from the respondent No.2, the petitioner expressed its inability to continue rendering supplies. Pursuant to this, respondent No.2, introduced the petitioner to the respondent No.1, which had agreed to provide Bill Discounting Services to the respondent No.2.

6. It is the case of the petitioner that, composite transaction structure was explained to the petitioner by the representatives of the respondents and the petitioner was assured that, at all points in time that their payments against the supplies would remain secured. In furtherance of the same, the respondents shared the Master Service Agreement ("MSA" for short) with the petitioner, to induce the petitioner to agree to the composite transaction structure.

7. Thereafter, on August 07, 2020, Facility Agreement ("FA", for short) was executed between the petitioner and the respondent No.1.

8. That apart in early 2021, the respondent No.2 began defaulting on its payments to the respondent No.1. On April 20, 2021, the respondent No.1 sent a 'Loan Recall Notice' to the petitioner, claiming an amount of ₹ 1,97,27,033/-. Upon the petitioner's enquiry, the respondent No.1 stated that the notice was a mere formality since the petitioner is a NBFC and did not impact the extant arrangement between the three parties. The respondent No.1 continued to disburse money to the petitioner even after the 'Loan Recall Notice'.

9. Thereafter, on August 26, 2021, the respondent No.1 sent an Arbitration Reference Notice to the petitioner under Clause 13 of the FA, along with a letter of appointment of a sole Arbitrator for the arbitration only against the petitioner. Subsequently, on August 31, 2021, the respondent No.1 filed its Statement of Claim before the Arbitrator and moved an application under Section 17 of the Act of 1996 to take possession of the movable/immovable property and goods of the petitioner.

10. The petitioner contacted the respondent No.1, objecting to the unilateral appointment and also to the incorrect picture being portrayed by the respondent No.1, in the transactions and the agreements. Even before the petitioner could file a response to the arbitration notice, the sole Arbitrator withdrew from the arbitration proceedings on September 10, 2021.

11. On November 18, 2021, the respondent No.1 filed an application under Section 7 of the Insolvency and Bankruptcy Code

('IBC', for short) against petitioner before the NCLT, New Delhi, abandoning the arbitration process. The said application is presently pending adjudication before the NCLT, Delhi Bench, New Delhi.

12. The respondent No.1 had also lodged a police complaint for cheating and breach of trust against the petitioner, for which the petitioner received a notice on November 22, 2021 from the Assistant Commissioner of Police, District Investigation Unit. The petitioner duly responded to the notice and filed a counter-complaint against the respondent No. 1 on November 29, 2021.

13. Thereafter, the respondent No.1, on November 25, 2021, sent another Arbitration Notice under Section 11 of the Act of 1996 to the petitioner appointing a new arbitrator, and for the first time making a reference to a "Service Agreement" dated July 31, 2020 executed amongst the respondents, which agreement had never been disclosed to the petitioner. By way of the said arbitration notice dated November 25, 2021, the respondent No.1 has sought to invoke arbitration under the Arbitration Agreement contained in the FA seeking a principal amount of ₹ 1,80,40,606/- from the petitioner along with interest.

14. The respondent No.1 has filed a petition under Section 9 of the Act, 1996, titled ***M/s UGRO Capital Limited v. M/s. A.E.S. Engineers Private Limited & Anr***., being ***AP. No. 502 /2021*** and Section 11(6) of the Act of 1996 petition being ***AP. No. 47 / 2022***, against the petitioner before the High Court of Judicature at Calcutta, which are pending adjudication.

15. Ms. Sonam Gupta, the learned Counsel for the petitioner, stated that the respondent No.2, began defaulting on its payments to

the respondent No.1. As a result, the respondent No.1 started compelling the petitioner for the money the respondent No.2 owed to it under the tripartite arrangement. In fact, the respondent No.1 began misrepresenting the FA as a 'Loan Agreement', completely keeping respondent No.2 away from the transaction, by restricting its role to a mere 'introducer' and mischaracterising the petitioner as the borrower so as to compel the petitioner to pay.

16. She stated that, on April 20, 2021, the respondent No.1 sent a 'Loan Recall Notice' to the petitioner, claiming an amount of ₹1,97,27,033/- and the respondent No. 1 continued to disburse money to the petitioner even after the 'Loan Recall Notice'.

17. She submitted that, on August 26, 2021, the respondent No.1 sent an Arbitration Reference Notice to the petitioner under Clause 13 of the FA, along with a letter of appointment of a sole Arbitrator and chose to invoke arbitration only against the petitioner.

18. She stated that the petitioner objected to the unilateral appointment of Arbitrator by the respondent No.1. Even before the petitioner could file a response to the Arbitration Notice, the sole arbitrator withdrew from the arbitration proceedings.

19. Ms. Gupta stated that, in reply to the police complaint against the petitioner, the petitioner duly responded to the notice and filed a counter-complaint against the respondent No. 1 on November 29, 2021 for deliberately initiating false proceedings with the purpose of extorting monies.

20. She stated that, in reply to the notice of invocation of arbitration dated November 25, 2021, the petitioner, at first, issued an

initial response dated December 18, 2021 and, subsequently, a detailed response dated January 03, 2022, to the Arbitration Notice. She stated, the petitioner pointed out the *mala fide* attempts by the respondent No.1 to misrepresent and camouflage the composite transaction as a loan and highlighted that, in light of the composite arrangement, the disputes sought to be referred to arbitration go beyond the scope of the arbitration agreement contained in the FA and are required to be resolved through a composite arbitration under the MSA.

21. She also stated that on December 14, 2021 the NCLT, New Delhi Bench initiated Corporate Insolvency Resolution Process against the respondent No.2, in the matter of ***M/s Jaycee Castalloys Private Limited v. Kiran Udyog Private Limited***.

22. She submitted that, disputes have arisen between the parties which involve questions of fact and require adjudication by way of arbitration as envisaged under Clause 13 of the MSA. She has also submitted that the designated seat and venue of arbitration is New Delhi and the MSA confers exclusive jurisdiction on the courts at New Delhi and has relied on Clauses 13 and 14 of the MSA as reproduced under:-

> *"13. DISPUTES*
>
> *In the event of disputes, differences, claims and questions between the Parties hereto arising out of the Master Service Agreement or in any way relating hereto or any term, condition or provision herein mentioned or the construction or interpretation thereof or otherwise in relation hereto, the Parties shall first endeavour to settle such differences, disputes, claims or questions by arbitration of three (3) arbitrators, one each to be appointed by each Party, and each such arbitrator shall*

appoint a third arbitrator who shall act as a chairman of the arbitral panel. The Arbitration and Conciliation Act, 1996 and the rules made there under shall apply to and shall govern the arbitration proceedings. The venue of the arbitration shall be exclusively at New Delhi and the arbitration proceedings shall be conducted in English. The decision of the arbitrators shall be final and binding on the Parties.

14. JURISDICTION

This Agreement shall be construed in accordance with the laws of India and shall be subject to the exclusive jurisdiction of the competent courts in New Delhi only."

23. She stated that the respondent No.1 is attempting to portrait 'Bill discounting facility' extended to respondent No.2 as a loan to the petitioner. She clarified that the petitioner has only received amounts against the goods supplied and did not stand to benefit from the said transaction. She also stated that huge amount of monies are to be recovered from respondent No.2, against the invoices which were not marked to respondent No.1.

24. That apart, she alleged that the respondent No.1 has harassed and badgered the petitioner by trying to extort money, and lodged false police complaint and unnecessary litigations in Kolkata knowing that the petitioner being an MSME has a limited earning capital and cannot survive the expensive litigation. Therefore, the petitioner needs arbitral tribunal to be constituted in Delhi.

25. She further stated that the FA cannot be severed from the MSA and read selectively, as the nature of agreements and the inter-dependence of the two agreements is required as the disputes involved will go beyond the scope of FA and necessitates reference to MSA,

and interpretation of the process. Hence, the FA is only an off-shoot of the MSA, and if the two agreements are read separately then invoking of arbitration separately under the two agreements may result in parallel proceedings, consequently, there will be multiplicity of proceedings and bifurcation of cause of action, which is impermissible in law.

26. Ms. Gupta stated that the respondent No.2 availed Bill Discounting Facility from respondent No.1 under MSA whereby respondent No.1 agreed to settle the invoices placed by the suppliers on behalf of respondent No.2. Thereafter, the raised invoices by the petitioner to the respondent No. 2, acknowledge that the goods had been delivered, quality check completed and payment terms accepted. After verifying; respondent No.1 made payments against the invoices to the petitioner on the instruction of respondent No.2. The respondent No.2 will later repay the invoices to respondent No.1.

27. She stated that, there is no loan disbursement by the respondent no.1 to petitioner and the disbursement made by the respondent no.1 was against the invoices accepted by respondent no.2, as far as the petitioner is concerned, respondent No.1 stepped into the shoes of respondent No.2, thereby effectively becoming the purchaser of the goods from the petitioner. In support of her submission, she has relied upon the judgment of the Supreme Court in ***Corporation Bank and Anr. v. Navin J. Shah,(2000) 2 SSC 628.***

28. She further stated that upon receipt of payment against its invoices, the petitioner had no further role in repayment to be made between respondent no.1 and respondent no.2. She also stated that

under FA, respondent no.1 had been nominated as the constituted attorney of the petitioner; so as to enable respondent no. 1 to take any and all actions against respondent No.2 as may be required for ensuring its recoveries.

29. She contended that, it is an admitted position that transactions commenced under MSA, since May 2019, and FA was executed between petitioner and respondent No. 1 on August 07, 2020, and even after execution of FA, modus of transactions continued to be the same. In fact, transactions continued in the same manner even after FA was terminated in April 2021. Therefore, it is thus evident that, at all times the transactions continued to take place under MSA. She further submitted that the respondent no.1 is the lender under the agreements and under MSA a borrowing limit has been assigned to respondent No. 1, and with respondent No.1 as anchor, a sub-limit of the borrowing limit is utilised under FA towards clearing the dues of respondent No.2 to the petitioner.

30. She stated that the respondent No. 2 undertakes and is obliged to credit all receivables payable under invoices raised by petitioner to the Escrow Account/ Designated Account of respondent No. 1 on or before the due date. In the event of a default under FA, respondent No. 2 is required to credit the outstanding amount into the relevant Escrow Account/ Designated Account. The respondent No. 2 is also required to provide and maintain adequate security margin to ensure outstanding amounts under FA are secured.

31. Furthermore, she stated the doctrine of Group of Companies has been in existence before its enunciation in ***Chloro Controls India***

Private Limited v. Severn Trent Water Purification Inc. & Ors (2013) 1 SCC 641). Hence, the composite nature of transaction necessitates reference to MSA and interpretation of its clauses. Therefore, though the petitioner is not a signatory to the MSA but is a party by way of "incorporation by reference" as the MSA determined rights and obligations.

32. She contended that, under Clause 5.3 of the MSA, the respondent No.1 is entitled to withhold disbursement to petitioner until the respondent No.2, provides security towards the facility and in the event of the any default, respondent No.1 has the right to suspend the petitioner and its affiliates from doing any business with respondent No.2 and also withhold sourcing from and payments to them. The petitioner is not allowed to move to a third-party lender/financier without providing a prior written notice of 90 days to respondent No.1.

33. In support of her submissions, she has relied upon the judgments in ***Chloro Controls India Pvt. Ltd. (supra),*** which has been referred to a larger bench in ***Cox and Kings Limited v. SAP India Private Limited & Anr., 2022 SCC OnLine SC 570***. She has also placed reliance on the judgments of the Supreme Court in ***(i) Olympus Superstructures Private Limited v. Meena Vijay Khetan & Ors. (1999) 5 SCC (ii) Rodemadan India Ltd. v. International Trade Expo Centre Ltd. (2006) 11 SCC 651 (iii) Deccan Paper Mills Company Ltd. v. Regency Mahavir Properties (2021) 4 SCC 786.***

34. Dr. Amit George, the learned counsel for the respondent No.1 submitted that, this court lacks the territorial jurisdiction as FA state that the seat of arbitration shall be at Kolkata. He also submitted that

the FA binds the petitioner and the respondent No.1, which determines the rights and obligations of the parties. Furthermore, he stated that the MSA is inoperable to the present petitioner as the petitioner is admittedly not a party to the MSA.

35. He stated that the dispute is between respondent No. 1 and the petitioner and they are governed by Clause 13 of the FA, reproduced as under:-

> *"13. GOVERNING LAW, JURISDICTlON AND ARBITRATlON.*
> *13.1 This Agreement shall be construed in accordance with the laws of India and subject to the arbitration clause below, shall be subject to the exclusive jurisdiction of the competent courts in Kolkata.*
> *13.2 In the event of any dispute or difference between the parties under this Agreement, including in relation to the construction or interpretation of this Agreement, the parties shall first endeavor to settle such dispute or difference by amicable negotiations within 30 days of a written notice issued by one party to the other party. If the negotiations do not result in a resolution of the dispute or difference, either party shall be entitled to submit such dispute or difference to arbitration. If the negotiations do not result in a resolution of the dispute or difference" either party shall be entitled to submit such dispute or difference to arbitration, The Lender shall appoint an arbitrator at its sole discretion or in accordance with the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"). Arbitration shall be conducted in accordance with the Arbitration Act. The seat of arbitration shall be Kolkata and the arbitration proceeding shall be conducted in English. The decision of the arbitrator shall be final and binding on the parties"*

36. He stated that the petitioner is not a party to MSA and has no right to invoke the arbitration jurisdiction, if permitted to invoke

arbitration jurisdiction, it would defeat the express arbitration jurisdiction agreed between the petitioner and respondent No.1.

37. He alleged that the present petition is shambolic and misguided as the MSA is purely between respondent No. 1 and respondent No. 2, under which respondent No. 2 has agreed to provide the respondent No. 1 with the information regarding "Suppliers" which requires financial assistance from respondent No. 1 and the respondent No. 1 is a lender as per FA.

38. He stated it is admitted by the petitioner that the contractual relationship with respondent No. 1, commenced with signing of FA. He also stated that the FA between petitioner and respondent No. 1 is basically a "*Facility-cum-Loan Agreement"* pursuant to which the credit facility was granted by respondent No. 1 to the petitioner.

39. He emphasised the purpose of MSA between respondent No. 1 and respondent No. 2 and highlighted Clause 4, which is reproduced as under:-

> *"**Principle Obligation to Agreement"** wherein he has stated that "... Further, notwithstanding anything contained herein, in the event, the Principal fails to credit the Escrow Account/ Designated Account with such amounts that are payable pursuant to Supplier's Invoice, on or before such date/ within such time period as stipulated under the Facility Agreement, the such Borrower shall repay the relevant Facility together with other Outstanding Amount, directly to UGRO on or before the date/ time period stipulated under the Facility Documents for such repayment".*

40. He submitted that this petition is only in retaliation to the ***A. P. 502/2021***, under Section 9 and ***A.P. 47/2022*** under Section 11(6) of

the Act of 1996, filed by the respondent No. 1, before High Court at Calcutta and that the petitioner has appeared in the proceedings at High Court.

41. Furthermore, he is stated that, the terms of the FA and *modus operandi* of the transactions between the respondent no. 1 were to provide financial assistance as a "lender" to the petitioner which was the "borrower" under the FA. As per the FA, once the goods were delivered by the petitioner to the respondent no 2, the petitioner then raised an invoice on the respondent No.2 for the same. The respondent No.1 based on the recommendation of the respondent No.2 would provide credit facilities to petitioner against the invoices raised, in respect to the confirmed invoice by the respondent No.2.

42. He also stated that the petitioner requiring credit facilities in respect of a particular accepted invoice, the petitioner was to submit a disbursement request to the respondent No. 1, along with (a) copy of the purchase order issued by the said respondent No.2 to place orders for purchase of goods from the petitioner and in respect of which the accepted invoice was issued; (b) a copy of the accepted invoice in respect of which the petitioner intended to obtain a facility and (c) a copy of the aforesaid material receipt note. The petitioner could place the disbursement request not later than the availability period and one business day prior to the proposed date of draw under clause 3.1 of the said agreement.

43. He submitted that the respondent No.1 made the disbursement of the facility at its discretion by electronic mode in respect of which the unpaid accepted invoice having the minimum value of Rs. 10,000/-

and the date of remittance by the respondent No.1 was to be reckoned as the date of disbursement under clause 3.2 of the said agreement.

44. He also submitted that the interest was payable from the disbursement date until the final settlement date i.e., in respect of a particular facility, the date on which all outstanding amounts pertaining to the facility have been irrevocably and unconditionally paid and discharged in full to the satisfaction of the respondent No.1 and confirmed in writing by the petitioner. The Interest paid from the disbursement date until the expiry of the credit period was to be deducted by the respondent No.1 from the facility at the time of its disbursement in favor of the petitioner. In the event of all outstanding amounts were not received by the respondent No.1 by the end of the credit period, the petitioner was liable to pay interest to the respondent No.1 for the period from the expiry of the credit period until the final settlement date along with additional interest at the rate of 3% per month, under Clause 4 of the said agreement.

45. According to him, the petitioner is under an obligation to repay the facility as a bullet payment on the last day of the credit period i.e., 12 months unless extended by the respondent No.1 at its sole discretion. In this regard, the petitioner was to issue irrevocable instruction to the said respondent No.2 to deposit the receivables to the designated account towards repayment of the facility under Clause 5.1 of the said agreement.

46. Furthermore, in the event the said respondent No.2 fails to repay on the last day of the credit period, the petitioner will be liable to repay the same, together with interest, into the designated account, not

later than one business day from the expiry of the credit period (extended repayment period). The FA and the sanction letter issued by the respondent No.1 in favor of the petitioner categorically evidence the aforesaid formulation.

47. He submitted that, respondent No.1 under the FA sent termination notice dated April 20, 2021, as the petitioner availed nearly ₹2 crores. He stated that dispute between the petitioner and respondent No.1 cannot be treated as a tripartite dispute, as there is a clear bilateral agreement which is the FA between the petitioner and respondent No.1 and the present dispute has arisen purely in terms of the breach of the said FA.

48. He stated that the MSA was shared with the petitioner by the respondent No.1 and respondent No.2, purely for an understanding of the relationship shared between respondent No.1 and respondent No.2, In fact, if the same were a composite agreement, there would have to be a stipulated clause in either of the agreements which catered to the same. He also stated that the contention of the petitioner that the MSA and FA agreement being a tripartite dispute cannot be inferred, as it is a bilateral agreement.

49. He submitted that, it is mentioned under Clauses 5.1 and 5.2, wherein, the liability has been clearly established. He also stated that the dues are payable by the petitioner to the respondent No.1 as per terms of Clause 10 of FA. Furthermore, as the petitioner did not repay its debt under the FA, the respondent No.1, was constrained to send a Notice of Dispute dated August 26, 2021. He contended the submission of the petitioner, wherein, the petitioner stated that the

respondent No.1 unilaterally appointed the arbitrator is misplaced as arbitrator recused himself on September 10, 2021 citing personal issues.

50. He also stated that, there is petition under Section 7 of the Insolvency and Bankruptcy code filed before the NCLT, New Delhi bench. Furthermore, he stated that the respondent no.1, lodged a police complaint for cheating/breach of trust against the petitioner and the respondent No 1 has the right to proceed with criminal proceedings in such circumstances.

51. He submitted that the authenticity is not in doubt as the petitioner was well aware, that the FA binds the petitioner and the respondent No.1 and the dispute had arisen out of the same, and the Arbitration Clause was also invoked under the FA for the principal amount of ₹ 1,80,46,606/- from the petitioner.

52. He stated that the two agreements are not inter-dependent. He denied that reference to arbitration was made under the MSA, as the disputes involved in the present matter does not go beyond the scope of the FA and FA is not an off-shoot of MSA. The purpose of the FA was for respondent No.1 to extend credit facilities to the petitioner. Therefore, the FA and the MSA operate in completely different spheres and are independent of one another in their operation.

53. He contended that, even assuming without admitting that the said MSA is to be looked into, even then upon juxtaposing both the agreements that directly determines the rights and entitlements between the parties to the present petition, so its terms would evidently prevail over the MSA, in the case of any conflict.

54. Hence, the provision as to the seat of arbitration being Kolkata, would bind the parties and, therefore, this court would not have the territorial jurisdiction to hear the present matter in the light of the settled law in this regard. He denied that severing the two agreements and invoking separate arbitrations under the two agreements may result in parallel proceedings and, consequently, multiplicity of proceedings and bifurcation of cause of action and the subject matter, which is impermissible in law.

55. He stated that the arbitration clause invoked by the petitioner is much belated, as the respondent No.1, has already raised the dispute when its first recalled the loan/ termination notice vide "Loan Recall Notice" dated April 20, 2021, and secondly when it sent a reference of arbitration vide letter dated August 26, 2021, an Arbitrator, Mr. Ashfaque Anwar, was also nominated.

56. He submitted that the petitioner is trying to achieve a joinder as a non-signatory under MSA. He has relied upon the judgment of the Supreme Court in relation to joinder of non-signatory parties in the case of ***S.N. Prasad, Hitek Industries Ltd. (Bihar) v. Monnet Finance Ltd. & Ors. (2011) 1 SCC 320***, wherein, it held that, a non-signatory to an arbitration agreement could not be made a party to an arbitration proceeding emanating there under.

57. In support of his submission, he has relied upon the judgment of this Court in the case of ***STCI Finance Ltd. v. Shreyas kirti Lal Doshi & Anr. (2020) SCC Online Del 100***. In the said case, the plaintiff, which was a financial institution, had initiated arbitration proceedings against the borrower, and also filed a suit before this

Court against the guarantors to the said loan. The guarantors, who were admittedly not signatories to the Loan Agreement between the plaintiff and the borrower which contained an arbitration agreement, filed an application under Section 8 of the Arbitration Act, before this Court seeking reference of the *inter-se* disputes between the plaintiff and the guarantors to arbitration in terms of the Loan Agreement. The guarantors' *inter alia* argued that inasmuch as they stood guarantee for the disbursal of the loan to the borrower by the plaintiff, they were intimately connected with and could take recourse to the loan agreement under which the loan was disbursed.

58. In support of that submission, he has placed his reliance on the judgments in ***Chloro Controls India Pvt. Ltd. (supra)*** and ***Ameet Lalchand Shah and Ors. v. Rishabh Enterprises and Anr., (2018) 15 SCC 678***. He has also relied upon the judgment of this Court in the Court of ***Ion Exchange (India) Ltd. v. Panasonic Electric Works Co. Ltd. & Anr., (2014) SCC Online Del 7499***. In respect of party autonomy of the respondent No.2, he stated that the petitioner is acting contrary to party autonomy, in as much as, without its consent and against its stated wish to adjudicate under MSA, even after the petitioner and respondent No.2 had agreed to adjudicate any *inter-se* disputes under the FA. He further stated that, respondent No.1 has not contracted to a joint arbitration with the petitioner and respondent No.2 as it did not enter into a tripartite agreement with the said parties. The disputes, which the petitioner seeks adjudication of, are squarely bilateral in nature, involving the petitioner on the one hand, and respondent No.1 on the other.

59. He has relied upon the judgment of this court in the case of ***Laxmi Civil Engineering Services Ltd. & Ors. v. Gail (India) Limited, N.C. No. 2021:DHC:871***, wherein, a subcontractor sought to invoke the arbitration agreement entered into between the contractor and the employer, and to which agreement the sub-contractor was admittedly not a party. He has also stated that the observations made in ***Laxmi Civil Engineering (Supra)***, also point to the fact that the concept of a single identifiable economic endeavour/project between different parties are required to be strictly construed.

60. Furthermore, he has relied upon the judgment of this court in the case *of* ***Huawei Telecommunications (India) Co. Pvt. Ltd. v. Bharat Sanchar Nigam Limited (BSNL) and Anr., N.C. No. 2020:DHC:1416***, which was also a case involving a sub-contractor seeking to invoke the arbitration agreement entered into between the contractor and the employer.

61. He contended that the judgment in ***Olympus Superstructure Private Limited (supra)*** has been considered and distinguished in the judgment of the Supreme Court in the case of ***DLF Home Developers Limited v. Rajapura Homes Private Limited & Anr., 2021 SCC Online SC 781,*** wherein, the Court dealt with two different arbitration clauses in two related agreements between the parties. The nature of arbitration clauses are different and comparison with the dispute resolution of the main agreement with the latter agreement, is misplaced.

62. He contended that the petitioner has not been formally issued a Notice of Invocation of Arbitration under Clause 13.2, contained in the

MSA. He further stated that, a prior formal Invocation of Arbitration under Section 21 of the Act of 1996 is mandatory. In support of this submission, he has relied upon the judgment of this Court in the case of ***Alupro Building Systems Pvt. Ltd. v. Ozone Overseas Pvt. Ltd.*** (***2017) SCC Online Del 7228***.

63. He seeks dismissal of this petition.

64. Ms.Ekta Rai, the learned counsel for the respondent No.2, submitted that the petitioner cannot invoke the jurisdiction of this court as the dispute arises out of the FA which was signed between the respondent No. 1 and the petitioner and that the said agreement categorically state that, in the event of any dispute between the parties, the seat of arbitration shall be at Kolkata.

65. She stated that the dispute under Clause 13 of MSA as referred by the petitioner in the present petition stipulates for the appointment of a Three member Arbitral Tribunal. Whereas, the petitioner, nowhere in his petition, has furnished any document that suggests compliance with the particulars of the disputes under Clause 13 of MSA and approached the parties involved in the agreements to invoke arbitration before this Court to seek recourse.

66. She stated that, a bare reading of Section 11(6) of the Act of 1996, makes it abundantly clear that the provision does not render the Court the power to *prima facie* appoint an arbitrator merely relying upon the existence of an arbitration agreement, Section 11(6) of the Act of 1996 cannot be used simplicitier to invoke and initiate arbitration proceedings. However, the said provision has been incorporated in the Act of 1996 to enable a party to an arbitration

agreement to seek indulgence of the Court in an ongoing procedure of appointment of Arbitrators wherein, one party has invoked the arbitration clause as per the procedure agreed to between the parties and the other party has either failed to act as required under that procedure or has not consented to the same. Whereas, the judgments relied by the petitioner in the case of ***Ameet Lalchand Shah (supra)*** and ***Chloro Controls India Pvt. Ltd. (supra)***, the Court held that non-signatories/related parties to the mother contract may initiate arbitration proceedings under the mother contract as per Sections 45 and 8 of the Act of 1996, whereas in the present case, the said provisions of the Act of 1996, will not be applicable as the agreements herein have an independent existence and are distinct from each other, as both the agreement operates in different domains and have been executed by different parties.

67. She stated that the petitioner cannot stretch the right to invoke the arbitration clause as it is between the respondent No. 1 and respondent No. 2 in the MSA, with a motive to defeat the arbitration in the FA, which subsists between respondent No.1 and petitioner. She stated that the intention of the petitioner and respondent No.1 in the FA was to refer the disputes, if any to a sole arbitrator with seat of arbitration at Kolkata. The petitioner cannot now come to a different forum and demand a hearing on a different document. Hence, the petitioner does not have any right to invoke the jurisdiction of this Court for the purposes of appointment of Arbitrator(s) under section 11(6) of the Act of 1996.

68. In support of her submission, she has relied on the judgment of

the Supreme Court in the case of ***Jagdish Chander v. Ramesh Chander, (2007) 5 SCC 719.*** She has also referred to the judgment of the Supreme Court in ***Bank of India v. K. Mohandas, (2009) 5 SCC 313***.

69. She stated that, it is settled law that the arbitration clause forming part of the contract shall be treated as an independent agreement. She also stated that, where contracts are in conflict with each other, the agreement to which the persons invoking the arbitration of parties shall prevail. In light of the FA to which the petitioner and respondent No.1 are signatories, shall prevail and for that reason and the petitioner cannot seek appointment of an arbitrator under the MSA. Ms. Rai has placed reliance in this regard on the judgment of the Supreme Court in the case of ***Today Homes & Infrastructure (P) Ltd. v. Ludhiana Improvement Trust, (2014) 5 SCC 68.***

70. She submitted that, in consonance with Kolkata being the designated seat of arbitration, currently there are petitions filed by the respondent No.1 under Section 9 and Section 11 of the Act of 1996, before the High Court at Calcutta, which is pending adjudication as may be seen by the documents put on record by the petitioner. Therefore, it will be open for the petitioner to plead their case before the High Court at Calcutta and not before this Court. She has also placed reliance on the judgment of this Court in ***Libra Automotives Private Limited v. BMW India Private Limited and Another, (2019) SCC OnLine Del 9073.***

71. She has also stated that the MSA dated March 28, 2019 is a pre-dated Agreement signed between the respondent No.1 and

respondent No.2, independent of any role of the petitioner. The FA is a subsequent agreement signed between the respondent No.1 and the petitioner, after almost a year of signing of the MSA between the respondent Nos. 1 and 2. Therefore, it is an incorrect plea by the petitioner that the agreement between the respondent No.1 and petitioner in any manner relate to the solvency of the respondent No.2.

72. She submitted that the subject matter of dispute in the present petition is not in the nature of transaction between the respondent No.2 and the petitioner but whether the petitioner has any locus to invoke an arbitration proceeding against the respondent No.2 in an agreement to which the petitioner is not even a party. Since, the petitioner is not a party to the MSA it cannot invoke the jurisdiction of this court, the right available only to the parties in the MSA.

73. She stated that, in order to determine whether or not the petitioner has a right to invoke the jurisdiction of this Court, one need only to look at the arbitration agreement and whether or not the petitioner is a signatory to the same and the court has to look at the intention of the parties while determining whether the agreements are independent of each other.

74. She contended the judgments relied by the petitioner, in the case of ***Ameet Lalchand Shah (supra)*** and ***Chloro Controls India Pvt. Ltd. (supra),*** wherein, it is held that the non-signatories/ related parties to the Mother Contract may initiate arbitration proceedings under the mother contract, as per the section 45 and section 8 of the Act of 1996, and stated that the said judgments shall not be applicable to the present case, as this case is not filed under Section 8 or Section 45 of the Act

of 1996. She also stated that, there is a crucial difference in language of Section 8 and Section 45 of the Act of 1996, and Section 11(6) thereof, under which the petitioner has invoked the arbitration clause of the MSA, to which it is not a party.

75. She stated that under Section 45 of the Act of 1996, the legislature has deliberately inserted the words *"at the request of one of the parties or any person claiming through or under him"*. On the other hand, Section 11(6) of the Act of 1996 contemplates that, only parties who are signatories to the relevant arbitration agreement may place request for appointment of arbitrator before the Court.

76. She emphasised that the striking difference in the two provisions exists, as the legislature was conscious of the fact that the two provisions contemplate different scenarios under which the parties apply for initiation of arbitral proceedings. She also stated that the legislative intent is clear, in the first case i.e. Section 45 of the Act of 1996, application is made when a court is already seized of a matter which is the subject matter of arbitration. Therefore, in that case, it becomes abundantly important that the court be apprised of its lack of jurisdiction to entertain the particular case owing to the existence of an arbitration clause, and such information could be disclosed to the court by a party to the arbitration agreement or any other person claiming under it.

77. On the other hand, Section 11(6) of the Act of 1996, is for invoking the arbitration clause when, *inter alia*, the parties fail to reach consensus upon the appointment of arbitrator(s). Such remedy has statutorily been made available only to a party as opposed to Section

45 of the Act, where the words "*or any person claiming through or under him*". Moreover, Section 2(h) of the said Act, defines a "party", to mean a party to an arbitration agreement. In support of this argument, she has relied upon the judgment of the Supreme Court the case of ***Vidya Drolia (supra).***

78. She argued that, without admitting that the petitioner has *locus* to institute the arbitration proceedings under MSA, the petitioner did not follow the due process of invoking the Arbitration clause that is necessary under Section 21 of the Act of 1996 read with Clause 13 of the MSA, which needs to be complied before filing a petition under section 11(6) of the Act of 1996, i.e., the petitioner has neither sent a notice of invocation nor notified any related action before being made party to the present petition. She seeks dismissal of the present petition.

FINDINGS

79. Having heard the learned counsel for the parties and perused the record, the issue which needs to be decided is whether the petitioner is entitled to the prayer for appointment of an Arbitrator in this petition.

80. Concedingly, the appointment of an Arbitrator is being sought by the petitioner in terms of the MSA executed between the respondent Nos. 1 and 2. It is also a conceded position that the petitioner is not a signatory / party to the MSA.

81. The plea of the learned counsel for the petitioner is that, FA has been executed between the petitioner and the respondent No.1 and as a result thereof, the respondent No.1 is compelling the petitioner for

money, which respondent No.2 owed to it. It is the submission of Ms. Gupta that, FA cannot be severed from the MSA and read selectively. In other words, the nature of both the agreements is such that, they are inter-dependent and as such the disputes involved need to be decided together by reading both agreements jointly.

82. There is no dispute that the FA executed between the petitioner and respondent No.1 consists of an arbitration clause under Clause 13, which contemplate the seat of arbitration at Kolkata. It is also conceded that the respondent No.1 has already filed applications under Sections 9 and 11 of the Act of 1996, for certain interim prayers as well as for appointment of an Arbitrator invoking the arbitration Clause 13 under FA.

83. So it follows, the answer to the issue has to be in the negative for the reason that the petitioner is not a party to the agreement which the petitioner seek to invoke. Hence, in that sense, the arbitration clause in the MSA would only govern the disputes between respondent No.1 and respondent No.2 and not a dispute between the petitioner and respondent No.1.

84. The law in this regard is well settled by the judgment of the Supreme Court in the case of ***S.N. Prasad, Hitek Industries Ltd. (Bihar) (supra),*** wherein, the Supreme Court was concerned with the facts that, whether a guarantor for a loan, who is not a party to the loan agreement containing the arbitration agreement executed between the lender and borrower can be made a party to a reference to an arbitration, in regard to dispute relating to repayment of such loan and subjected to arbitration award. The Supreme Court has in paragraphs

21 to 25, held as under:

> *"21. The first respondent contended that the appellant having agreed to be a guarantor for the repayment of the loan, cannot 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.*
>
> *22. It was also submitted that the letter dated 27.10.1995 guaranteeing the loan of Rs. 75 lakhs was written by the appellant, as a Director of the borrower company; and that as the appellant had already given a guarantee letter dated 27.10.1995, he was not required to execute the tripartite loan agreements containing the arbitration clause; that the appellant was aware of the terms of the loan and was further aware that loan agreements with arbitration clause had to be executed; and that therefore it should be deemed that the appellant had agreed to abide by the terms contained in the loan agreements, including the arbitration clause. We find no merit in these contentions.*
>
> *23. When the appellant gave the guarantee letter dated 27.10.1995, he could not be imputed with the knowledge that the loan agreements which were to be executed in future (on 28.10.1995 and 6.11.1995) would contain an arbitration clause. Further, the appellant did not state in his letter dated 27.10.1995 that he would be bound by the terms of loan agreement/s that may be executed by the borrower. Therefore the question of appellant impliedly agreeing to the arbitration clause does not arise.*
>
> *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.*
>
> *25. As there was no arbitration agreement between the parties (the first respondent and appellant), the impleading of appellant as a respondent in the arbitration proceedings and the award against the appellant in such arbitration cannot be sustained. As a consequence, both the arbitration awards, as against the appellant are liable to be set aside. If the first respondent wants to enforce the alleged guarantee of the appellant, it is open to the first respondent to do so in accordance with law."*
>
> *(emphasis supplied)*

85. Similarly, while considering a similar issue in the case of ***STCI Finance Ltd. (supra)***, this Court has in paragraphs 20, 22 and 23 held as under:

> *"20……..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 subcontract, 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.

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."*
>
> *xxx xxx xxx*

> *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."*
>
> *(emphasis supplied)*

86. The reliance placed by Dr. George in the case of ***Laxmi Civil Engineering Services Ltd. & Ors. (supra)***, wherein in paragraphs 40 to 42 a coordinate Bench of this Court has held as under:-

> *"40. The present case indicates that petitioner no.1 had entered into separate contracts with the Sub-Contractors (petitioner nos.2 to 4) for execution of certain works. Such agreements were entered into, on a principal-to-principal basis. The contention that such contracts must be construed as a single composite transaction between GAIL and the petitioners, is misconceived. GAIL is not a party to the respective contracts entered into between petitioner no.1 and the Sub-Contractors. It had merely granted its approval to petitioner no.1 to engage the Sub-Contractors as Sub-*

> *Contractors in terms of its Contract.*
> *41. The reliance on the decision in the case of* ***Ameet Lalchand Shah v. Rishabh Enterprises*** *(supra), is equally misplaced. In that case, there were four separate agreements entered into between Rishabh Enterprises with three separate companies. Two agreements were with one company and the remaining two agreements were with two different companies. While, three of the agreements contained an Arbitration Clause, one of the agreements did not. The court found that there was one principal agreement (Equipment Lease Agreement) and the remaining three agreements were ancillary agreements. The court also found that parties to the agreements were also the parties to the main agreement – Equipment Lease Agreement and all four agreements were interconnected. It is in that context, the court held that the appellant's application for referring the parties to Arbitration could not be rejected. It is material to note that there was no dispute as to the existence of an Arbitration Agreement between the parties as the main Agreement included an Arbitration Clause. The question was whether disputes pertaining to an ancillary agreement, which was also between some of the parties to the main Agreement could be referred to Arbitration. The decision in that case is wholly inapplicable in the facts of the present case as there is no Arbitration Agreement between GAIL and the Sub-Contractors.*
> *42. In view of the above, this Court is unable to accept that an Arbitration Agreement exists between GAIL and the Sub-Contractors (petitioner nos.2 to 4) and GAIL cannot be compelled to arbitrate with them."*

87. He has also relied on the judgment of this Court in the case of ***Huawei Telecommunications (India) Co. Pvt. Ltd. (supra)*** wherein this Court has in paragraphs 34 and 38 to 40, held as under:-

> *"34. Applying the above said principles of law, it is clear that the Arbitration Agreement between one*

contract cannot be incorporated into another contract, unless there is a clear intention of the parties to do so while entering into a second agreement. The facts of the present case in my view are even on a lower pedestal than the cases referred to above, as in the present case the petitioner while entering into an MOU with ITI had specifically incorporated a separate Arbitration Clause to govern the subcontract, which has been extracted above. The in-built mechanism for reference of the dispute arising between the parties was also mentioned therein, namely, to refer the disputes through International Center for Alternate Dispute Resolution. No part of the MOU even remotely indicates that there was any reference of the Arbitration Clause mentioned in the main Purchase Order in the MOU. Petitioner and ITI had agreed on the disputes and the mechanism with respect thereto that was to be adopted in the future. On the other hand, Clause 20 of the GCC provided a different mechanism of referring the disputes, whereby appointment of the Sole Arbitrator was envisaged by the CMD of BSNL, as well as the disputes that were intended to be referred.

xxxx xxxx xxxx

38. The present case is thus clearly covered by the judgment of the Supreme Court in the case of M.R. Engineers (supra). There is no reference in the MOU which indicates any intent to incorporate the Arbitration Clause in the Mother Purchase Order. BSNL is not a party to the MOU which has an Arbitration Clause between petitioner and ITI only.

39. It is also significant to mention that the Arbitration Clauses are different in the two contracts and clearly the intention of the parties was neither to incorporate the Arbitration Clause of the Purchase Order into the MOU and nor was their any intent to enter into a composite arbitration. As held by the Co-Ordinate Bench in Libra Automotives Private Limited (supra), this Court under Section 11(6) of the Act cannot incorporate an

> *Arbitration Clause for the parties nor rewrite its terms. BSNL is thus right in his contention that no arbitration can be invoked against BSNL with regard to the present Purchase Order.*
>
> *40. In so far as the ITI is concerned, the petitioner is entitled to prefer its claims against the ITI as there is clearly an Arbitration Clause between the parties. From the list of documents, however, placed on record by the petitioner, it cannot be said that the petitioner has invoked arbitration against the ITI. The only notice of invocation that has been placed on record is dated 30.07.2019 and which is against the BSNL. The petitioner cannot therefore seek appointment of an Arbitrator in the present petition even against ITI."*
>
> *(emphasis supplied)*

88. In support of the submission, the learned counsel for the petitioner has primarily placed reliance on the judgments in ***Chloro Controls India Private Limited (supra)*** and ***Vidya Drolia (supra)*** to contend that the composite nature of transaction necessitates a reference of a dispute to the arbitration on the principle that petitioner is not a signatory to the MSA but is a party by way of incorporation by reference.

89. I am unable to agree with the submission made by Ms. Gupta for the reason ***Chloro Controls India Private Limited (supra)*** and ***Vidya Drolia (supra)*** primarily relates to Doctrine of Group of Companies, inasmuch as, the arbitration agreement entered into by a company within a group of companies can bind its non-signatory and affiliates. In other words, a non-signatory or a third party could be subjected to arbitration without his prior consent, but the same would be in exceptional cases and the Court shall examine these exceptions

from the touchstone of direct relationship to the parties signatory to the arbitration agreement, direct commonality of the subject matter and the agreement between the parties being a composite transaction where performance of the principal or mother agreement may not be feasible without the aid and performance of the supplementary or ancillary agreement for achieving the common object and collectively have a bearing on the dispute.

90. That apart, the Court would have to examine whether the composite reference of such parties would serve the ends of justice. It is only in an affirmative answer, the reference of even non-signatory parties would fall within the exceptions.

91. In the MSA, there is no reference to the petitioner by name and that in the arbitration clause, therein, has specific reference to the seat of arbitration but New Delhi is the venue. The same is reproduced as under:

> *"13.* ***DISPUTES***
>
> *In the event of disputes, differences, claims and questions between the Parties hereto arising out of the Master Service Agreement or in any way relating hereto to any term, condition or provision herein mentioned or the construction or interpretation thereof or otherwise in relation hereto, the Parties shall first endeavor to settle such differences, disputes, claims or questions by arbitration of three (3) arbitrators, one each to be appointed by each party, and each such arbitrator shall appoint a third arbitrator who shall act as the chairman of the arbitral panel. The arbitration and conciliation act, 1996 and the rules made there under shall apply to and shall govern the arbitration proceedings. The venue of the arbitration shall be exclusively at New Delhi and the arbitration proceeding shall be conducted in English. The*

decision of the arbitration shall be final and binding on the parties."

(emphasis supplied)

92. Whereas, the FA is an independent agreement wherein the petitioner and respondent No.1 are signatories. That apart, in the agreement, the petitioner herein is referred to as a "Borrower" and the respondent No.1 as "Lender". Moreover, FA has a specific and distinct arbitration clause than that of MSA. In other words, the exclusive jurisdiction has been specifically referred, i.e., seat of arbitration is at Kolkata, which is contrary to the arbitration clause as specified in the MSA. Therefore, the petitioner cannot enunciate the MSA as a mother agreement, and the arbitration under Clause 13 therein, cannot be invoked as the petitioner is not a signatory to it. The arbitration under Clause 13 of the FA is reproduced as under:-

"13. GOVERNING LAW, JURISDICTION AND ARBITRATION

13.1 This Agreement shall be construed in accordance with the laws of India and subject to the arbitration clause below shall be subject to the exclusive jurisdiction of the competent courts in Kolkata.

13.2 In the event of any dispute or difference between the parties under the Agreement, including in relation to the construction or interpretation of this Agreement, the parties shall first endeavor to settle such dispute or difference by amicable negotiations within 30 days of a written notice issued by one party to the other party. If the negotiations do not result in a resolution of the dispute or difference, either party shall be entitled to submit such dispute or difference to arbitration. The Lender shall appoint an arbitrator at its sole discretion or in accordance with the Arbitration and

> *Conciliation Act, 1996 ("Arbitration Act"). Arbitration shall be conducted in accordance with the Arbitration Act. The seat of arbitration shall be Kolkata and the arbitration proceedings shall be conducted in English. The decision of the arbitrator shall be final and binding on the parties."*
>
> *(emphasis supplied)*

93. In so far as the reliance placed by the counsel for the petitioner on the judgment in the case of ***Ameet Lalchand Shah and Ors. (supra)*** is concerned, the same has no applicability in the facts, inasmuch as the facts in the said case are that, on February 1, 2012, respondent No.1, (Rishabh Enterprises) entered into two agreements with M/s Juwi India Renewable Energies Pvt. Ltd., i.e., (i) Equipment and Material Supply Contract for purchase of Power Generating Equipment and (ii) Engineering Installation and Commissioning Contract for installation and commissioning of Solar Plant. Both these agreements contained arbitration clause. The first respondent entered into a sale and purchase agreement dated March 5, 2012 with the second appellant company Astonfield Renewables Private Limited for purchasing CIS Photovoltaic products to be leased to appellant No.3, Dante Energy Pvt. Ltd. to be installed at the Solar Plant at Dongri, District Jhansi, Uttar Pradesh. As per the agreement products were valued for ₹25,16,00,000/-. The second appellant Astonfield received ₹21,40,49,999/- from the respondents under various cheques issued by the Rishabh Enterprises. This agreement does not contain an arbitration clause. An equipment lease agreement dated March 14, 2012 was entered into between the Rishabh Enterprises and Dante Energy Pvt. Ltd. whereby Dante Energy agreed to pay Rishabh Enterprises

₹13,50,000/- as lease rent for March, 2012 and from April, 2012 onwards. The said rent payable was ₹28,26,000/-.

94. The disputes arose between the parties when the respondent alleged that appellant No.3 Dante Energy Pvt. Ltd. has defaulted in payment of rent and that Astonfield committed fraud by inducing Rishabh Enterprises to purchase the products by investing huge amounts. The question arose before the Supreme Court was whether four agreements (para 12.1) are inter-connected to refer the parties to arbitration, though there is no arbitration clause in sale and purchase agreement between Rishabh Enterprises and Astonefield. The Supreme Court has in paragraph 24 held as under:

> *"24. In a case like the present one, though there are different agreements involving several parties, as discussed above, it is a single commercial project namely operating a 2 MWp Photovoltaic Solar Plant at Dongri, Raksa, District Jhansi, Uttar Pradesh. Commissioning of the Solar Plant, which is the commercial understanding between the parties and it has been effected through several agreements. The agreement-Equipment Lease Agreement (14.03.2012) for commissioning of the Solar Plant is the principal/main agreement. The two agreements of Rishabh with Juwi India:(i) Equipment and Material Supply Contract (01.02.2012); and (ii) Engineering, Installation and Commissioning Contract (01.02.2012) and the Rishabh's Sale and Purchase Agreement with Astonfield (05.03.2012) are ancillary agreements which led to the main purpose of commissioning the Photovoltaic Solar Plant at Dongri, Raksa, District Jhansi, Uttar Pradesh by Dante Energy (Lessee). Even though, the Sale and Purchase Agreement (05.03.2012) between Rishabh and Astonfield does not contain arbitration clause, it is integrally connected with the commissioning of the Solar Plant at Dongri, Raksa, District Jhansi, U.P. by Dante Energy. Juwi India, even though, not*

> *a party to the suit and even though, Astonfield and Appellant No. 1-Ameet Lalchand Shah are not signatories to the main agreement viz. Equipment Lease Agreement (14.03.2012), it is a commercial transaction integrally connected with commissioning of Photovoltaic Solar Plant at Dongri, Raksa, District Jhansi, U.P. Be it noted, as per clause(v) of Article 4, parties have agreed that the entire risk, cost of the delivery and installation shall be at the cost of the Rishabh (Lessor). Here again, we may recapitulate that engineering and installation is to be done by Juwi India. What is evident from the facts and intention of the parties is to facilitate procurement of equipments, sale and purchase of equipments, installation and leasing out the equipments to Dante Energy. The dispute between the parties to various agreements could be resolved only by referring all the four agreements and the parties thereon to arbitration."*
>
> *(emphasis supplied)*

95. Suffice to state that, in the said case, the Supreme Court has come to a conclusion that, it is a single commercial contract operating a Solar Plant at Jhansi, Uttar Pradesh and it has been effected through several agreements. It was in that fact situation, the Supreme Court has held that all the agreements are inter-connected and made a reference to the arbitration. It is not such a case in the case in hand.

96. In so far as the judgment in the case of ***Booz Allen and Hamilton Inc. v. SBI Home Finance Limited and Ors., (2011) 5 SCC 532*** is concerned, the said judgment was in the context whether the disputes relating to rights *in rem* are required to be adjudicated by Courts and Public Tribunal being unsuited for arbitration. In the said case, respondent had filed a Suit for Enforcement of Mortgage by Sale. The Supreme Court held that the enforcement of mortgage is right *in rem* binding not only parties, but also the entire the world. Such a right

has to be decided by Courts of Law and not by a Arbitral Tribunal. Even on the scope of Section 11 of the Act of 1996, the Supreme Court held, the Court seized of the Suit on applications under Section 8 and 16 has to decide all aspects of arbitrability. But the Court has drawn a distinction between an application under Section 8 and application under Section 11 of the Act of 1996. It held that while considering application, under Section 11, the Court does not embark upon arbitrability or appropriateness of adjudication by a private forum, once it finds there exist an arbitration agreement, leaves the issue of arbitrability for decision of Arbitral Tribunal. The judgment is clearly distinguishable on facts.

97. Similar issue is in ***Olympus Superstructures Pvt. Ltd. (supra)*** in which, this Court was concerned with two agreements dated March 9, 1994 and one agreement dated September 26, 1994 between the same parties and held, whether the disputes and differences arising under interior design agreement are connected with the disputes and differences arisen from the main contract. The judgment has no applicability as parties to the agreements were the same unlike in the case in hand, where the parties to both the agreements are different, i.e., neither the petitioner is a signatory to the MSA nor the respondent No.2 is signatory to FA. In this regard I may refer to paragraphs 10 and 11 of the judgment of the Supreme Court in the case of ***Jagdish Chander (supra)*** as under:-

> *"10. Learned counsel for the first respondent next contended that clause 16 of the deed of partnership discloses a clear intention on the part of the partners to settle their dispute relating to partnership by an*

alternative dispute resolution process. He pointed out that clause 16 required the partners to "mutually decide the disputes" or "refer the disputes to arbitration". This, according to him, is in the nature of a con-arb agreement, that is, it requires the parties to settle the disputes by negotiations (conciliation and mediation), and failing settlement by such negotiations, refer the disputes to arbitration for settlement. He submitted that the clause provides what Section 89 CPC now statutorily requires. It is contended that if under Section 89 CPC, parties can be mandated to have recourse to alternative dispute resolution processes to settle their disputes, there is no reason why the disputes between the parties in this case should not be referred to ADR process including arbitration under clause 16. This contention, though attractive, has no merit. The object and scope of Section 11 of the Act is specific and narrow. Though the power exercised under Section 11 of the Act has been held to be a judicial power the proceedings relate only to appointment of Arbitral Tribunal. The disputes as such are not before the Chief Justice or his designate for adjudication. Therefore, Section 89 CPC has no application. It should not also be overlooked that even though Section 89 mandates courts to refer pending suits to any of the several alternative dispute resolution processes mentioned therein, there cannot be a reference to arbitration even under Section 89 CPC, unless there is a mutual consent of all parties, for such reference. Be that as it may.

11. The existence of an arbitration agreement as defined under Section 7 of the Act is a condition precedent for exercise of power to appoint an arbitrator/Arbitral Tribunal, under Section 11 of the Act by the Chief Justice or his designate. It is not permissible to appoint an arbitrator to adjudicate the disputes between the parties, in the absence of an arbitration agreement or mutual consent. The designate of the Chief Justice of Delhi High Court could not have appointed the

arbitrator in the absence of an arbitration agreement."
(emphasis supplied)

98. Additionally, I find that the petitioner herein while filing the present petition under Section 11(6) of the Act of 1996 has not even invoked the arbitration clause by issuing a notice under Section 21 of the Act of 1996. The law laid down with regard to the provision invoking the arbitration agreement in the case of ***Hindustan Construction Company Ltd. v. State of Orissa and Ors. 2013 (1) ILR-CUT 548,*** is well settled. In view of my above findings, I am not in agreement with the submissions advanced by the learned counsel for the petitioner without prejudice to the earlier ground.

99. That apart, the respondent No.1 has already invoked arbitration clause under the FA before the High Court at Calcutta by filing applications under Sections 9 and 11(6) of the Act of 1996. Hence the petition, even otherwise, shall not be maintainable before this Court.

100. Therefore, this Court dismiss the present petition. No costs.

V. KAMESWAR RAO, J

MAY 22, 2023*/aky/jg*