SUPREME COURT OF INDIA

Chloro Controls (I)P.Ltd.

Vs.

Severn Trent Water Purification Inc.& Ors

C.A.No.7134 of 2012

(S.H.Kapadia,Swatanter Kumar and A.K.Patnaik,JJ.)

28.09.2012

JUDGMENT

Swatanter Kumar,J.

1. Leave granted.

2. The expanding need for international arbitration and divergent schools of thought, have provided new dimensions to the arbitration jurisprudence in the international field. The present case is an ideal example of invocation of arbitral reference in multiple, multi- party agreements with intrinsically interlinked causes of action, more so, where performance of ancillary agreements is substantially dependent upon effective execution of the principal agreement. The distinguished learned counsel appearing for the parties have raised critical questions of law relatable to the facts of the present case which in the opinion of the Court are as follows :

> "(1) What is the ambit and scope of Section 45 of the Arbitration and Conciliation Act, 1996 (for short the 1996 Act)?
>
> (2) Whether the principles enunciated in the case of *Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya*[1] is the correct exposition of law?
>
> (3) Whether in a case where multiple agreements are signed between different parties and where some contain an arbitration clause and others dont and further the parties are not identically common in proceedings before the Court (in a suit) and the arbitration agreement, a reference of disputes as a whole or in part can be made to the arbitral tribunal, more particularly, where the parties to an action are claiming under or through a party to the arbitration agreement?

(4) Whether bifurcation or splitting of parties or causes of action would be permissible, in absence of any specific provision for the same, in the 1996 Act."

3.Chloro Controls (India) Private Ltd., the appellant herein, filed a suit on the original side of the High Court of Bombay being Suit No.233 of 2004, for declaration that the joint venture agreements and supplementary collaboration agreement entered into between some of the parties are valid, subsisting and binding. It also sought a direction that the scope of business of the joint venture company, Respondent No. 5, set up under the said agreements includes the manufacture, sale, distribution and service of the entire range of chlorination equipments including the electro-chlorination equipment and claimed certain other reliefs as well, against the defendants in that suit. The said parties took out two notices of motion, being Notice of Motion No.553 of 2004 prior to and Notice of Motion No.2382 of 2004 subsequent to the amendment of the plaint. In these notices of motion, the principal question that fell for consideration of the learned Single Judge of the High Court was whether the joint venture agreements between the parties related only to gas chlorination equipment or whether they included electro-chlorination equipment as well. The applicant had prayed for an order of restraint, preventing Respondent Nos. 1 and 2, the foreign collaborators, from acting upon their notice dated 23rd January, 2004, indicating termination of the joint venture agreements and the supplementary collaboration agreement. A further prayer was made for grant of injunction against committing breach of contract by directly or indirectly dealing with any person other than the Respondent No.5, in any manner whatsoever, for the manufacture, sale, distribution or services of the chlorination equipment, machinery parts, accessories and related equipments including electro-chlorination equipment, in India and other countries covered by the agreement. The defendants in that suit had taken out another Notice of Motion No.778 of 2004, under Section 8 read with Section 5 of the1996 claiming that arbitration clauses in some of the agreements governed all the joint venture agreements and, therefore, the suit should be referred to an appropriate arbitral tribunal for final disposal and until a final award was made by an arbitral tribunal, the proceedings in the suit should be stayed. The learned Single Judge, vide order dated 28th December, 2004, allowed Notice of Motion No.553 of 2004 and consequently disposed of Chloro Controls(I) P.Ltd vs Severn Trent Water Purification ... on 28 September, 2012Notice of Motion No.2382 of 2004 as not surviving. Against this order, an appeal was preferred, which came to be registered as Appeal No.24 of 2005 and vide a detailed judgment dated 28th July, 2011, a Division Bench of the High Court of Bombay set aside the order of the learned Single Judge and dismissed both the notices of motion taken out by the plaintiff in the suit.

4. Notice of Motion No.778 of 2004 was dismissed by another learned Single Judge of the High Court of Bombay, declining the reference of the suit to an arbitral tribunal vide order dated 8th April, 2004. This order was again assailed in appeal by the defendants in the suit

and another Division Bench of the Bombay High Court, vide its judgment dated 4th March, 2010, allowed the Notice of Motion No.778 of 2004 and made reference to arbitration under Section 45 of the 1996 Act.

5.The judgments of the Division Benches, dated 4th March, 2010 and 28th July, 2011, respectively, have been assailed by the respective parties before this Court in the present Special Leave Petitions, being SLP(C) No.8950/2010 and SLP(C) No.26514-15/2011, respectively. Thus, both these appeals shall be disposed of by this common judgment.

6. Before we notice in detail the factual matrix giving rise to the present appeals and the contentions raised, it would be appropriate to illustrate the corporate structure of the companies and the scope of the agreements that were executed between the parties to these proceedings. Corporate Structure of the Companies who are parties to lis

7. In order to describe the corporate structure with precision we will explain it diagrammatically as follows:

Severn Trent (Del) Inc.Formerly Known As Severen Trent U.S. Inc.; Name Changed In May 1992 Severn Trent Services (Del) Inc.R-1 Capital Control Co. Inc.Acquired 80% On 15.05.1990 And 20% On 31.03.1994. Name Changed On 1.4.2002 To Severn Trent Water Purification Inc.(Gas Chlo. & Hypogen Product Lines) R-2 - Capital Control (Delaware) Co. Inc. Formed On 21.09.94 Excel Technologies Intl Corp.Acquired In 1998 Original Omnipure And Sanilec Manufacturer Appellant Chloro Control India Pvt. Ltd. Merged Into On 31.03.2003 Shareholders Agreement Jv Capital Control (India) Pvt Ltd.(On 14.11.1995 A New Joint Venture) R-5 - Gas Chlorinators & Hypogen Distributorship And Knowhow Agreement Odn, B.V.Denora North America, Inc.Groupo De Nora Original Seaclor And Seaclor Mac Manufacturer Jv Serven Trent De Nora Llc Sept, 2001 Products Currently Offered Are Omnipure, Sanile 7 Seaclor R-3 Titanor Components Ltd.Distributes Seaclor Mac Product Line R-4 Hi Point Services Pvt Ltd Omnipure, Sanilec Before 1998 Independent Distributor Of Excel Technologies Since Prior To Severn Trents Acquisition Of Excel Technologies Currently, Independent Distributor For Severn Trent Denora Distributes Omnipure And Sanilec Products In India

8. Severn Trent, U.S., Inc. was a company existing under the laws of the State of Pennsylvania, United States of America (for short, U.S.A.). This name came to be changed, in 1992, to Severn Trent (Delaware) Inc., which is the principal parent company. This company owned a 100 per cent subsidiary, Severn Trent Services (Delaware) Inc., U.S.A. Severn Trent Services (Delaware) Inc. owned Capital Control (Delaware) Co. Inc. which was formed on 21st September, 1994. On or about 14th May, 1990, Severn Trent Services PLC, U.K., an erstwhile state-owned water authority, privatized in 1989, expanded its business into

the U.S.A. by acquiring 80 per cent shares in Capital Control Co. Inc. on 15th May 1990 and a further 20 per cent on 31st March 1994. It is in this period that the joint venture agreements with the appellant were negotiated, with the consent of the Severn Trent group, which was, by that time, a majority shareholder in Capital Control Co. Inc. Subsequently, the name of Capital Control Co. Inc., was changed to Severn Trent Water Purification, Inc. (Respondent No.1), with effect from 1st April, 2002. The Severn Trent Water Purification Inc./Capital Control Co. Inc. then came to be merged with Capital Control (Delaware) Co. Inc. (Respondent No. 2), on 31st March, 2003. As a result thereof, Capital Control (Delaware) Co. Inc. ceased to exist. As per the pleadings of the parties, reference to Capital Control Co. Inc. includes reference to Capital Control Co. Inc. as well as Capital Control (Delaware) Co. Inc.

9. The appellant is a company carrying on business under that name and style for the manufacture of chlorination equipments and incorporated under the Indian laws by Madhusudan Kocha (Respondent No.9 herein) and his group (for short, the Kocha Group). This company had been negotiating with Respondent No. 1 for entering into a joint venture agreement, to deal with the manufacture, distribution and sale of gas chlorination equipment and Hypogen electro- chlorination equipment Series 3300, etc. This led to the execution of joint venture agreements between the appellant and Respondent No.1.The joint venture agreements were signed between these companies for constituting a joint venture company under the name and style of Capital Control (India) Pvt. Ltd., with 1,50,000 equity shares of Rs. 10 each and 50 per cent shareholding with each party. These agreements being prior to the merger of Capital Control (Delaware) Co. Inc. with Capital Control Co. Inc. and also prior to the change of name of Capital Control Co. Inc. to Severn Trent Water Purification Inc., 50 per cent of the shares allotted to the foreign collaborators were to be equally divided between Capital Control (Delaware) Co. Inc. and Capital Control Co. Inc. These joint venture agreements were executed between the parties on 16th November, 1995, as already noticed. However, the joint venture company had been incorporated on 14th November, 1995 itself.

10. In the year 1998, Excel Technologies International Corporation came to be acquired by Severn Trent Services (Delaware) Inc. This company was dealing in the manufacture of Omnipure and Sanilec, distinct brands of chlorination products. Later, Excel Technologies entered into a joint venture agreement with De Nora North America Inc. and floated another joint venture company, Severn Trent De Nora LLC in September, 2001 for dealing in the products Omnipure, Sanilec and Seaclor Mac. It may be noticed that Seaclor Mac was a product dealt with and distributed by Titanor Components Ltd., Respondent no.3, and whose original manufacturer was Groupo De Nora; the latter is the parent company of the De nora North America Inc. The distribution rights in respect of all these three products were given

by the joint venture company Severn Trent De Nora LLC to Hi Point Services Pvt. Ltd., Respondent No. 4, for independent distribution of the products for Severn Trent De nora LLC, in India.

11.This corporate structure clearly indicates that Severn Trent Services (Del.) Inc. is the holding company of the companies which have entered into the joint venture agreements, for floating both the companies Capital Controls (India) Pvt. Ltd., as well as Severn Trent De Nora LLC. The disputes have actually arisen between Chloro Controls (India) Pvt. Ltd. and the Kocha Group on the one hand, and Severn Trent Water Purification Inc., the erstwhile Capital Control (Delaware) Co. Inc. and Capital Control Co. Inc. on the other

Details of Agreements

Details of Agreements

S.No.	Date of Agreement	Detail of Agreement	Parties of the Agreement	Whether of the Arbitration Clause Yes
1.	16.11.1995	Shareholder Agreement	1.Capital Control (Delware)Company Inc.(Respondent No.) 2. Chloro Control India Pvt.Ltd.(Appellant)	
2.	16.11.1995	International Distributor Agreement	1. Capital Control Inc(Colmar)Now serven trent Water Purification Inc.(Respondent No.1) 2. Company Control Company Inc . Pvt. Ltd.	No.
		Managing		

3.	16.11.1995	Directors Agreements	Company Control Company Inc . Pvt. Ltd. (Respondent No. 5) Mr. M.B.Khocha	No.
4.	16.11.1995	Financial & Technical Know-how licience Agreement	1. Capital Control Inc(Colmar)Now serven trent Water Purification Inc.(Respondent No.1) 2. Capital Control (Inida)Pvt.Ltd. (Respondent No.5)	Yes Now
5.	16.11.1995	Export Sales Agreement	1. Capital Control (Inida)Pvt.Ltd (Colmar) Serven Trent Water Purification Inc.(Respondent No.1) 2. Capital Control (India) Pvt. Ltd.(Respondent No.5)	Yes Now
6.	16.11.1995	Trademark Registered User Licience Agreement	1.Capital Control Inc(Colmar)Now serven trent Water Purification Inc.(Respondent No.1) 2. Capital Control India	Now

			Pvt.(Respondent No.5)	
7.	16.11.1995	Supplementary Collaboration Agreement	1.Capital Control Inc(Colmar)Now serven trent Water Purification Inc.(Respondent No.1) 2. Capital Control India Pvt. (Respondent No.5)	Now

12. Prior to the formation of the joint venture company, the Chloro Controls Group carried on the business of manufacture and sale of gas chlorination equipments and from 1980 onwards, it developed and commenced the manufacturing of electro-chlorination equipment also. The business was done in the name of Chloro Controls Equipments Company, a sole proprietary concern of Respondent No.9, Mr. M.B. Kocha and it was the distributor in India for the products of the Capital Controls group for more than a decade prior to the formation of the joint venture. On 1st December, 1988, a letter of intent and a letter of understanding were executed between Capital Controls Company Inc., Colmar, Pennsylvania, U.S.A (which name was subsequently changed in the year 2002 to Severn Trent Water Purification Inc., respondent No.1) and respondent no.9 to form a new, jointly-owned company in India, to be called Capital Controls (India) Pvt. Ltd., the respondent No.5 in the present appeals, for the purposes of manufacture, sale and export of chlorination equipments on the terms and conditions as agreed between the parties. The formation of the joint venture company got delayed for some time, because Respondent No.1 informed the appellant that Severn Trent, U.K. and the officers of the Capital Controls Company Inc., Colmar, Pennsylvania, U.S.A. had acquired all the shares of the Capital Controls Company Inc. and this share acquisition permitted them to support their representatives and distributers with continuity. On 14th November, 1995, the joint venture company, Capital Controls (India) Private Ltd.,

Respondent No. 5, was incorporated and registered under the Companies Act, 1956 (for short, the Companies Act).

13. To examine the factual matrix of the case in its correct perspective, reference to pleadings of the parties would be appropriate.

14. The petitioner is a Private Limited Company and its shares are entirely held by Respondent/Defendant Nos.9 to 11 (Kocha/Chloro Control Group). Respondent No.1Company was earlier known as Capital Control Company Inc. and in or about the year 1990 the Capital Controls Group came to be acquired by Severn Trent Services PLC (UK), originally a State owned water authority and following privatization from the UK Government in 1989, it proceeded to build a product and services business from the US beginning with the acquisition of the Capital Controls Group. The name of the first respondent was changed to Severn Trent Water Purification Inc. with effect from 1st April, 2002. Thus, Respondent Nos.1 and 2 became the group companies and were earlier part of the Capital Controls Group (hereinafter referred to as the Capital Controls/Severn Trent Group). Till January 1999, the respondent Nos.1 and 2 developed and sold electro¬chlorination equipment under the brand name Hypogen and from January 1999 onwards, the said brand was replaced by the brands Sanilec and Omnipure. Respondent Nos.1 and 2 carried on the business of manufacture, supply, sale and distribution of chlorination equipments, including gas and electro-chlorination equipments. Respondent No.3 is a company incorporated under the Companies Act and engaged in the business of manufacture and marketing of electro-chlorination equipment. In or about the year 1989-90, the said Respondent no.3 was floated as a joint venture in technical and financial collaboration with the De Nora group of Italy which held 51% of the equity share capital of the said respondent. Respondent No.4 is a Private Limited Company incorporated under the Companies Act and carried on business in electro-chlorination equipments. It had a tie-up with an American Company called Excel Technologies International Inc. which was engaged in the business of electrolytic disinfection equipment.

15. Respondent No.5, i.e., Capital Controls (India) Private Ltd. is a Company incorporated under the Companies Act pursuant to the joint venture agreements dated 16th November, 1995 executed between the appellant and respondent no.9 on the one hand and the respondent nos.1 and 2 on the other. 50 per cent of the share capital of Respondent No.5 is held by the appellant and balance of 50 per cent is held by Respondent No.2. Thus, the appellant and Respondent No.2 are the joint venture partners who have together incorporated the Respondent No.5 company.

16. Respondent Nos.6 and 8 are the Directors of the Respondent No.5 Company, appointed as such by the Capital Controls Group. Respondent No.7 is the Chairman also appointed by the Capital Controls Group, but has no casting vote. Respondent Nos.9 to 11 are the Directors of the Respondent no.5 company, nominated by the Kocha Group/Chloro Controls Group and Respondent No.9 is the Managing Director of the said joint venture.

17. It appears that the joint venture company, Respondent no.5, was incorporated on 14th November, 1995. As discussed above, the joint venture agreements were primarily a project between Respondent Nos. 1 and 2 on the one hand and the appellant company along with its proprietor, Respondent No. 9, on the other. The purpose of these joint venture agreements as indicated in the Memorandum of Association of this joint venture company was to design, manufacture, import, export, act as agent, marketing etc. of gas and electro-chlorination equipments. In order to achieve this object, the parties had decided to execute various agreements. It needs to be emphasized at this stage itself that, as is clear from the above narrated chart, the agreements had been signed between different parties, each agreement containing somewhat different clauses. Therefore, there is a need to examine the content and effect of each of the seven agreements that are stated to have been signed between different parties. Content, scope and purpose of the agreements subject matter of the present appeals

18. The parties to the proceedings, except respondent Nos. 3 and 4, were parties to one or more of the seven agreements entered into between the parties. This includes the Principal Agreement, i.e., the Shareholders Agreement, the Financial and Technical Know-how License Agreement, the International Distributor Agreement, Exports Sales Agreement, Trademark Registered User License Agreement and Managing Directors Agreement, all dated 16th November, 1995. Lastly, the parties also entered into and executed a Supplementary Collaboration Agreement in August, 1997. We have already noticed that except respondent Nos.3 and 4 who were not signatory to any agreement, all other parties were not parties to all the agreements but had signed one or more agreement(s) keeping in mind the content and purpose of that agreement.

19. Now we shall proceed to discuss each of these agreements. Share Holders Agreement

20. The Shareholders Agreement dated 16th November, 1995 was entered into and executed between the Capital Control (Delaware) Co. Inc., respondent No. 2, on the one hand and Chloro Controls (India) Private Ltd., the appellant company run by the Kocha/ Capital Controls group and Mr. M.B. Kocha, respondent No. 9, on the other. As is apparent from the pleadings on record, these two groups had negotiated for starting a joint venture company in India and for this purpose they had entered into the Shareholders Agreement. The main object of this agreement was to float a joint venture company which would be responsible for

manufacture, sale and services of the products as defined in the Financial & Technical Know-How License Agreement, in terms of clause 1 of the Agreement. The Agreement was subject to obtaining all necessary approvals, licenses and authorization from the Government of India, as the joint venture company under the name and style of Capital Control India Pvt. Ltd. was to be registered as a company with its office located in India at Bombay and to carry on its business in India. The plant was to be taken on lease. As already noticed, the authorized capital of the company was Rs.5 million, consisting of equity shares of Rs.10 each. In terms of clause 7, Capital Controls, which was the short form for Capital Control (Delaware) Co. Inc., appointed the joint venture company as a distributor in India of the products manufactured by it, subject to the terms and conditions of the International Distributor Agreement attached to that Agreement as Appendix II. Directors to the joint venture company were to be nominated for a period of three years in accordance with clause 8 of the Agreement. Clause 14 made it obligatory for the parties to ensure that the joint venture company entered into the Financial and Technical Know-How License Agreement with Capital Controls, subject to which, as mentioned above, the joint venture company was to have the right and license to manufacture the specified products in India. The Financial and Technical Know-How License Agreement, which was annexed to the Principal Agreement as Appendix IV, was to be executed relating to sale and purchase of chlorination equipment assets. This Agreement had to be construed and interpreted in accordance with the laws of the Union of India in terms of clause 29. Further clause 21 related to termination of this Principal Agreement. In terms of this clause, it was agreed that the Agreement was to continue in force and effect for so long as each party held not less than twenty-six per cent (26%) of the total paid- up equity shares of the company or in the event that the company failed to achieve a cumulative sales volume of Rs.120 million over three years and cumulative profit of fifteen per cent (15%) over three years from signing of the Agreement. Either party had the option to terminate the agreement and dispose of the shares as provided in the terms thereof. Material breach of the Agreement or a deadlock regarding the management of the Company were, inter alia, the contemplated grounds for termination of the Agreement, whereby the party not in default could terminate the Agreement by giving notice in writing to the other party. The period of notice in the event of a material breach was 90 days from the date of such notice. Clause 21.3 provided that in the event of the termination of the Agreement, the joint venture company would be wound up and all obligations undertaken by Chloro Controls under different agreements would cease with immediate effect. In such an eventuality, even the name of the joint venture company was required to be changed and the word Capital, either individually or in combination with other words, was to be removed.

21. Two other very material clauses of this Agreement, which require the attention of this Court, are clauses 4 and 30. In terms of clause 4.5, the Kocha Group and their company Chloro Controls were bound not to engage themselves, directly or indirectly, or even have financial interest in the manufacture, sale or distribution of chlorination equipment which were similar to those manufactured by the joint venture company during the term of the Agreement. In terms of clause 30, all or any disputes or differences arising under or in connection with the Agreement between the parties were liable to be settled by arbitration, in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce (for short, the ICC), by three arbitrators designated in conformity with those Rules. The arbitration proceedings were to be held in London, England and were to be governed by and subject to English laws.

22. As is clear from the above terms and conditions of this Agreement, it was treated as a principal agreement executed between the parties and other agreements, like the Financial & Technical Know- How License Agreement, Trademark Registered User License Agreement, International Distributor Agreement, Managing Directors Agreement and Export Sales Agreements were not the only anticipated agreements to be executed between the parties, but their drafts and necessary details had been annexed as Appendix I to VII of the shareholder agreement. The other Agreements were only required to be signed by the parties who, as per the Shareholders Agreement, were required to sign such agreement. The Arbitration Clause of the Shareholders Agreement reads as under:

> "Any dispute or difference arising under or in connection with this Agreement, or any breach thereof, which cannot be settled by friendly negotiation and agreement between the parties, shall be finally settled by arbitration conducted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three arbitrators designated in conformity with those Rules. The arbitration proceedings shall be held in London, England and shall be governed by and subject to English law. Judgment upon the award rendered may be entered in any court of competent jurisdiction. International Distributor Agreement

23. The International Distributor Agreement has been mentioned as Appendix II to the Shareholders Agreement. The International Distributor Agreement was executed on the same day and entered into between Capital Controls Company Inc., respondent No.1 and the joint venture company Capital Controls India Pvt. Ltd., respondent no.5. Under this Agreement, the joint venture company was appointed as the exclusive distributor of products in the territory and for the term provided under clause 10 of that Agreement. The specified territory was India, Afghanistan, Nepal and Bhutan but the agreement also stated that exports to other countries were not permissible except with the specific authorization by respondent No.1.

Besides providing the rights and duties of the Distributors, this Agreement also stated the schedule for delivery of products/orders, the prices payable, commissions and inspection. It also provided for the terms of payment. Distributors orders of products were subject to acceptance by the seller at its offices and the seller reserved his right, at any time, to cease manufacture as well as offering for sale any product and to change the design of product.

24. This distributorship right was non-assignable and was exclusively between the distributor and the seller. The relationship between the parties was agreed to be that of a seller and purchaser. Clause 11 of the Agreement then clearly postulated that the distributor was an independent contractor and not joint venture or partner with an agent or employee of the seller. Clause 13 provided that the Agreement contained the entire understanding between the parties with respect to that subject matter and superseded all negotiations, discussions, promises or agreements, prior to or contemporaneous with this Agreement.

25. Further, this Agreement contained the confidentiality clause as well as the non-competition clause being clauses 16 and 18, respectively. The latter specified that the distributor shall not, directly or indirectly, sell, manufacture or supply products similar to any of the products or engage, directly or indirectly, in any business the same as or similar to that of seller, except subject to the conditions of the Agreement.

26. In terms of clause 20, the agreement between the parties was to remain confidential and not to be discussed, shown to or filed with any Government agencies without the prior consent of the seller in writing. This Agreement did not contain any arbitration clause, but it did provide a jurisdiction clause i.e. clause 21, which read as under:

> "The construction, interpretation and performance of this Agreement and all transactions under it shall be governed by and interpreted under the laws of the State of Pennsylvania, U.S.A., and the parties hereto agree that each shall be subject to the jurisdiction of, and any litigation hereunder shall be brought in, any federal or state court located in the Eastern District of the Commonwealth of Pennsylvania, and that the resolution of such litigation by such court shall be binding upon the parties.

27. We may notice here that the International Distributor Agreement was not only executed in furtherance to Clause 7 of the Shareholders Agreement but in that clause itself it was also stated to be annexed thereto as Appendix II. The Distributor Agreement was liable to be renewed as long as the Distributor i.e. Capital Controls, held at least twenty-six per cent (26%) of the shares in the joint venture company. Managing Directors Agreement

28. Clause 8.6 of the Shareholders Agreement had provided for appointment or reappointment of the Managing Director or whole time Director by mutual consent. Subject

to the provisions of the Companies Act, it was agreed that Mr. Kocha would be appointed as the first Managing Director of the Company for an initial period of 3 years and on such terms and conditions as were specified in Appendix III, i.e., the Managing Directors Agreement of the same date. In other words, the Managing Directors Agreement had been executed between joint venture company, Capital Control India Pvt. Ltd. and Mr. M.B. Kocha, on terms already agreed to between the parties to the Shareholders Agreement.

29. The joint venture company, which is stated to have been incorporated on 14th November, 1995, held Board Meeting on 16th November, 1995 and as contemplated under Clause 8.6 of the Shareholders Agreement, appointed Mr. Kocha as the Managing Director of the Company for three years commencing from 1st April, 1996. This Managing Directors Agreement spelt out the powers which the Managing Director could exercise and more specifically, under Clause 3, the powers which the Managing Director could exercise only with the prior approval of the Board of Directors of the Joint Venture Company. For instance, under Clause 3 (k), the Managing Director was not entitled to undertake any new business or substantially expand the business contemplated thereunder except with the approval of the Board of Directors. Further, clause 6 contained a non-compete clause requiring Mr. Kocha not to run any similar business for two years after the date of termination of the Agreement.

30. This Agreement also did not contain any arbitration agreement and provided no terms which were not within the contemplation of clause 8.7 of the Shareholders Agreement. Chloro Controls (I) P.Ltd vs Severn Trent Water Purification ... on 28 September, 2012 Export Sales Agreement

31. Export Sales Agreement was again singed between the Chloro Control India Pvt. Ltd. and Capital Control Co. Inc., the foreign partner to the joint venture. This Agreement, on its bare reading, presupposes the existence and working of the joint venture company. The products required to be manufactured by the joint venture company under the Shareholders Agreement as well as those stated in Exhibit 1 of this Agreement were to be exported to different countries by Capital Control Company Inc. which was required to export those goods and execute such orders as per the terms and conditions of this Agreement, except in countries specified in Exhibit 2 to the Agreement. It is noteworthy that the export could be effected to all countries covered under the Territory excluding the countries specified in Ext. 2 of the agreement which was completely in consonance with the execution and performance of Shareholder Agreement and the International Distributor Agreement executed between the parties. This Agreement stipulated distinct terms and conditions which had to be adhered to by the parties while the Capital Control Company Inc. was to act as sole and exclusive agent for sale of the products. The products under the Agreement meant design, supply, installation commissioning and after-sale services of chlorination systems and equipment related

products manufactured by the Joint Venture Company. The services under the Agreement could be performed by Capital control Co. Inc. itself or through its affiliated corporation or duly appointed sales agents and distributors. In terms of Clause 17 of the Agreement, it was to be construed and interpreted in accordance with the laws in the State of Pennsylvania, U.S.A. It specifically contained an arbitration clause (clause 18) that read as under:

> "Any dispute of difference arising under or in connection with this Agreement, or any breach thereof, which cannot be settled by friendly negotiation and agreement between the parties shall be finally settled by arbitration conducted in accordance with the Rules of American Arbitration Association. The arbitration proceedings shall be held in Pennsylvania, U.S.A. Judgment upon the award rendered may be rendered may be entered in any court of competent jurisdiction. Financial and Technical Know-how License Agreement and Trademark Registered User Agreement

32. Now, we shall deal with both these agreements together as both these agreements are inter-dependent and one finds elaborate reference to one in the other. Furthermore, both these agreements have been entered into and executed between Capital Control Co. Inc. on the one hand and the joint venture company on the other.

33. Under clause 14 of the Shareholders Agreement, it was required of the parties to cause the joint venture company to enter into the Financial and Technical Know-How License Agreement with the Capital Controls under which the latter was to grant the joint venture company the right and license to manufacture the products in India in accordance with the Technical Know-How and other technical information possessed by Capital Controls. Clause 18 of the Principal Agreement also referred to this agreement and postulated that if the Government of India did not grant permission for the terms of foreign collaboration contained in this agreement, even the Principal Agreement, i.e. the Shareholders Agreement would be liable to be terminated without giving rise to any claim for damages. Both these clauses provided that this Agreement was attached to the Principal Agreement Chloro Controls(I) P.Ltd vs Severn Trent Water Purification ... on 28 September, 2012 itself and had been referred to as the License Agreement, for short.

34.We may refer to certain terms of this agreement which would indicate that the terms and conditions of the Principal Agreement were to be implemented through this Agreement. Besides providing the obligations of the Capital Controls (respondent no.5), it also stipulated that the licensee, i.e. the joint venture company would be free to manufacture the products under the said patent even after the expiry of the Agreement. Under clauses 9 and 10 of the Agreement, obligations of the licensee were stated and it required the licensee to maintain quality comparable to corresponding products made by Capital Controls in USA and to allow

free access and information to Capital Controls. The products manufactured by the licensee whose quality was approved by Capital Controls could be marked with the legend, Manufactured in India under license from Capitals Control Company Inc. Colmar, Pennsylvania, USA. However, if the agreement was terminated, the licensee was not to use the trademark and legend.

35. As stated, the purpose of this Agreement was that the licensee desired to obtain the right and license to manufacture the products in accordance with the Technical Know-How owned or acquired by Capital Controls and for which that company was willing to grant license on the terms and conditions stated in that Agreement. The first and foremost restriction was that the rights under the agreement were non- transferable and the right was restricted to sell the products exclusively in India and the countries listed in the Appendix to the Agreement. The Agreement also contained a non-competing clause providing that the licensee must not manufacture or have manufactured for it, sell or offer for sale or be financially interested in similar products without prior written permission of Capital Controls. Respondent no.1 had also agreed that its affiliated companies would sell the product in India only through the licensee. The Agreement provided for payment of royalties under clause 11.

36. Another very significant clause of this Agreement was the Term and Termination clause. The agreement was to continue in force for ten years from the date it was filed with the Reserve Bank of India, subject to earlier termination in terms of clause 15.2. Clause 14.2 provided practically for the conditions of termination of this Agreement similar to those contemplated for the Share Holders Agreement. Neither any modification/amendment of this Agreement nor any waiver of its terms and conditions was to be binding upon the parties unless made in writing and duly executed by both the parties. Appendix I to this agreement recorded the products which the joint venture company was to manufacture. In the event of dispute, the parties were expected to settle it by friendly negotiations, failing which it was to be referred to the ICC, by three Arbitrators designated in conformity with the relevant Rules. Clause 26, the Arbitration clause, read as under:-

> "Any dispute or difference arising under or in connection with this Agreement, or any breach thereof, which cannot be settled by friendly negotiation and agreement between the parties shall be finally settled by arbitration conducted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three arbitrators designated in conformity with those Rules. The Arbitration proceedings shall be held in London, England and shall be governed by and subject to English Law. Judgment upon the award rendered may be entered in Chloro

Controls(I) P.Ltd vs Severn Trent Water Purification ... on 28 September, 2012 any court of competent jurisdiction.

37. Clauses 15.1 and 15.2 of the Principal Agreement referred to the Trademark Registered User License Agreement. Firstly, it is provided that respondent no.9, Mr. Kocha and Chloro Controls acknowledged that Capital Controls was the sole owner of certain trademarks and trade- names used by Capital Controls in connection with the sale of the products. Besides agreeing that they would not adopt, use or register as a trademark or tradename any word or symbol, which in the opinion of Capital Controls is confusingly similar to their trademarks, there the joint venture company was required to enter into a Trademark Registered User License Agreement for obtaining the right to use certain trademarks and tradenames and it was further specifically provided that the said agreement formed part of the Financial and Technical Know-How License Agreement.

38. The Trademark Registered User Agreement, as already noticed, was executed between the respondent no.1 and respondent no.5, the joint venture company. The relationship between the parties under this agreement was contractual and respondent no.1 had agreed to grant user permission to use the trademarks, subject to the terms and conditions specified in the agreement. The agreement was executed with the clear intention that the license owner (respondent No. 1) would provide its secret drawings, plans, specifications, test data, formulae and other manufacturing procedures and as well as technical know-how for assembly, manufacture, quality control and testing of goods to the licensee, the joint venture company. The agreement dealt with various aspects including grant of non-exclusive right to use the trademarks in relation to the goods in the territory as the registered user of the trademarks. In terms of clause 10 of the agreement, the joint venture company was not to acquire any ownership interest in the trademarks or registrations thereof by virtue of use of trademark and it was specifically agreed that every permitted use of trademarks by the user would enure to the benefit of the licensor company. This Agreement was to terminate automatically in the event the License Agreement i.e. the Financial and Technical Know-How License Agreement, was terminated for any reason. Clause 13 also provided that the permitted use of the trademarks did not involve the payment of any royalty or other consideration, other than the royalties payable under the Financial and Technical Know-How License Agreement by joint venture company to the licensor company. This agreement was terminable on the conditions stipulated in clause 16, which again were similar to the termination clause provided in other agreements. This Agreement did not contain an arbitration clause. Supplementary Collaboration Agreement

39. The last of the documents in this series which requires to be mentioned by the Court is the Supplementary Collaboration Agreement. Any joint venture agreement in India which is

in collaboration with a foreign partner can be commenced only after obtaining the permission of the Government of India. The parties herein had already executed a joint venture agreement dated 16th November, 1995. The company obtained the permission of the Government of India vide its letter No. FC-II 830(96)245(96) dated 11th October, 1996 amended on 21st April, 1997. The company then commenced the operation and business of the joint venture company with effect from 1st April, 1997.

40. In the letter by the Government of India dated 11th October, 1996, besides noticing the items of manufacture activity covered by the foreign collaboration agreement, foreign equity participation being 50% and other conditions which had been specifically postulated, under clause 7 of the letter it was specified that the approval letter was made a part of the foreign collaboration agreement executed between the parties and only those provisions of the agreement which were covered by the said letter or which were not at variance with the said letter would be binding on the Government of India or the Reserve Bank of India. Thus, the parties were directed to proceed to finalize the agreement.

41. Vide its letter dated 21st December, 1996, the joint venture company had written to the Ministry of Industry, Department of Industrial Policy and Promotion, Government of India, requesting to amend point No. 2 of the above-mentioned approval letter. The request was to widen the scope of the manufacture activities covered by the foreign collaboration agreement. The company wished to add the manufacture of gas and electro-chlorination equipments, amongst other stated items. The other amendment that was sought for was increase in the authorized share capital from Rs.25 lakhs to paid-up capital of 50 lakhs in the joint venture company. Both these requests of the joint venture company were accepted by the Government of India vide their letter dated 21st April, 1997 and clauses (2), (3) and (4) of the earlier approval letter dated 11th October, 1996 were modified. All other terms and conditions of the approval letter remained the same. The Government of India had asked for acknowledgement of the said letter.

42. In furtherance to this letter of the Government of India, the joint venture company and the respondent no.2 executed this Supplementary Collaboration Agreement. The important part of this one- page agreement is we hereby conform that we shall adhere to the terms and conditions as stipulated by the Government of India. Letter No. FC.II: 830(96) 295(96) dated 11.10.1996, amended 21.04.1997. It also stated that the companies had entered into the joint venture agreement dated 16th November, 1995 and had commenced their operation with effect from 1st April, 1997. In other words, the Supplementary Collaboration Agreement was a mere confirmation of the previous joint venture agreement. By this time i.e., somewhere in

August 1997, all other agreements had been executed, the joint venture company had come into existence and, in furtherance to those agreements, it had commenced its business.

43. As we have already noticed under the head Corporate Structure, the name of Respondent No. 1, Capital Control Co. Inc. was changed to Severn Trent Water Purification Inc. with effect from 1st April, 2002. Later on, respondent no.2, Capital Control (Delaware) Co. Inc. was merged with the respondent no.1 on 31st March, 2003. Thus, for all purposes and intents, in fact and in law, interest of respondent no.1 and 2 was controlled and given effect to by Severn Trent.

44.On this issue, version of the respondents had been disputed in the earlier round of litigation between the parties where respondent No. 1, Severn Trent Water Purification Co. Inc., USA, had filed a petition for winding up respondent No. 5-Chloro Controls India Pvt. Ltd., the joint venture company, on just and equitable ground under Section 433(j) of the Companies Act. In this petition, specific issue was raised that merger of Capital Controls (Delaware) Co. with Severn Trent was not intimated to the respondent No. 5 company prior to the filing of the arbitration petition by Severn Trent under Section 9 of the 1996 Act as well as that Severn Trent was not a share holder of the joint venture company and thus had no locus standi to file the petition. This Court vide its judgment dated 18th February, 2008 in Civil Appeal No. 1351 of 2008 titled Severn Trent Water Purification Inc. v. Chloro Control (India) Pvt. Ltd. and Anr. held that the winding up petition by Severn Trent Water Purification Inc. was not maintainable as it was not a contributory. But the question whether that company was a creditor of the joint venture company was left open.

45. At this very stage, we may make it clear that we do not propose to deal with any of the contentions raised in that petition whether decided or left open, as the judgment has already attained finality. In terms of the settled position of law, the said judgment cannot be brought in challenge in the present proceedings, collaterally or otherwise.

46. Certain disputes had already arisen between the parties that resulted in termination of the joint venture agreements. Vide letter dated 21st July, 2004, Severn Trent Services informed respondent no.9, respondent no.5 and Chloro Controls India Pvt. Ltd., the present appellant, that they had failed to remedy the issues and grievances communicated to them in their previous correspondences and meetings and also failed to engage in any productive negotiation in this connection and therefore, they were terminating from that very day, the joint venture agreements executed between them and the appellant company, which included agreements stated in that letter i.e. the Shareholders Agreement, the International Distributor Agreement, the Financial and Technical Know-How License Agreement, the Export Sales Agreement and the Trademark Registered User Agreement, all dated 16th November, 1995

and requested them to commence the winding up proceedings of the joint venture company, respondent No. 5. They were also called upon to act in accordance with the terms of the agreement in the event of such termination. It may be noticed here itself that prior to the serving of the notice of termination, a suit had been instituted by the appellant in which application under Section 8/45 of the 1996 Act was filed. Contentions of the learned Counsel appearing for the parties in the backdrop of above detailed facts

47. The appellant had filed a derivative suit being Suit No. 233 of 2004 praying, inter alia, for a decree of declaration that the joint venture agreements and the supplementary collaboration agreement are valid, subsisting and binding and that the scope of business of the joint venture company included the manufacture, sale, distribution and service of entire range of chlorination equipments including electro- chlorination equipment. An order of injunction was also obtained restraining respondent Nos. 1 and 2 from interfering in any way and/or preventing respondent No.5 from conducting its business of sale of chlorination equipments including electro-chlorination equipment and that they be not permitted to sell their products in India save and except through the joint venture company, in compliance of clause 2.5 of the Financial and Technical Know-How License Agreement read with the Supplementary Collaboration Agreement. Besides this, certain other reliefs have also been prayed for.

48. After the institution of the suit, as already noticed, the respondent Nos.1 and 2 had terminated the joint-venture agreements vide notices dated 23rd January, 2004 and 21st July, 2004. Resultantly, in the amended plaint, specific prayer was made that both these notices were wrong, illegal and invalid; in breach of the joint venture agreements and of no effect; and the joint venture agreements were binding and subsisting. To be precise, the appellant had claimed damages, declaration and injunction in the suit primarily relying upon the agreements entered into between the parties. In this suit, earlier interim injunction had been granted in favour of the appellant, which was subsequently vacated at the appellate stage. The respondent Nos.1 and 2 filed an application under Section 8 of the Act, praying for reference of the suit to the arbitral tribunal in accordance with the agreement between the parties. This application was contested and finally decided by the High Court in favour of respondent Nos.1 and 2, vide order dated 4th March, 2010 making a reference of the suit to arbitration.

49. It is this Order of the Division Bench of the High Court of Bombay that has given rise to the present appeals before this Court. While raising a challenge, both on facts and in law, to the judgment of the Division Bench of the Bombay High Court making a reference of the entire suit to arbitration, Mr. Fali S. Nariman, learned senior counsel appearing for the appellant, has raised the following contentions:

"1. There is inherent right conferred on every person by Section 9 of the Code of Civil Procedure, 1908, (for short CPC) to bring a suit of a civil nature unless it is barred by a statute or there was no agreement restricting the exercise of such right. Even if such clause was there (is invoked), the same would be hit by Section 27 of the Indian Contract Act, 1872 and under Indian law, arbitration is only an exception to a suit and not an alternative to it. The appellant, in exercise of such right, had instituted a suit before the Court of competent jurisdiction, at Bombay and there being no bar under any statute to such suit. The Court could not have sent the suit for arbitration under the provisions of the 1996 Act.

2. The appellant, being dominus litus to the suit, had included respondent Nos.3 and 4, who were necessary parties. The appellant had claimed different and distinct reliefs. These respondents had not been added as parties to the suit merely to avoid the arbitration clause but there were substantive reliefs prayed for against these respondents. Unless the Court, in exercise of its power under Order I, Rule 10(2) of the CPC, struck out the name of these parties as being improperly joined, the decision of the High Court would be vitiated in law as these parties admittedly were not parties to the arbitration agreement.

3. On its plain terms, Section 45 of the 1996 Act provides that a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration. The expression party refers to parties to the action or suit. The request for arbitration, thus, has to come from one of the parties to the suit or action or any person claiming through or under him. The Court then can refer those parties to arbitration. The expression parties used under Section 45 would necessarily mean all the parties and not some or any one of them. If the expression parties is not construed to mean all parties to the action and the agreement, it will result in multiplicity of proceedings, frustration of the intended one-stop remedy and may cause further mischief. Judgment of the High Court in referring the entire suit, including the parties who were not parties to the arbitration agreement as well as against whom the cause of action did not arise from arbitration agreement, suffers from error of law.

4. The 1996 Act is an amending and consolidating Act being an enactment setting out in one statute the law relating to arbitration, international commercial arbitration and enforcement of foreign arbitral awards. Further, the 1996 Act has no provision like Section 34 of the Arbitration Act, 1940 (for short 1940 Act). In Section 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961 (for short 1961 Act), there

existed a mandate only to stay the proceedings and not to actually refer the parties to arbitration. Thus, the position before 1996 in India, as in England, permitted a partial stay of the suit, both as regards matters and parties. But after coming into force of the 1996 Act, it is no longer possible to contend that some parties and/or some matters in a suit can be referred to arbitration leaving the rest to be decided by another forum.

5. Bifurcation of matters/cause of action and parties is not permissible under the provisions of the 1996 Act. Such procedure is unknown to the law of arbitration in India. The judgment of this Court in the case of Sukanya Holdings Pvt. Ltd. (supra) is a judgment in support of this contention. This judgment of the Court is holding the field even now. In the alternative, it is submitted that bifurcation, if permitted, would lead to conflicting decisions by two different forums and under two different systems of law. In such situations, reference would not be permissible.

6. In the alternative, reference to arbitral tribunal is not possible in the facts and circumstances of the present case. Where three major agreements, i.e., Managing Director Agreement, Trademark Registered User Agreement and Supplementary Collaboration Agreement do not have any arbitration clause, there the International Distributor Agreement exclusively provides the jurisdiction for resolution of dispute to the federal or state courts in the Eastern District of the Commonwealth of Pennsylvania, USA. This latter agreement, thus, provided for resolution of disputes under a specific law and by a specific forum. Thus, for uncertainty and indefiniteness, the alleged arbitration clause is unenforceable. Thus, in the present case, out of all the agreements signed between different parties, four agreements, i.e., Managing Director Agreement, International Distributor Agreement, Trademark Registered User Agreement and the Supplementary Collaboration Agreement, have no arbitration clause. Furthermore, different agreements have been signed by different parties and respondent No.9 is not a party to some of the agreements containing/not containing an arbitration clause. In any case, respondent Nos.3 and 4 are not party to any of the Agreements and the cause of action of the appellant against them is limited to the scope of International Distributor Agreement vis-a-vis the products covered under the joint-venture agreement. On these contentions, it is submitted that the judgment of the High Court is liable to be set aside and no reference to arbitral tribunal is possible. Also, the submission is that, within the ambit and scope of Section 45 of the 1996 Act, multiple agreements, where some contain an arbitration clause and others dont, a composite reference to arbitration is not permissible. There has to be clear intention of the parties to refer the dispute to arbitration."

50. Mr. Harish Salve, learned senior counsel, while supporting the judgment of the High Court for the reasons stated therein, argued in addition that the submissions made by Mr. F.S. Nariman, learned senior counsel, cannot be accepted in law and on the facts of the case. He contended that :

> "i) Under the provisions of the 1996 Act, particularly in Part II, the Right of Reference to Arbitration is indefeasible and therefore, an interpretation in favour of such reference should be given primacy over any other interpretation.
>
> ii) In substance, the suit and the reliefs claimed therein relate to the dispute with regard to the agreed scope of business of the joint venture company as regards gas based chlorination or electro based chlorination. This major dispute in the present suit being relatable to joint venture agreement therefore, execution of multiple agreements would not make any difference. The reference of the suit to arbitral Tribunal by the High Court is correct on facts and in law.
>
> iii) The filing of the suit as a derivative action and even the joinder of respondent Nos.3 and 4 to the suit were primarily attempts to escape the impact of the arbitration clause in the joint venture agreements. Respondent Nos. 3 and 4 were neither necessary nor appropriate parties to the suit. In the facts of the case the party should be held to the bargain of arbitration and even the plaint should yield in favour of the arbitration clause.
>
> iv) All agreements executed between the parties are in furtherance to the Shareholders Agreement and were intended to achieve only one object, i.e., constitution and carrying on of business of chlorination products by the joint venture company in India and the specified countries. The parties having signed the various agreements, some containing an arbitration clause and others not, performance of the latter being dependent upon the Principal Agreement and in face of clause 21.3 of the Principal Agreement, no relief could be granted on the bare reading of the plaint and reference to arbitration of the complete stated cause of action was inevitable.
>
> v) The judgment of this Court in the case of Sukanya (supra) does not enunciate the correct law. Severability of cause of action and parties is permissible in law, particularly, when the legislative intent is that arbitration has to receive primacy over the other remedies. Sukanya being a judgment relatable to Part 1 (Section 8) of the 1996 Act, would not be applicable to the facts of the present case which exclusively is covered under Part II of the 1996 Act.

vi)The 1996 Act does not contain any restriction or limitation on reference to arbitration as contained under Section 34 of the 1940 Act and therefore, the Court would be competent to pass any orders as it may deem fit and proper, in the circumstances of a given case particularly with the aid of Section 151 of the CPC.

vii) A bare reading of the provisions of Section 3 of the 1961 Act on the one hand and Section 45 of the 1996 Act on the other clearly suggests that change has been brought in the structure and not in the substance of the provisions. Section 3 of the 1961 Act, of course, primarily relates to stay of proceedings but demonstrates that the plaintiff claiming through or under any other person who is a party to the arbitration agreement would be subject to the applications under the arbitration agreement. Thus, the absence of equivalent words in Section 45 of 1996 Act would not make much difference. Under Section 45, the applicant seeking reference can either be a party to the arbitration agreement or a person claiming through or under such party. It is also the contention that a defendant who is neither of these, if cannot be referred to arbitration, then such person equally cannot seek reference of others to arbitration. Such an approach would be consistent with the development of arbitration law."

51.The contention raised before us is that Part I and Part II of the 1996 Act operate in different fields and no interchange or interplay is permissible. To the contra, the submission is that provisions of Part I have to be construed with Part II. On behalf of the appellant, reliance has been placed upon the judgment of this Court in the case *Bhatia International v. Bulk Trading S.A. and Anr*[2]The propositions stated in the case of Bhatia International (supra) do not directly arise for consideration of this Court in the facts of the present case. Thus, we are not dealing with the dictum of the Court in Bhatia Internationals case and application of its principles in this judgment. It is appropriate for us to deal with the interpretation, scope and ambit of Section 45 of the 1996 Act particularly relating to an international arbitration covered under the Convention on Recognition and Enforcement of Foreign Arbitral Awards (for short, the New York Convention).

52. Now, we shall proceed to discuss the width of Section 45 of the 1996 Act. Interpretation of Section 45 of the 1996 Act

53. In order to invoke jurisdiction of the Court under Section 45, the applicant should satisfy the pre-requisites stated in Section 44 of the 1996 Act.

54. Chapter I, Part II deals with enforcement of certain foreign awards in accordance with the New York Convention, annexed as Schedule I to the 1996 Act. As per Section 44, there has to be an arbitration agreement in writing. To such arbitration agreement the conditions stated in Schedule I would apply. In other words, it must satisfy the requirements of Article II of

Schedule I. Each contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration their disputes in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. The arbitration agreement shall include an arbitration clause in a contract or an arbitration agreement signed by the parties or entered in any of the specified modes. Subject to the exceptions stated therein, the reference shall be made.

55.The language of Section 45 read with Schedule I of the 1996 Act is worded in favour of making a reference to arbitration when a party or any person claiming through or under him approaches the Court and the Court is satisfied that the agreement is valid, enforceable and operative. Because of the legislative intent, the mandate and purpose of the provisions of Section 45 being in favour of arbitration, the relevant provisions would have to be construed liberally to achieve that object. The question that immediately follows is as to what are the aspects which the Court should consider Chloro Controls(I) P.Ltd vs Severn Trent Water Purification ... on 28 September, 2012while dealing with an application for reference to arbitration under this provision.

56. The 1996 Act makes it abundantly clear that Part I of the Act has been amended to bring these provisions completely in line with the Uncitral Model Law on International Commercial Arbitration (for short, the Uncitral Mode Law), while Chapter I of Part II is meant to encourage international commercial arbitration by incorporating in India, the provisions of the New York Convention. Further, the protocol on Arbitration Clauses (for short Geneva Convention) was also incorporated as part of Chapter II of Part II.

57. For proper interpretation and application of Chapter I of Part II, it is necessary that those provisions are read in conjunction with Schedule I of the Act. To examine the provisions of Section 45 without the aid of Schedule I would not be appropriate as that is the very foundation of Section 45 of the Act. The International Council for Commercial Arbitration prepared a Guide to the Interpretation of 1958 New York Convention, which lays/contains the Road Map to Article II. Section 45 is enacted materially on the lines of Article II of this Convention. When the Court is seized with a challenge to the validity of an arbitration agreement, it would be desirable to examine the following aspects :

> “1. Does the arbitration agreement fall under the scope of the Convention?
>
> 2. Is the arbitration agreement evidenced in writing?
>
> 3. Does the arbitration agreement exist and is it substantively valid?

4. Is there a dispute, does it arise out of a defined legal relationship, whether contractual or not, and did the parties intend to have this particular dispute settled by arbitration?

5. Is the arbitration agreement binding on the parties to the dispute that is before the Court?

6. Is this dispute arbitrable."

58. According to this Guide, if these questions are answered in the affirmative, then the parties must be referred to arbitration. Of course, in addition to the above, the Court will have to adjudicate any plea, if taken by a non-applicant that the arbitration agreement is null and void, inoperative or incapable of being performed. In these three situations, if the Court answers such plea in favour of the non-applicant, the question of making a reference to arbitration would not arise and that would put the matter at rest.

59. If the parties are referred to arbitration and award is made under these provisions of the Convention, then it shall be binding and enforceable in accordance with the provisions of Sections46 to 49 of the 1996 Act. The procedure prescribed under Chapter I of Part II is to take precedence and would not be affected by the provisions contained under Part I and/or Chapter II of Part II in terms of Section 52. This is the extent of priority that the Legislature had intended to accord to this Chapter 1 of Part II.

60. Amongst the initial steps, the Court is required to enquire whether the dispute at issue is covered by the arbitration agreement. Stress has normally been placed upon three characteristics of arbitrations which are as follows:

"(1) Arbitration is consensual. It is based on the parties agreement;

(2) Arbitration leads to a final and binding resolution of the dispute; and (3) arbitration is regarded as substitute for the court litigation and results in the passing of an binding award.

61. Mr. Nariman, learned senior counsel appearing on behalf of the appellant, contended that in terms of Section 45 of the 1996 Act, parties to the agreement shall essentially be the parties to the suit. A stranger or a third party cannot ask for arbitration. They have to be essentially the same. Further, the parties should have a clear intention, at the time of the contract, to submit any disputes or differences as may arise, to arbitration and then alone the reference contemplated under Section 45 can be enforced.

62. To the contra, Mr. Salve, the learned senior counsel appearing for respondent No. 1, submitted that the phrase at the request of one of the parties or any person claiming through

or under him is capable of liberal construction primarily for the reason that under the 1996 Act, there is a greater obligation to refer the matters to arbitration. In fact, the 1996 Act is the recognition of an indefeasible Right to Arbitration. Even a party which is not a signatory to the arbitration agreement can claim through the main party. Particularly, in cases of composite transactions, the approach of the Courts should be to hold the parties to the bargain of arbitration rather than permitting them to escape the reference on such pleas.

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

64. We have already noticed that the language of Section 45 is at a substantial variance to the language of Section 8 in this regard. In Section 45, the expression any person clearly refers to the legislative intent of enlarging the scope of the words beyond the parties who are signatory to the arbitration agreement. Of course, such applicant should claim through or under the signatory party. Once this link is established, then the Court shall refer them to arbitration. The use of the word shall would have to be given its proper meaning and cannot be equated with the word may, as liberally understood in its common parlance. The expression shall in the language of the Section 45 is intended to require the Court to necessarily make a reference to arbitration, if the conditions of this provision are satisfied. To that extent, we find merit in the submission that there is a greater obligation upon the judicial authority to make such reference, than it was in comparison to the 1940 Act. However, the right to reference cannot be construed strictly as an indefeasible right. One can claim the reference only upon satisfaction of the pre-requisites stated under Sections 44 and 45 read with Schedule I of the 1996 Act. Thus, it is a legal right which has its own contours and is not an absolute right, free of any obligations/limitations.

65. Normally, arbitration takes place between the persons who have, from the outset, been parties to both the arbitration agreement as well as the substantive contract underlining that agreement. But, it does occasionally happen that the claim is made against or by someone who is not originally named as a party. These may create some difficult situations, but certainly, they are not absolute obstructions to law/the arbitration agreement. Arbitration, thus, could be possible between a signatory to an arbitration agreement and a third party. Of course, heavy onus lies on that party to show that, in fact and in law, it is claiming through or under the signatory party as contemplated under Section 45 of the 1996 Act. Just to deal with such situations illustratively, reference can be made to the following examples in Law and Practice of Commercial Arbitration in England (Second Edn.) by Sir Michael J. Mustill:

"1. The claimant was in reality always a party to the contract, although not named in it.

2. The claimant has succeeded by operation of law to the rights of the named party.

3. The claimant has become a part to the contract in substitution for the named party by virtue of a statutory or consensual novation.

4. The original party has assigned to the claimant either the underlying contract, together with the agreement to arbitrate which it incorporates, or the benefit of a claim which has already come into existence."

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

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

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

69. In a case like the present one, where origin and end of all is with the Mother or the Principal Agreement, the fact that a party was non-signatory to one or other agreement may not be of much significance. The performance of any one of such agreements may be quite irrelevant without the performance and fulfillment of the Principal or the Mother Agreement. Besides designing the corporate management to successfully complete the joint ventures, where the parties execute different agreements but all with one primary object in mind, the Court would normally hold the parties to the bargain of arbitration and not encourage its avoidance. In cases involving execution of such multiple agreements, two essential features exist; firstly, all ancillary agreements are relatable to the mother agreement and secondly, performance of one is so intrinsically inter- linked with the other agreements that they are incapable of being beneficially performed without performance of the others or severed from the rest. The intention of the parties to refer all the disputes between all the parties to the arbitral tribunal is one of the determinative factor.

70. We may notice that this doctrine does not have universal acceptance. Some jurisdictions, for example, Switzerland, have refused to recognize the doctrine, while others have been equivocal. The doctrine has found favourable consideration in the United States and French jurisdictions. The US Supreme Court in Ruhrgos AG v Marathon Oil Co. [526 US 574 (1999)] discussed this doctrine at some length and relied on more traditional principles, such as, the non- signatory being an alter ego, estoppel, agency and third party beneficiaries to find jurisdiction over the non-signatories.

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

72. As already noticed, an arbitration agreement, under Section 45 of the 1996 Act, should be evidenced in writing and in terms of Article II of Schedule 1, an agreement in writing shall include an arbitral clause in a contract or an arbitration agreement signed by the parties or

contained in an exchange of letters or telegrams. Thus, the requirement that an arbitration agreement be in writing is an expression incapable of strict construction and requires to be construed liberally, as the words of this Article provide. Even in a given circumstance, it may be possible and permissible to construe the arbitration agreement with the aid and principle of incorporation by reference. Though the New York Convention is silent on this matter, in common practice, the main contractual document may refer to standard terms and conditions or other standard forms and documents which may contain an arbitration clause and, therefore, these terms would become part of the contract between the parties by reference. The solution to such issue should be case-specific. The relevant considerations to determine incorporation would be the status of parties, usages within the specific industry, etc. Cases where the main documents explicitly refer to arbitration clause included in standard terms and conditions would be more easily found in compliance with the formal requirements set out in the Article II of the New York Convention than those cases in which the main contract simply refers to the application of standard forms without any express reference to the arbitration clause. For instance, under the American Law, where standard terms and conditions referred to in a purchase order provided that the standard terms would have been attached to or form part of the purchase order, this was considered to be an incorporation of the arbitration agreement by reference. Even in other countries, the recommended criterion for incorporation is whether the parties were or should have been aware of the arbitration agreement. If the Bill of Lading, for example, specifically mentions the arbitration clause in the Charter Party Agreement, it is generally considered sufficient for incorporation. Two different approaches in its interpretation have been adopted, namely,(a) interpretation of documents approach; and (b) Conflict of laws approach. Under the latter, the Court could apply either its own national law or the law governing the arbitration.

73. In India, the law has been construed more liberally, towards accepting incorporation by reference. In the case of Owners and Parties Interested in the *Vessel M.V. Baltic Confidence & Anr. v. State Trading Corporation of India Ltd. & Anr*[3]the Court was considering the question as to whether the arbitration clause in a Charter Party Agreement was incorporated by reference in the Bill of Lading and what the intention of the parties to the Bill of Lading was. The primary document was the Bill of Lading, which, if read in the manner provided in the incorporation clause thereof, would include the arbitration clause of the Charter Party Agreement. The Court observed that while ascertaining the intention of the parties, attempt should be made to give meaning and effect to the incorporation clause and not to invalidate or frustrate it by giving it a literal, pedantic and technical reading. This Court, after considering the judgments of the courts in various other countries, held as under:

> "19 From the conspectus of the views expressed by courts in England and also in India, it is clear that in considering the question, whether the arbitration clause in a

Charter Party Agreement was incorporated by reference in the Bill of Lading, the principal question is, what was the intention of the parties to the Bill of Lading? For this purpose the primary document is the Bill of Lading into which the arbitration clause in the Charter Party Agreement is to be read in the manner provided in the incorporation clause of the Bill of Lading. While ascertaining the intention of the parties, attempt should be made to give meaning to the incorporation clause and to give effect to the same and not to invalidate or frustrate it giving a literal, pedantic and technical reading of the clause. If on a construction of the arbitration clause of the Charter Party Agreement as incorporated in the Bill of Lading it does not lead to inconsistency or insensibility or absurdity then effect should be given to the intention of the parties and the arbitration clause as agreed should be made binding on parties to the Bill of Lading. If the parties to the Bill of Lading being aware of the arbitration clause in the Charter Party Agreement have specifically incorporated the same in the conditions of the Bill of Lading then the intention of the parties to abide by the arbitration clause is clear. Whether a particular dispute arising between the parties comes within the purview of the arbitration clause as incorporated in the Bill of Lading is a matter to be decided by the arbitrator or the court. But that does not mean that despite incorporation of the arbitration clause in the Bill of Lading by specific reference the parties had not intended that the disputes arising on the Bill of Lading should be resolved by an arbitrator."

74. Reference can also be made to the judgment of this Court in the case of *Olympus Superstructure Pvt. Ltd. v. Meena Vijay Khetan & Ors*[4]where the parties had entered into a purchase agreement for the purchase of flats. The main agreement contained the arbitration clause (clause 39). The parties also entered into three different Interior Design Agreements, which also contained arbitration clauses. The main agreement was terminated due to disputes about payment and non-grant of possession. These disputes were referred to arbitration. A sole arbitrator was appointed to make awards in this respect. Inter alia, the question was raised as to whether the disputes under the Interior Design Agreements were subject to their independent arbitration clauses or whether one and the same reference was permissible under the main agreement. It was argued that the reference under clause 39 of the main agreement could not permit the arbitrator to deal with the disputes relating to Interior Design Agreements and the award was void. The Court, however, took the view that parties had entered into multiple agreements for a common object and the expression other mattersconnected with appearing in clause 39 would permit such a reference. The Court held as under :

"30.If there is a situation where there are disputes and differences in connection with the main agreement and also disputes in regard to other matters connected with the

subject-matter of the main agreement then in such a situation, in our view, we are governed by the general arbitration clause 39 of the main agreement under which disputes under the main agreement and disputes connected therewith can be referred to the same arbitral tribunal. This clause 39 no doubt does not refer to any named arbitrators. So far as clause 5 of the Interior Design Agreement is concerned, it refers to disputes and differences arising from that agreement which can be referred to named arbitrators and the said clause 5, in our opinion, comes into play only in a situation where there are no disputes and differences in relation to the main agreement and the disputes and differences are solely confined to the Interior Design Agreement. That, in our view, is the true intention of the parties and that is the only way by which the general arbitration provision in clause 39 of the main agreement and the arbitration provision for a named arbitrator contained in clause 5 of the Interior Design Agreement can be harmonised or reconciled. Therefore, in a case like the present where the disputes and differences cover the main agreement as well as the Interior Design Agreement, (that there are disputes arising under the main agreement and the Interior Design Agreement is not in dispute) it is the general arbitration clause 39 in the main agreement that governs because the questions arise also in regard to disputes relating to the overlapping items in the schedule to the main agreement and the Interior Design Agreement, as detailed earlier. There cannot be conflicting awards in regard to items which overlap in the two agreements. Such a situation was never contemplated by the parties. The intention of the parties when they incorporated clause 39 in the main agreement and clause 5 in the Interior Design Agreement was that the former clause was to apply to situations when there were disputes arising under both agreements and the latter was to apply to a situation where there were no disputes or differences arising under the main contract but the disputes and differences were confined only to the Interior Design Agreement. A case containing two agreements with arbitration clauses arose before this Court in Agarwal Engg. Co. v. Technoimpex Hungarian Machine Industries Foreign Trade Co. There were arbitration clauses in two contracts, one for sale of two machines to the appellant and the other appointing the appellant as sales representative. On the facts of the case, it was held that both the clauses operated separately and this conclusion was based on the specific clause in the sale contract that it was the sole repository of the sale transaction of the two machines. Krishna Iyer, J. held that if that were so, then there was no jurisdiction for travelling beyond the sale contract. The language of the other agreement appointing the appellant as sales representative was prospective and related to a sales agency and later purchases, other than the purchases of these two machines. There was therefore no overlapping. The case before us and the above case exemplify contrary situations. In one case the disputes are connected and in the other they are

distinct and not connected. Thus, in the present case, clause 39 of the main agreement applies. Points 1 and 2 are decided accordingly in favour of the respondents."

75. The Court also took the view that a dispute relating to specific performance of a contract in relation to immoveable property could be referred to arbitration and Section 34(2)(b)(i) of the 1996 Act was not attracted. This finding of the Court clearly supports the view that where the law does not prohibit the exercise of a particular power, either the Arbitral Tribunal or the Court could exercise such power. The Court, while taking this view, has obviously rejected the contention that a contract for specific performance was not capable of settlement by arbitration under the Indian law in view of the statutory provisions. Such contention having been rejected, supports the view that we have taken. Threshold Review

76. Where the Court which, on its judicial side, is seized of an action in a matter in respect of which the parties have made an arbitration agreement, once the required ingredients are satisfied, it would refer the parties to arbitration but for the situation where it comes to the conclusion that the agreement is null and void, inoperative or incapable of being performed. These expressions have to be construed somewhat strictly so as to ensure that the Court returns a finding with certainty and on the correct premise of law and fact as it has the effect of depriving the party of its right of reference to arbitration. But once the Court finds that the agreement is valid then it must make the reference, without any further exercise of discretion {refer General Electric Co. v. Renusagar Power Co. [(1987) 4 SCC 137]}. These are the issues which go to the root of the matter and their determination at the threshold would prevent multiplicity of litigation and would even prevent futile exercise of proceedings before the arbitral tribunal.

77. The issue of whether the courts are empowered to review the existence and validity of the arbitration agreement prior to reference is more controversial. A majority of the countries admit to the positive effect of kompetenz kompetenz principle, which requires that the arbitral tribunal must exercise jurisdiction over the dispute under the arbitration agreement. Thus, challenge to the existence or validity of the arbitration agreement will not prevent the arbitral tribunal from proceeding with hearing and ruling upon its jurisdiction. If it retains jurisdiction, making of an award on the substance of the dispute would be permissible without waiting for the outcome of any court action aimed at deciding the issue of the jurisdiction. The negative effect of the kompetenz kompetenz principle is that arbitrators are entitled to be the first to determine their jurisdiction which is later reviewable by the court, when there is action to enforce or set aside the arbitral award. Where the dispute is not before an arbitral tribunal, the Court must also decline jurisdiction unless the arbitration agreement is patently void, inoperative or incapable of being performed.

78. This is the position of law in France and in some other countries, but as far as the Indian Law is concerned, Section 45 is a legislative mandate and does not admit of any ambiguity. We must take note of the aspect of Indian law that Chapter I of Part II of the 1996 Act does not contain any provision analogous to Section 8(3) under Part I of the Act. In other words, under the Indian Law, greater obligation is cast upon the Courts to determine whether the agreement is valid, operative and capable of being performed at the threshold itself. Such challenge has to be a serious challenge to the substantive contract or to the agreement, as in the absence of such challenge, it has to be found that the agreement was valid, operative and capable of being performed; the dispute would be referred to arbitration. [*State of Orissa v. Klockner and Company & Ors*[5]

79. Alan Redfern and Martin Hunter in Law and Practice of International Commercial Arbitration, (Fourth Edition) have opined that when several parties are involved in a dispute, it is usually considered desirable that the dispute should be dealt with in the same proceedings rather than in a series of separate proceedings. In general terms, this saves time, money, multiplicity of litigation and more importantly, avoids the possibility of conflicting decisions on the same issues of fact and law since all issues are determined by the same arbitral tribunal at the same time. In proceedings before national courts, it is generally possible to join additional parties or to consolidate separate sets of proceedings. In arbitration, however, this is difficult, sometimes impossible, to achieve this because the arbitral process is based upon the agreement of the parties.

80. Where there is multi-party arbitration, it may be because there are several parties to one contract or it may be because there are several contracts with different parties that have a bearing on the matter in dispute. It is helpful to distinguish between the two. Where there are several parties to one contract, like a joint venture or some other legal relationship of similar kind and the contract contains an arbitration clause, when a dispute arises, the members of the consortium or the joint venture may decide that they would each like to appoint an arbitrator. In distinction thereto, in cases involving several contracts with different parties, a different problem arises. They may have different issues in dispute. Each one of them will be operating under different contracts often with different choice of law and arbitration clauses and yet, any dispute between say the employer and the main contractor is likely to involve or affect one or more of the suppliers or sub-contractors, even under other contracts. What happens when the dispute between an employer and the main contractor is referred to arbitration, and the main contractor wishes to join the sub-contractor in the proceedings, on the basis that if there is any liability established, the main contractor is entitled to pass on such liability to the sub- contractor? This was the issue raised in the Adgas case {*Abu Dhabi Gas Liquefaction Co. Ltd. v. Eastern Bechtel Corp*[6]Adgas was the owner of a plant that produced liquefied natural gas in the Arabian Gulf. The company started arbitration in

England against the main contractors under an international construction contract, alleging that one of the huge tanks that had been constructed to store the gas was defective. The main contractor denied liability but added that, if the tank was defective, it was the fault of the Japanese sub-contractor. Adgas brought ad hoc arbitration proceedings against the main contractor before a sole arbitrator in London. The main contractor then brought separate arbitration proceedings, also in London, against the Japanese sub- contractor.

81. There is little doubt that if the matter had been litigated in an English court, the Japanese company would have been joined as a party to the action. However, Adgas did not agree that the Japanese sub-contractor should be brought into its arbitration with the main contractor, since this would have lengthened and complicated the proceedings. The Japanese sub-contractor also did not agree to be joined. It preferred to await the outcome of the main arbitration, to see whether or not there was a case to answer.

82. Lord Denning, giving judgment in the English Court of Appeal, plainly wished that an order could be made consolidating the two sets of arbitral proceedings so as to save time and money and to avoid the risk of inconsistent awards:

> "As we have often pointed out, there is a danger in having two separate arbitrations in a case like this. You might get inconsistent findings if there were two separate arbitrators. This has been said in many casesit is most undesirable that there should be inconsistent findings by two separate arbitrators on virtually the self-same question, such as causation. It is very desirable that everything should be done to avoid such a circumstance [Abu Dhabi Gas, op.cit.at 427]"

83. We have already referred to the contention of Mr. Fali S. Nariman, the learned senior counsel appearing for the appellant, that the provisions of Section 45 of the 1996 Act are somewhat similar to Article II(3) of the New York Convention and the expression parties in that Section would mean that all parties to the action before the Court have to be the parties to the arbitration agreement. If some of them are parties to the agreement, while the others are not, Section 45 does not contemplate the applicable procedure and the status of the non-signatories. The consequences of all parties not being common to the action and arbitration proceedings are, as illustrated above, multiplicity of proceedings and frustration of the intended one stop action. The Rule of Mischief would support such interpretation. Even if some unnecessary parties are added to the action, the Court can always strike out such parties and even the cause of action in terms of the provisions of the CPC. However, where such parties cannot be struck off, there the proceedings must continue only before the Court.

84. Thus, the provisions of Section 45 cannot be effectively applied or even invoked. Unlike Section 24 of the 1940 Act, under the 1996 Act the Court has not been given the power to

refer to arbitration some of the parties from amongst the parties to the suit. Section 24 of 1940 Act vested the Court with the discretion that where the Court thought fit, it could refer such matters and parties to arbitration provided the same could be separated from the rest of the subject matter of the suit. Absence of such provision in the 1996 Act clearly suggests that the Legislature intended not to permit bifurcated or partial references of dispute or parties to arbitration. Without prejudice to this contention, it was also the argument that it would not be appropriate and even permissible to make reference to arbitration when the issues and parties in action are not covered by the arbitration agreement. Referring to the consequences of all parties not being common to the action before the Court and arbitration, the disadvantages are:

> "a)There would be multiplicity of litigation;b)Application of principle of one stop action would not be possible; andc) It will frustrate the application of the Rule of Mischief. TheCourt can prevent the mischief by striking out unnecessary parties or causes of action."

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

86. Another issue raised before the Court is that there is possibility of the arbitration proceedings going on simultaneously with the suit, which would result in rendering passing of conflicting orders possible. This would be contrary to the public policy of India that Indian courts can give effect to the foreign awards which are in conflict with judgment of the Indian courts.

87. To the contra, Mr. Salve, learned senior counsel appearing for respondent No.1, contended that the expressions parties to arbitration, any person claiming through or under him and at the request of one of the party appearing in Section 45 are wide enough to include some or all the parties and even non-signatory parties for the purposes of making a reference to arbitration. It is also the contention that on the true construction of Sections 44, 45 and 46 of the 1996 Act, it is not possible to accept the contention of the appellant that all the parties to an action have to be parties to the arbitration agreement as well as the Court proceedings. This would be opposed to the principle that parties should be held to their bargain of arbitration. The Court always has the choice to make appropriate orders in exercise of inherent powers to bifurcate the reference or even stay the proceedings in a suit pending before it till the conclusion of the arbitration proceedings or otherwise. According to Mr. Salve, if the interpretation advanced by Mr. Nariman is accepted, then mischief will be encouraged which would frustrate the arbitration agreement because a party not desirous of

going to arbitration would initiate civil proceedings and add non-signatory as well as unnecessary parties to the suit with a view to avoid arbitration. This would completely frustrate the legislative object underlining the 1996 Act. Non-signatory parties can even be deemed to be parties to the arbitration agreement and may successfully pray for referral to arbitration.

88. As noticed above, the legislative intent and essence of the 1996 Act was to bring domestic as well as international commercial arbitration in consonance with the Uncitral Model Rules, the New York Convention and the Geneva Convention. The New York Convention was physically before the Legislature and available for its consideration when it enacted the 1996 Act. Article II of the Convention provides that each contracting State shall recognise an agreement and submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not concerning a subject matter capable of settlement by arbitration. Once the agreement is there and the Court is seized of an action in relation to such subject matter, then on the request of one of the parties, it would refer the parties to arbitration unless the agreement is null and void, inoperative or incapable of performance.

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

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

91. Examined from the point of view of the legislative object and the intent of the framers of the statute, i.e., the necessity to encourage arbitration, the Court is required to exercise its

jurisdiction in a pending action, to hold the parties to the arbitration clause and not to permit them to avoid their bargain of arbitration by bringing civil action involving multifarious cause of action, parties and prayers. Legal Relationship

92. Now, we should examine the scope of concept of legal relationship as incorporated in Article II(1) of the New York Convention vis-a-vis the expression any person claiming through or under him appearing in Section 45 of the 1996 Act. Article II(1) and (3) have to be read in conjunction with Section 45 of the Act. Both these expressions have to be read in harmony with each other. Once they are so read, it will be evident that the expression legal relationship connotes the relationship of the party with the person claiming through or under him. A person may not be signatory to an arbitration agreement, but his cause of action may be directly relatable to that contract and thus, he may be claiming through or under one of those parties. It is also stated in the Law and Practice of International Commercial Arbitration, Alan Redfern and Martin Hunter (supra), that for the purposes of both the New York Convention and the UNCITRAL Model Law, it is sufficient that there should be a defined legal relationship between the parties, whether contractual or not. Plainly there has to be some contractual relationship between the parties, since there must be some arbitration agreement to form the basis of the arbitral proceedings. Given the existence of such an agreement, the dispute submitted to arbitration may be governed by the principles of delictual or tortuous liability rather than by the law of contract.

93. In the case of *Roussel - Uclaf v. G.D. Searle & Co. Ltd. And G.D. Searle & Co*[7] the Court held:

> "The argument does not admit of much elaboration, but I see no reason why these words in the Act should be construed so narrowly as to exclude a wholly-owned subsidiary company claiming, as here, a right to sell patented articles which it has obtained from and been ordered to sell by its parent. Of course, if the arbitration proceedings so decide, it may eventually turn out that the parent company is at fault and not entitled to sell the articles in question at all; and, if so, the subsidiary will be equally at fault. But, if the parent is blameless, it seems only common sense that the subsidiary should be equally blameless. The two parties and their actions are, in my judgment, so closely related on the facts in this case that it would be right to hold that the subsidiary can establish that it is within the purview of the arbitration clause, on the basis that it is claiming through or under the parent to do what it is in fact doing whether ultimately held to be wrongful or not.

94. However, the view expressed by the Court in the above case does not find approval in the decision of the Court of Appeal in the case of City of London v. Sancheti [(2009) 1 Lloyds

Law Reports 116]. In paragraph 34, it was held that the view in the case of Roussel Uclaf need not be followed and stay could not be obtained against a party to an arbitration agreement or a person claiming through or under such a party, as mere local or commercial connection is not sufficient. But the Court of Appeal hastened to add that, in cases such as the one of Mr. Sancheti, the Corporation of London was not party to the arbitration agreement, but the relevant party is the United Kingdom Government. The fact that in certain circumstances, the State may be responsible under international law for the acts of one of its local authorities, or may have to take steps to redress wrongs committed by one of the local authorities, does not make the local authority a party to the arbitration agreement. Chloro Controls(I) P.Ltd vs Severn Trent Water Purification ... on 28 September, 2012

95. Having examined both the above-stated views, we are of the considered opinion that it will be the facts of a given case that would act as precept to the jurisdictional forum as to whether any of the stated principles should be adopted or not. If in the facts of a given case, it is not possible to construe that the person approaching the forum is a party to the arbitration agreement or a person claiming through or under such party, then the case would not fall within the ambit and scope of the provisions of the section and it may not be possible for the Court to permit reference to arbitration at the behest of or against such party.

96. We have already referred to the judgments of various courts, that state that arbitration could be possible between a signatory to an agreement and a third party. Of course, heavy onus lies on that party to show that in fact and in law, it is claiming under or through a signatory party, as contemplated under Section 45 of the 1996 Act.

97. Michael J. Mustill and Stewart C. Boyd in The Law and Practice of Commercial Arbitration in England have observed that the applicant must show that the person whose claim he seeks to stay is either a party to the arbitration agreement or a person claiming through or under such a party. It is further noticed that it occasionally happens that the plaintiff is not himself a party to the arbitration agreement on which the application is founded. This may arise in the following situations :

> "i) The plaintiff has acquired the rights, which the action is brought to enforce, from someone who is a party to an arbitration agreement with the defendant;
>
> ii) The plaintiff is bringing the action on behalf of someone else, who is a party to an arbitration agreement with the defendant.
>
> iii) When the expression used in the provision, the words claiming under plaintiff relate to substantive right which is being asserted."

98. The requirements can scarcely be interpreted in their literal sense, this would mean that a person could claim a stay even though not a party to the arbitration agreement. However, the applicant must be party to the agreement against whom legal proceedings have been initiated rather than a party as intervenor.

99. Joinder of non signatory parties to arbitration is not unknown to the arbitration jurisprudence. Even the ICCAs Guide to the Interpretation of the 1958 New York Convention also provides for such situation, stating that when the question arises as to whether binding a non-signatory to an arbitration agreement could be read as being in conflict with the requirement of written agreement under Article I of the Convention, the most compelling answer is no and the same is supported by a number of reasons.

100. Various legal basis may be applied to bind a non-signatory to an arbitration agreement. The first theory is that of implied consent, third party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle. They apply to private as well as public legal entities. The second theory includes the legal doctrines of agent-principal relations, apparent authority, piercing of veil (also called the alter ego), joint venture relations, succession and estoppel. They do not rely on the parties intention but rather on the force of the applicable law.

101. We may also notice the Canadian case of The City of Prince George v. A.L. Sims & Sons Ltd. [YCA XXIII (1998), 223] wherein the Court took the view that an arbitration agreement is neither inoperative nor incapable of being performed if a multi-party dispute arises and not all parties are bound by the arbitration agreement: the parties bound by the arbitration agreement are to be referred to arbitration and court proceedings may continue with respect to the other parties, even if this creates a risk of conflicting decisions.

102. We have already discussed that under the Group of Companies Doctrine, an arbitration agreement entered into by a company within a group of companies can bind its non-signatory affiliates, if the circumstances demonstrate that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties.

103. The question of formal validity of the arbitration agreement is independent of the nature of parties to the agreement, which is a matter that belongs to the merits and is not subject to substantive assessment. Once it is determined that a valid arbitration agreement exists, it is a different step to establish which parties are bound by it. Third parties, who are not explicitly mentioned in an arbitration agreement made in writing, may enter into its ratione personae scope. Furthermore, the Convention does not prevent consent to arbitrate from being

provided by a person on behalf of another, a notion which is at the root of the theory of implied consent.

104. If one analyses the above cases and the authors views, it becomes abundantly clear that reference of even non-signatory parties to arbitration agreement can be made. It may be the result of implied or specific consent or judicial determination. Normally, the parties to the arbitration agreement calling for arbitral reference should be the same as those to the an action. But this general concept is subject to exceptions which are that when a third party, i.e. non-signatory party, is claiming or is sued as being directly affected through a party to the arbitration agreement and there are principal and subsidiary agreements, and such third party is signatory to a subsidiary agreement and not to the mother or principal agreement which contains the arbitration clause, then depending upon the facts and circumstances of the given case, it may be possible to say that even such third party can be referred to arbitration.

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

106. The New York Convention clearly postulates that there should be a defined legal relationship between the parties, whether contractual or not, in relation to the differences that may have arisen concerning the subject matter capable of settlement of arbitration. We have referred to a number of judgments of the various courts to emphasize that in given circumstances, if the ingredients above-noted exist, reference to arbitration of a signatory and

even a third party is possible. Though heavy onus lies on the person seeking such reference, multiple and multi-party agreements between the parties to the arbitration agreement or persons claiming through or under such parties is neither impracticable nor impermissible.

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

108. Mr. Nariman, the learned senior counsel, while relying upon the judgments in the cases of *Turnock v. Sartoris [1888 (43) Chancery Division*[8]*Taunton-Collins v. Cromie & Anr., [1964 Vol.1 Weekly Law Reports 633]* and Sumitomo Corporation v. CDS Financial Services (Mauritius) Ltd. and Others[9]again emphasized that the parties to the agreement have to be parties to the suit and also that the cause of action cannot be bifurcated unless there was a specific provision in the 1996 Act itself permitting such bifurcation or splitting of cause of action. He also contended that there is no provision like Sections 21 and 24 of the 1940 Act in the 1996 Act and thus, it supports the view that bifurcation of cause of action is impermissible and such reference to arbitration is not permissible.

109. In the case of Turnock (supra), the Court had stated that it was not right to cut up that litigation into two actions, one to be tried before the arbitrator and the other to be tried elsewhere, as in that case matters in respect of which the damages were claimed by the plaintiff could not be referred to arbitration because questions arising as to the construction of the agreement and provisions in the lease deed were involved and they did not fall within the power of the arbitrator in face of the arbitration agreement. In the case of Taunton-Collins (supra), the Court again expressed the view that it was undesirable that there should be two proceedings before two different tribunals, i.e., the Chloro Controls(I) P.Ltd vs Severn Trent Water Purification on 28 September, 2012 official referee and an Arbitrator, as they may reach inconsistent findings.

110. This Court dealt with the provisions of the 1940 Act, in the case of *Anderson Wright Ltd. v. Moran & Company*[10]and described the conditions to be satisfied before a stay can be granted in terms of Section 34 of the 1940 Act. The Court also held that it was within the jurisdiction of the Court to determine a question whether the plaintiff was a party to the contract containing the arbitration clause or not. Still in the case of Sumitomo Corporation

(supra), this Court primarily declined the reference to arbitration for the reason that the disputes stated in the petition did not fall within the ambit of the arbitration clause contained in the agreement between the parties and also that the Joint Venture Agreement did not itself contain a specific arbitration clause. An observation was also made in paragraph 20 of the judgment that the party would mean the party to the judicial proceeding should be a party to the arbitration agreement.

111. It will be appropriate to refer to the contentions of Mr. Salve, the learned senior counsel. According to him, reference, even of the non-signatory party, could be made to arbitration and upon such reference the proceedings in an action before the Court should be stayed. The principle of bifurcation of cause of action, as contemplated under the CPC, cannot stricto sensu apply to Section 45 of the 1996 Act in view of the non-obstante language of the Section. He also contended that parties or issues, even if outside the scope of the arbitration agreement, would not per se render the arbitration clause inoperative. Even if there is no specific provision for staying the proceedings in the suit under the 1996 Act, still in exercise of its inherent powers, the Court can direct stay of the suit proceedings or pass such other appropriate orders as the court may deem fit.

112. We would prefer to first deal with the precedents of this Court cited before us. As far as Sumitomo Corporation (supra) is concerned, it was a case dealing with the matter where the proceedings under Section 397-398 of the Companies Act had been initiated and the Company Law Board had passed an order. Whether the appeal against such order would lie to the High Court was the principal question involved in that case. The denial of arbitration reference, as already noticed, was based upon the reasoning that disputes related to the joint venture agreement to which the parties were not signatory and the said agreement did not even contain the arbitration clause. On the other hand, it was the other agreement entered into by different parties which contained the arbitration clause. As already noticed, in paragraph 20, the Court had observed that a party to an arbitration agreement has to be a party to the judicial proceedings and then alone it will fall within the ambit of Section 2(h) of the 1996 Act. As far as the first issue is concerned, we shall shortly proceed to discuss it when we discuss the merits of this case, in light of the principles stated in this judgment. However, the observations made by the learned Bench in the case of Sumitomo Corporation (supra) do not appear to be correct. Section 2(h) only says that party means a party to an arbitration agreement. This expression falls in the Chapter dealing with definitions and would have to be construed along with the other relevant provisions of the Act. When we read Section 45 in light of Section 2(h), the interpretation given by the Court in the case of Sumitomo Corporation (supra) does not stand to the test of reasoning. Section 45 in explicit language permits the parties who are claiming through or under a main party to the arbitration

agreement to seek reference to arbitration. This is so, by fiction of law, contemplated in the provision of Section 45 of the 1996 Act.

113. We have already discussed above that the language of Section 45 is incapable of being construed narrowly and must be given expanded meaning to achieve the twin objects of arbitration, i.e., firstly, the parties should be held to their bargain of arbitration and secondly, the legislative intent behind incorporating the New York Convention as part of Section 44 of the Act must be protected. Moreover, paragraph 20 of the judgment of Sumitomo Corporation (supra) does not state any principle of law and in any event it records no reasons for arriving at such a conclusion. In fact, that was not even directly the issue before the Court so as to operate as a binding precedent. For these reasons, respectfully but without hesitation, we are constrained to hold that the conclusion or the statement made in paragraph 20 of this judgment does not enunciate the correct law. Scope of jurisdiction while referring the parties to arbitration

114. An application for appointment of arbitral tribunal under Section 45 of the 1996 Act would also be governed by the provisions of Section 11(6) of the Act. This question is no more res integra and has been settled by decision of a Constitution Bench of seven Judges of this Court in the case of *SBP and Co. v. Patel Engineering Ltd. and Anr*[11]wherein this Court held that power exercised by the Chief Justice is not an administrative power. It is a judicial power. It is a settled principle that the Chief Justice or his designate Judge will decide preliminary aspects which would attain finality unless otherwise directed to be decided by the arbitral tribunal. In para 39 of the judgment, the Court held as under :

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

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

115. This aspect of the arbitration law was explained by a two Judge Bench of this Court in the case of *Shree Ram Mills Ltd. v. Utility Premises (P) Ltd*[12]wherein, while referring to the judgment in SBP & Co. (supra) particularly the above paragraph, this Court held that the scope of order under Section 11 of the 1996 Act would take in its ambit the issue regarding territorial jurisdiction and the existence of the arbitration agreement. The Court noticed that if these issues are not decided by the Chief Justice or his designate, there would be no question of proceeding with the arbitration. It held as under:

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

closed their rights and the matter has not been barred by limitation. Thus, where the Chief Justice comes to a finding that there exists a live issue, then naturally this finding would include a finding that the respective claims of the parties have not become barred by limitation."(emphasis supplied)

116. Thus, the Bench while explaining the judgment of this Court in SBP & Co. (supra) has stated that the Chief Justice may not decide certain issues finally and upon recording satisfaction that prima facie the issue has not become dead even leave it for the arbitral tribunal to decide. Chloro Controls(I) P.Ltd vs Severn Trent Water Purification ... on 28 September, 2012

117. In *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd*[13]another equi-bench of this Court after discussing various judgments of this Court, explained SBP & Co. (supra) in relation to scope of powers of the Chief Justice and/or his designate while exercising jurisdiction under Section 11(6), held as follows :

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

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

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

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

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

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

(b)Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment

without objection. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:

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

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

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

119. The above expressions are mere observations of the Court and do not fit into the contours of the principle of ratio decidendi of the judgment. The issues in regard to validity or existence of the arbitration agreement, the application not satisfying the ingredients of Section 11(6) of the 1996 Act and claims being barred by time etc. are the matters which can be adjudicated by the Chief Justice or his designate. Once the parties are heard on such issues and the matter is determined in accordance with law, then such a finding can only be disturbed by the Court of competent jurisdiction and cannot be reopened before the arbitral tribunal. In SBP & Co. (supra), the Seven Judge Bench clearly stated, the finality given to the order of the Chief Justice on the matters within his competence under Section 11 of the Act are incapable of being reopened before the arbitral tribunal. Certainly the Bench dealing with the case of Shree Ram Mills (supra) did not intend to lay down any law in direct conflict with the Seven Judge Bench judgment in SBP & Co. (supra). In the reasoning given in Shree Ram Mills case, the Court has clearly stated that matters of existence and binding nature of arbitration agreement and other matters mentioned therein are to be decided by the Chief Justice or his designate and the same is in line with the judgment of this Court in the case of

SBP & Co. (supra). It will neither be permissible nor in consonance with the doctrine of precedent that passing observations by the Bench should be construed as the law while completely ignoring the ratio decidendi of that very judgment. We may also notice that the judgment in Shree Ram Mills (supra) was not brought to the notice of the Bench which pronounced the judgment in the case of National Insurance Co. Ltd. (supra).

120. As far as the classification carved out by the Court in the case of National Insurance Co. Ltd. (supra) are concerned, it draws its origin from paragraph 39 of the judgment in the case of SBP & Co. (supra) wherein the Constitution Bench of the Court had observed that it may not be possible at that stage to decide whether a live claim made is one which comes within the purview of the arbitration clause. It will be more appropriate to leave the seriously disputed questions to be decided by the Arbitral Tribunal on taking evidence along with the merits of the claim, subject matter of the arbitration.

121. The foundation for category (2) in para 22 of the National Insurance Company Ltd. (supra) is directly relatable to para 39 of the judgment of this court in SBP & Co. (supra) and matters falling in that category are those which, depending on the facts and circumstances of a given case, could be decided by the Chief Justice or his designate or even may be left for the decision of the arbitrator, provided there exists a binding arbitration agreement between the parties. Similar is the approach of the Bench in the case of Shree Ram Mills (supra) and that is why in paragraph 27 thereof, the Court has recorded that it would be appropriate sometimes to leave the question regarding the claim being alive to be decided by the arbitral tribunal and the Chief Justice may record his satisfaction that parties have not closed their rights and the matter has not been barred by limitation.

122. As already noticed, the observations made by the Court have to be construed and read to support the ratio decidendi of the judgment. Observations in a judgment which are stared upon by the judgment of a larger bench would not constitute valid precedent as it will be hit by the doctrine of staire decisis. In the case of the Shri Ram Mills (supra) surely the Bench did not intend to lay down the law or state a proposition which is directly in conflict with the judgment of the Constitution Bench of this Court in the case of SBP & Co. (supra).

123. We have no reason to differ with the classification carved out in the case of National Insurance Co. (supra) as it is very much in conformity with the judgment of the Constitution Bench in the case of SBP (supra). The question that follows from the above discussion is as to whether the views recorded by the judicial forum at the threshold would be final and binding on the parties or would they constitute the prima facie view. This again has been a matter of some debate before this Court. A three Judge Bench of this Court in the case of *Shin-Etsu Chemical Co. Ltd. v. M/s. Aksh Optifibre Ltd. & Anr*[14]was dealing with an

application for reference under Section 45 of the 1996 Act and consequently, determination of validity of arbitration agreement which contained the arbitration clause governed by the ICC Rules in Tokyo, Japan. The appellant before this Court had terminated the agreement in that case. The respondent filed a suit claiming a decree of declaration and injunction against the appellant for cancellation of the agreement which contained the arbitration clause. In that very suit, the appellant also prayed that this long term sale and purchase agreement, which included the arbitration clause be declared void ab initio, inoperative and incapable of being performed on the ground that the said agreement contained unconscionable, unfair and unreasonable terms; was against public policy and was entered into under undue influence. The appellant had also filed an application under Section 8 of the 1996 Act for reference to arbitration. Some controversy arose before the Trial Court as well as before the High Court as to whether the application was one under Section 8 or Section 45 but when the matter came up before this Court, the counsel appearing for both the parties rightly took the stand that only Section 45 was applicable and Section 8 had no application. In this case, the Court was primarily concerned and dwelled upon the question whether an order refusing reference to arbitration was appealable under Section 50 of the 1996 Act and what would be its effect.

124. We are not really concerned with the merits of that case but certainly are required to deal with the limited question whether the findings recorded by the referring Court are of final nature, or are merely prima facie and thus, capable of being re-adjudicated by the arbitral tribunal. Where the Court records a finding that the agreement containing the arbitration clause or the arbitration clause itself is null and void, inoperative or incapable of being performed on merits of the case, it would decline the reference. Then the channel of legal remedy available to the party against whom the reference has been declined would be to take recourse to an appeal under Section 50(1)(a) of the 1996 Act. The Arbitral Tribunal in such situations does not deliver any determination on the issues in the case. However, in the event that the referring Court deals with such an issue and returns a finding that objections to reference were not tenable, thus rejecting, the plea on merits, then the issue arises as to whether the arbitral tribunal can re-examine the question of the agreement being null and void, inoperative or incapable of performance, all over again. Sabharwal, J., after deliberating upon the approaches of different courts under the English and the American legal systems, stated that both the approaches have their own advantages and disadvantages. The approach whereby the courts finally decide on merits in relation to the issue of existence and validity of the arbitration agreement would result to a large extent in avoiding delay and increased cost. It would not be for the parties to wait for months or years before knowing the final outcome of the disputes regarding jurisdiction alone. Then, he held as follows :

> "56. I am of the view that the Indian Legislature has consciously adopted a conventional approach so as to save the huge expense involved in international commercial arbitration as compared to domestic arbitration.
>
> 57. In view of the aforesaid discussion, I am of the view that under Section 45 of the Act, the determination has to be on merits, final and binding and not prima facie."

125. However, Srikrishna, J. took a somewhat different view and noticing the truth that there is nothing in Section 45 to suggest that a finding as to the nature of the arbitration agreement has to be ex facie or prima facie, observed that if it were to be held that the finding of the court under Section 45 should be a final, determinative conclusion, then it is obvious that until such a pronouncement is made, the arbitral proceedings would have to be in limbo. So, he held as follows :

> 105. I fully agree with my learned Brother's view that the object of dispute resolution through arbitration, including international commercial arbitration, is expedition and that the object of the Act would be defeated if proceedings remain pending in the court even after commencing of the arbitration. It is precisely for this reason that I am inclined to the view that at the pre-reference stage contemplated by Section 45, the court is required to take only a prima facie view for making the reference, leaving the parties to a full trial either before the Arbitral Tribunal or before the court at the post-award stage.

126. Dharmadhikari, J., the third member of the Bench, while agreeing with the view of Srikrishna, J. and noticing, Where a judicial authority or the court refuses to make a reference on the grounds available under Section 45 of the Act, it is necessary for the judicial authority or the court which is seized of the matter to pass a reasoned order as the same is subject to appeal to the appellate court under Section 50(1)(a) of the Act and further appeal to this Court under sub-section (2) of the said section. expressed no view on the issue of prima facie or finality of the finding recorded on the pre-reference stage, he left the question open in the following paragraph :

> "112.Whether such a decision of the judicial authority or the court, of refusal to make a reference on grounds permissible under Section 45 of the Act would be subjected to further re-examination before the Arbitral Tribunal or the court in which eventually the award comes up for enforcement in accordance with Section 48(1)(a) of the Act, is a legal question of sufficient complexity and in my considered opinion since that question does not directly arise on the facts of the present case, it should be left open

for consideration in an appropriate case where such a question is directly raised and decided by the court.

127. The judgment of this Court in Shin-Etsu Chemical Co. Ltd. (supra) preceded the judgment of this Court in the case of SBP & Co. (supra). Though the Constitution Bench in the latter case referred to this judgment in paragraph 89 of the judgment but did not discuss the merits or otherwise of the case presumably for absence of any conflict. However, as already noticed, the Court clearly took the view that the findings returned by the Chief Justice while exercising his judicial powers under Section 11 relatable to Section 8 are final and not open to be questioned by the arbitral tribunal. Sections 8 and 45 of the 1996 Act are provisions independent of each other. But for the purposes of reference to arbitration, in both cases, the applicant has to pray for a reference before the Chief Justice or his designate in terms of Section 11 of the 1996 Act. We may refer to the exact terminology used by the larger Bench in SBP & Co. (supra) in relation to the finality of such matters, as reflected in para 12 of the judgment which reads as under :

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

accordance with Section 34 of the Act. The question, in the context of sub-section (7) of Section 11 is, what is the scope of the right conferred on the Arbitral Tribunal to rule upon its own jurisdiction and the existence of the arbitration clause, envisaged by Section 16(1), once the Chief Justice or the person designated by him had appointed an arbitrator after satisfying himself that the conditions for the exercise of power to appoint an arbitrator are present in the case. Prima facie, it would be difficult to say that in spite of the finality conferred by sub-section (7) of Section 11 of the Act, to such a decision of the Chief Justice, the Arbitral Tribunal can still go behind that decision and rule on its own jurisdiction or on the existence of an arbitration clause. It also appears to us to be incongruous to say that after the Chief Justice had appointed an Arbitral Tribunal, the Arbitral Tribunal can turn round and say that the Chief Justice had no jurisdiction or authority to appoint the Tribunal, the very creature brought into existence by the exercise of power by its creator, the Chief Justice. The argument of the learned Senior Counsel, Mr K.K. Venugopal that Section 16 has full play only when an Arbitral Tribunal is constituted without intervention under Section 11(6) of the Act, is one way of reconciling that provision with Section 11 of the Act, especially in the context of sub-section (7) thereof. We are inclined to the view that the decision of the Chief Justice on the issue of jurisdiction and the existence of a valid arbitration agreement would be binding on the parties when the matter goes to the Arbitral Tribunal and at subsequent stages of the proceeding except in an appeal in the Supreme Court in the case of the decision being by the Chief Justice of the High Court or by a Judge of the High Court designated by him. (Emphasis supplied)

128. We are conscious of the fact that the above dictum of the Court is in relation to the scope and application of Section 11 of the 1996 Act. It has been held in various judgments of this Court but more particularly in the case of SBP (supra) which is binding on us that before making a reference, the Court has to dispose of the objections as contemplated under Section 8 or Section 45, as the case may be, and wherever needed upon filing of affidavits. Thus, to an extent, the law laid down by this Court on Section 11 shall be attracted to an international arbitration which takes place in India as well as domestic arbitration. This, of course, would be applicable at pre- award stage. Thus, there exists a direct legal link, limited to that extent.

129. We are not oblivious of the principle Kompetenz kompetenz. It requires the arbitral tribunal to rule on its own jurisdiction and at the first instance. One school of thought propagates that it has duly the positive effect as it enables the arbitrator to rule on its own jurisdiction as it widely recognized international arbitration. However, the negative effect is equally important, that the Courts are deprived of their jurisdiction. The arbitrators are to be not the sole judge but first judge, of their jurisdiction. In other words, it is to allow them to come to a decision on their own jurisdiction prior to any court or other judicial authority and

thereby limit the jurisdiction of the national courts to review the award. The kompetenz kompetenz rule, thus, concerned not only is the positive but also the negative effect of the arbitration agreement. [refer Fouchard Gaillard Goldman on International Commercial Arbitration]

130. This policy has found a favourable mention with reference to the New York Convention in some of the countries. This is one aspect. The more important aspect as far as Chapter I of Part II of the 1996 Act is concerned, is the absence of any provision like Section 16 appearing in Part I of the same Act. Section 16 contemplates that the arbitrator may determine its own jurisdiction. Absence of such a provision in Part II, Chapter I is suggestive of the requirement for the Court to determine the ingredients of Section 45, at the threshold itself. It is expected of the Court to answer the question of validity of the arbitration agreement, if a plea is raised that the agreement containing the arbitration clause or the arbitration clause itself is null and void, inoperative or incapable of being performed. Such determination by the Court in accordance with law would certainly attain finality and would not be open to question by the arbitral tribunal, even as per the principle of prudence. It will prevent multiplicity to litigation and re-agitating of same issues over and over again. The underlining principle of finality in Section 11(7) would be applicable with equal force while dealing with the interpretation of Sections 8 and 45. Further, it may be noted that even the judgment of this Court in SBP & Co. (supra) takes a view in favour of finality of determination by the Court despite the language of Section 16 in Part I of the 1996 Act. Thus, there could hardly be any possibility for the Court to take any other view in relation to an application under Section 45 of the 1996 Act. Since, the categorization referred to by this Court in the case of National Insurance Company Ltd. (supra) is founded on the decision by the larger Bench of the Court in the case of SBP & Co. (supra), we see no reason to express any different view. The categorization falling under para 22.1 of the National Insurance Company case (supra) would certainly be answered by the Court before it makes a reference while under para 22.2 of that case, the Court may exercise its discretion and decide the dispute itself or refer the dispute to the arbitral tribunal. Still, under the cases falling under para 22.3,the Court is expected to leave the determination of such dispute upon the arbitral tribunal itself. But wherever the Court decides in terms of categories mentioned in paras 22.1 and 22.2, the decision of the Court is unreviewable by the arbitral tribunal.

131.Another very significant aspect of adjudicating the matters initiated with reference to Section 45 of the 1996 Act, at the threshold of judicial proceedings, is that the finality of the decision in regard to the fundamental issues stated under Section 45 would further the cause of justice and interest of the parties as well. To illustratively demonstrate it, we may give an example. Where party A is seeking reference to arbitration and party B raises objections going to the very root of the matter that the arbitration agreement is null and void, inoperative

and incapable of being performed, such objections, if left open and not decided finally at the threshold itself may result in not only parties being compelled to pursue arbitration proceedings by spending time, money and efforts but even the arbitral tribunal would have to spend valuable time in adjudicating the complex issues relating to the dispute between the parties, that may finally prove to be in vain and futile. Such adjudication by the arbitral tribunal may be rendered ineffective or even a nullity in the event the courts upon filing of an award and at execution stage held that agreement between the parties was null and void inoperative and incapable of being performed. The Court may also hold that the arbitral tribunal had no jurisdiction to entertain and decide the issues between the parties. The issue of jurisdiction normally is a mixed question of law and facts. Occasionally, it may also be a question of law alone. It will be appropriate to decide such questions at the beginning of the proceedings itself and they should have finality. Even when the arbitration law in India contained the provision like Section 34 of the 1940 Act which was somewhat similar to Section 4 of the English Arbitration Act, 1889, this Court in the case of Anderson Wright Ltd. (supra) took the view that while dealing with the question of grant or refusal of stay as contemplated under Section 34 of the 1940 Act, it would be incumbent upon the Court to decide first of all whether there is a binding agreement for arbitration between the parties to the suit or not. Applying the analogy thereof will fortify the view that determination of fundamental issues as contemplated under Section 45 of the 1996 Act at the very first instance by the judicial forum is not only appropriate but is also the legislative intent. Even, the language of Section 45 of the 1996 Act suggests that unless the Court finds that an agreement is null and void, inoperative and incapable of being performed, it shall refer the parties to arbitration. Correctness of Law stated in Sukanya

132. Though rival contentions have been raised before us on the correctness of the judgment of this Court in Sukanya Holdings Pvt. Ltd. (supra), Mr. Salve vehemently tried to persuade us to hold that this judgment does not state the correct exposition of law and to that effect it needs to be clarified by this Court in the present case. On the contrary, Mr. Nariman argued that this judgment states the correct law and, in fact, the principles stated should be applied to the present case.

133. The ambit and scope of Section 45 of the 1996 Act, we shall be discussing shortly but at this stage itself, we would make it clear that it is not necessary for us to examine the correctness or otherwise of the judgment in the case of Sukanya (supra). This we say for varied reasons. Firstly, Sukanya was a judgment of this Court in a case arising under Section 8 Part I of the 1996 Act while the present case relates to Section 45 Part II of the Act. As such that case may have no application to the present case. Secondly, in that case the Court was concerned with the disputes of a partnership concern. A suit had been filed for dissolution of partnership firm and accounts also challenging the conveyance deed executed

by the partnership firm in favour of one of the parties to the suit. The Court noticing the facts of the case emphasized that where the subject matter of the suit includes subject matter for arbitration agreement as well as other disputes, the Court did not refer the matter to arbitration in terms of Section 8 of the Act. In the case in hand, there is a mother agreement and there are other ancillary agreements to the mother agreement. It is a case of composite transaction between the same parties or the parties claiming through or under them falling under Section 45 of the Act. Thus, the dictum stated in para 13 of the judgment of Sukanya would not apply to the present case. Thirdly, on facts, the judgment in Sukanyas case, has no application to the case in hand.

134. Thus, we decline to examine the merit or otherwise of this contention. On Merits

135. The Corporate structure of the companies in the present case has already been stated by us in paragraph 7 which we need not refer here again in detail. Suffice it to note that Kocha group had floated a company and incorporated the same under the Indian laws, which was carrying on the business of manufacture of chlorination equipment under the name and style Chloro Control India Private Limited. They were negotiating with Severn Trent Water Purification Inc. for an international joint venture agreement to deal with the manufacture, distribution and sale of gas chlorination equipment and electro- chlorination equipment, Hypogen Series 3300 etc. On this basis, they had entered into a joint venture agreement which was signed between them. The joint venture agreement contemplated that the business shall be carried on under the name and style of Capital Controls India Ltd. Private Limited. The agreements gave 50 per cent shareholding to the foreign collaborators which were to be equally divided between Capital Control (Del) Company Inc. and Capital Control Company Inc. These joint venture agreements were executed between the parties on 16th November, 1995 but the joint venture company had been incorporated on 14th November, 1995 itself. Severn Trent Services (Del) Inc. is the holding company of the companies which have entered into the joint venture agreement for floating both, the Capital Control India Ltd. as well as Severn Trent De Nora LLC. The disputes had arisen actually between the Kocha Group on the one hand and Severn Trent Water Purification Inc. on the other, and the disputes were mainly with regard to Capital Control (India) Pvt. Ltd. Inc. Now, we must note, even at the cost of repetition, the parties signatory to each of these agreements and we must also note which of these agreements did not contain arbitration clause. Shareholders Agreement dated 16th November, 1995 was executed between the Capital Control (Delaware) Company Inc. and Chloro Control India Private Ltd. Capital Control Delaware Company Inc. was a subsidiary of Severn Trent Services (Delaware) Inc. and was formed on 21st September, 1994. Capital Control Company Inc. came to be merged with Capital Control (Delaware) Company Inc. in March 1994. As a result the Capital Control Delaware Company was no more in existence. Thus, the reference to Capital Control Company Inc.

includes reference to Capital Control Company Inc. as well as Capital Control (Delaware) Company Inc.

136.The corporate structure of the Companies involved in the present litigation clearly shows that name of Capital Control Company Inc., incorporated in the year 1994, was changed to Severn Trent Water Purification Inc. with effect from April, 2002. Thus, both these companies together were subsidiaries of the holding company Severn Trent Services (Delaware) Inc. The joint venture agreement was executed between Chloro Control (India) Pvt. Ltd. and the erstwhile Capital Control Company Inc. resulting into creation of the joint venture company, Capital Control (India) Pvt. Ltd. This is the basic structure which one has to make clear before examining the agreements and their impact. The negotiations between the appellant and the respondent nos.1 and 2 or their holding companies were going on since 1990 and ultimately culminated into execution of the joint venture agreement. In terms of the Shareholders Agreement, the authorized share capital of the company was five million rupees consisting of equity shares of Rs.10/- each. Initially the parties had decided to issue equity capital of 1,50,000 equity shares of Rs.10/- each with 50% of the initial equity to Capital Controls and the remaining 50% to Chloro Controls. It is necessary to refer in some detail the relevant clauses of this Agreement as this agreement is the Principal or the Mother Agreement. All other agreements were executed in furtherance to and for achieving the purpose of this Agreement. This agreement notices that Capital Control was engaged in the design, manufacture, import, marketing, export etc. of gas and electro-chlorination equipments. The company was to be registered and as is evident, in furtherance to the negotiations, steps for registration of the said company had been taken and finally it came to be incorporated on 14th November, 1995. The main object of the joint venture company was the manufacture, service and sale of the products. In terms of the Principal Agreement, establishment of a plant, management of the company, appointment of Directors, implementation of decisions of the Board of Directors, appointment or re-appointment of the Managing Director, dividend policy, loans, financial information, trademarks, transfer of shares, sale-purchase of chlorination equipment, assets, government approvals, performance of Chloro Controls, trademark, service of notices, modifications, severability and arbitration, settlement of disputes by arbitration etc. were the matters specifically provided for under this agreement. A very significant feature of this contract was that the Kocha Group was put under an injunction to not engage directly or indirectly or be financially interested in the manufacture, sale or distribution of chlorination equipment and related products, which is similar to those manufactured or sold by the company during the term of the agreement. Similarly, a restriction was also placed upon Capital Controls and even its holding companies to not directly or indirectly engage in or to be financially interested in the manufacture, sale

or distribution in India of products manufactured or sold by the company, during the term of the agreement.

137. The Principal Agreement specifically referred to various agreements or even terms and conditions thereof. Clause 7 of the agreement provided for execution of the International Distributor Agreement which was Appendix II to this Agreement. The Financial and Technical Know-how Licence Agreement was executed in furtherance to clause 14 thereof. Similarly, the Trademark Registered User License Agreement was required to be executed between the parties in terms of clause 15 of this Agreement. Other terms and conditions of the Principal Agreement referred to management of the company by appointment or reappointment of Directors or Managing Directors inasmuch as Clause 8.6 contemplated execution of the agreement which was appended as Appendix III. Still, certain other clauses of the Principal Agreement specifically dealt with the sale of goods manufactured by the joint venture company, nationally and internationally. This resulted in signing of the International Distribution and Export Sales Agreement between the parties.

138. All the five agreements signed by the parties were primarily to fulfill their obligations and ensure performance of this Principal Agreement. The Supplementary Collaboration Agreement executed in August 1997 was only to comply with the conditions of the Government Approval which were granted vide letter dated 11th October, 1996, as amended by letter dated 21st April, 1997. The companies which executed the various agreements were the companies signatory to the Principal Agreement or their holding companies or the companies belonging to the respondent group in which they had got merged for the purposes of attaining effective designing, manufacturing, import, export and marketing of the agreed chlorinated products.

139. All the subsequent agreements were, therefore, ancillary or incidental agreements to the Principal Agreement. Thus, the joint venture entered between the parties had different facets. Its foundation was provided under the Principal Agreement but all the agreed terms could only be fulfilled by performance of the ancillary agreements. If one segregates the Principal Agreement from the rest, the subsequent agreements would be rendered ineffective. If the agreed goods were not manufactured in India with the technical know- how of the respondent No. 1 company and the joint venture company was not incorporated, the question of the Distribution Agreement, Managing Director Agreement, Financial and Technical Know-How License Agreement or the Export Sales Agreement would not have even arisen, in any event. Conversely, if the ancillary agreements were not performed in a collective manner, the Principal Agreement would be of no consequence. In other words, it was one composite transaction for attaining the purpose of business of the joint venture company. All these agreements are so intrinsically connected to each other that it is neither possible nor probable

to imagine the execution and implementation of one without the collective performance of all the other agreements. The intention of the parties was clear that all these agreements were being executed as integral parts of a composite transaction. It can safely be covered under the principle of agreements within an agreement. For instance, the Financial and Technical Know-How License Agreement not only finds a specific mention in the Principal Agreement but its contents also are referable to the clauses of the Principal Agreement. The Financial and Technical Know- How License Agreement was Appendix III to the Principal Agreement and the details of the goods which were contemplated to be manufactured, distributed and sold under the Principal Agreement had been specified in Appendix I of the Financial and Technical Know-How Agreement. If the latter agreement was not there, the Principal Agreement between the parties would have remained incomplete and the parties would have been at a disadvantage to know as to what goods were to be manufactured and what goods could not have been manufactured. The Principal Agreement referred either specifically or by necessary implication to all other agreements. They were inter-dependent for their performance and one could not be read and understood completely without the aid of the other.

140. Having held that all these other agreements as well as the mother/ principal agreement were part of a composite transaction to facilitate implementation of the principal agreement and that was in reality the intention of the parties, now, we will deal with the question of parties to the principal agreement. When the mother agreement dated 16th November, 1995 was executed between the parties, presumably the Certificate of Incorporation of Capital Control India Private Ltd. had not been issued to the parties though it had been incorporated on 14th November, 1995. If the company had been duly incorporated and the Certificate of Incorporation was available to the parties, then there could be no reason for the parties to propose in the Principal Agreement that the joint venture company would be in the name of Capital Controls India Private Ltd. or any other name which would be mutually agreed between the parties. The reference to joint venture company, thus, was not by a specific name. Both the parties have signed this agreement with the clear intention that the company, Capital Control India Pvt. Ltd., will be the joint venture company. Thus, non-mentioning of the name of the joint venture company in the principal agreement, though it had been incorporated on 14th November, 1995, is immaterial and inconsequential in face of intention of the parties appearing from the written documents on record. Once the Principal Agreement was signed, all other agreements had to be executed by or in favour of the joint venture company. That is how to all these other agreements the joint venture company i.e. Capital Control India Pvt. Ltd. is a party. It further completely supports the view that non-mentioning of the name of Capital Control India Pvt. Ltd. can hardly affect the findings of the Court. With regard to the management of the joint venture company and implementation of the

Principal Agreement, the parties had entered into the Managing Director Agreement dated 16th November, 1995. This agreement was signed by each of the concerned partners i.e. by Capital Control India Pvt. Ltd., respondent No. 5 and the Kocha Group, respondent No. 9. This agreement provided as to how the Managing Directors were to be appointed or reappointed and how the meeting of the Board of Directors of the company were to be conducted in accordance with law and the terms of the Mother Agreement. This agreement came to be signed between the joint venture company and the Kocha Group.

141. Other aspect of performance of the Principal Agreement was the Financial and Technical Know-How License Agreement. This agreement had been signed between the Capital Control Company Inc., subsequently known as Severn Trent Water Purification, respondent No. 1, one the one hand and the joint venture company, respondent No. 5. Severn Trent Water Purification Inc. is the holding company of the joint venture to the extent of its share holding and is the company into which Capital Control (Del.) Co. Inc. had merged. Severn Trent Water Purification Inc. is thus, the resultant product of Capital Control (Del.) Company Inc. being merged into Capital Control Company Inc. and its name was changed with effect from 1st April, 2002. All these three companies had at the relevant time been or when came into existence were and are subsidiaries of Severn Trent (Del.) Inc. The requisite technical know-how was possessed by these companies and was agreed to be imparted in favour of the joint venture company, in furtherance to and as per the terms and conditions contained in the Principal Agreement.

142. Similarly, Severn Trent Water Purification Inc. had entered into an International Distributor Agreement and an Export Sales Agreement with the joint venture to facilitate the sale, marketing and export of goods, under these two different agreements. Thus, it is crystal clear that all the six material agreements had been signed by some parties or their holding companies or the companies into which the signatory company had merged. None of these companies is either stranger to the transaction or not an appropriate party. The parties who have signed the agreements could alone give rights or benefits to the joint venture company and they, in turn, were the companies descendants in interest or the subsidiaries of Severn Trent Services Del. Inc.

143. May be all the parties to the lis are not signatory to all the agreements in question, but still they would be covered under the expression claiming through or under the parties to the agreement. The interests of these companies are not adverse to the interest of the principal company and/or the joint venture company. On the contrary, they derive their basic interest and enforceability from the Mother Agreement and performance of all the other agreements by respective parties had to fall in line with the contents of the Principal Agreement. In view of the settled position of law that we have indicated above, we will have no hesitation in

holding that these companies claim their interest and invoke the terms of the agreement or defend the action in the capacity of a party claiming through or under the parties to the agreement.

Arbitration

144. When we refer to all the six relevant agreements in relation to the arbitration clause, the Shareholders Agreement, the Financial and Technical Know-How License Agreement and the Export Sales Agreement contained the arbitration clause while the other three agreements, i.e., International Distributor Agreement, the Managing Directors Agreement and the Trademark Registered User License Agreement did not contain any such arbitration clause. The arbitration clause contained in the Principal Agreement in clause 30 has been reproduced above. It requires that any dispute or difference arising under or in connection with that agreement which could not be settled by friendly negotiation and agreement between the parties, would be finally settled by arbitration conducted in accordance with the Rules of ICC. This clause is widely worded. It is comprehensive enough to include the disputes arising under and in connection with the agreement. The word connection has been added by the parties to expand the scope of the disputes under the agreements. The intention to make it more comprehensive is writ large from the language of the agreement and particularly clause 30 of the Mother Agreement. It is useful to notice that the agreement has to be construed and interpreted in accordance with laws of the Union of India, as consented by the parties.

145. The expression connection means a link or relationship between people or things or the people with whom one has contact (Concise Oxford Dictionary (Indian Edition). Connection means act of uniting; state of being united; a relative; relation between things one of which is bound up with (Law Lexicon 2nd Edn. 1997).

146. Thus, even the dictionary meaning of this expression is liberally worded. It implies expansion in its operation and effect both. Connection can be direct or remote but it should not be fanciful or marginal. In other words, there should be relevant connection between the dispute and the agreement by specific words or by necessary implication like reference to all other agreements in one (principal) agreement. The expression appearing in clause 30 has to be given a meaningful interpretation particularly when the Principal Agreement itself, by specific words or by necessary implication, refers to all other agreements. This would imply that the other agreements originate from the Principal Agreement and hence, its terms and conditions would be applicable to those agreements. There are three agreements, as already noticed, which do not contain any specific arbitration clause. Both the Managing Director Agreement and the International Distributor Agreement directly relate to the Principal

Agreement stating the manner in which the affairs would be managed and the Managing Directors be appointed. At the same time, the International Distributor Agreement is executed between the Severn Trent Water Purification Inc. the erstwhile Capital Control Company Inc. and the Capital Control India Private Ltd., the joint venture company. Firstly, the chances of dispute between the same group of companies were remote and secondly these were the companies which were held by the same management. The parties had also agreed to have relationship as that of seller and distributor to make the joint venture company a success. The interest of Capital Controls Company Inc. and that of the Capital Control India Private Ltd., to the extent of the formers share, were common. Furthermore, this being an integral part of the Principal Agreement would, in our opinion, be squarely covered by the arbitration clause contained in the Mother/Shareholders Agreement. This agreement has been specifically referred in clause 7 of the Mother/Shareholders Agreement. Not only that there is incorporation reference of International Distribution Agreement in the Mother/Shareholders Agreement but, in fact, it is an integral part thereof.

147. Another aspect of the case is that all these agreements were executed simultaneously on 16th November, 1995 which fact fully supports the view that the parties intended to have all these agreements as a composite transaction. Furthermore, when the parties signed the Supplementary Collaboration Agreement in August 1997, by that time all these agreements had not only been signed and understood by the parties but, in fact, had also been acted upon.

148. In the Supplementary Collaboration Agreement, the parties re- confirmed the existence of the joint venture agreement dated 16th November, 1995 and made a specific stipulation that both the parties confirmed to adhere by the terms and conditions stipulated by the Government of India in its letters dated 11th October, 1996, amended on 21st April, 1997. This was signed by Madhusudan B. Kocha, member of the Kocha group on behalf of the joint venture company and Capital Controls (Delaware) Inc. The necessity for executing this agreement was in face of the condition of Government approval as well as the subsequent amendment of clause 2, 3 and 4 of the approval letter dated 11th October, 1996 i.e. items of manufacture, proposed location and foreign equity.

149. The conduct of the parties and even the subsequent events leave no doubt in the mind of the Court that the parties had executed, intended and actually implemented the composite transaction contained in the Principal Agreement. The Courts have also applied the Group of Companies Doctrine in such cases. As already noticed, this Court in the case of Olympus Superstructure Pvt. Ltd. (supra) permitted reference to arbitration where there were multiple contracts between the parties, interpreting the words in connection with and disputes relating to connected matters.

150. Besides making the reference, the Court also held that making of two awards which may be conflicting in relation to the items which are likely to overlap in two agreements could not be permitted. The courts have also accepted and more so in group company cases that the fact that a party being non-signatory to one or other agreement may not be of much significance, the performance of one may be quite irrelevant with the performance and fulfillment of the principal or the mother agreement. That, in fact, is the situation in the present case.

151. One of the arguments advanced was that the International Distributor Agreement had specifically provided for construction, interpretation and performance of the agreement and for the transaction under that agreement to be governed by and interpreted by the laws of State of Pennysylvania, USA and parties thereto agreed that any litigation thereunder shall be brought in any federal or state court in the Eastern District of the Commonwealth of Pennysylvania which fact would oust the possibility of reference to arbitration in terms of clause 30 of the Principal Agreement, as the parties had chosen a specific forum of the court system. Discussion on this argument may not be greatly relevant in view of the above discussion in this judgment. This being a composite transaction, the parties could opt for any remedy.

152. In the present case, we have already noticed, that some agreements contain the arbitration clause, while others dont. The Shareholders Agreement, Financial and Technical Knowhow Licence Agreement and Export Sales Agreement contain the arbitration clause, while the International Distributor Agreement, Managing Directors Agreement and Trade Mark Registered User Agreement do not contain the arbitration clause. The arbitration clause contained under clause 30 of the Shareholders Agreement and that under clause 26 of the Financial and Technical Knowhow Licence Agreement are identical. They both require the disputes to be referred to arbitration in London as per the ICC Rules. However, the arbitration clause contained in clause 18 of the Export Sales Agreement provides for reference of the disputes to arbitration at Pennsylvania, USA, in accordance with rules of American Arbitration Association. It also provides that the judgment upon the Award rendered could be entered in any court of competent jurisdiction. Still, clause 21 of the International Distributor Agreement required the construction, interpretation and performance of the agreement to be governed by and interpreted under the laws of the State of Pennsylvania, USA. Any litigation thereunder was to be brought in any federal or State Court located in the Eastern District of the Commonwealth of Pennsylvania, which was to be binding upon the parties.

153. As already noticed, two of the agreements did not contain any arbitration clause, but they also did not subject the parties even for litigative jurisdiction. They are the Managing Directors Agreement and the Trademark Registered User Agreement. These two agreements

had been executed in furtherance to and for compliance of the terms and conditions of the mother agreement which contained the arbitration clause. They were, thus, intrinsically inter-connected with the mother agreement.

154. All these agreements were signed on the same day and in furtherance to the mother agreement. None of the parties have invoked the jurisdiction of the Court at Pennsylvania, USA. Thus, it was an alternative remedy that too restricted to the disputes, if any arising from that agreement. Where different agreements between the parties provide for alternative remedies, it does not necessarily mean that the other remedy or jurisdiction stands ousted. Where the parties to such composite transaction provide for different alternative forums, including arbitration, it has to be taken that real intention of the parties was to give effect to the purpose of agreement and refer the entire subject matter to arbitration and not to frustrate the remedy in law. It was for the parties to chose either to institute a suit qua the International Distributor Agreement at Pennsylvania or to invoke the arbitration agreement in terms of clause 30 of the mother agreement. They have chosen the latter remedy. The question, therefore, does not arise as to which law would apply since the only litigation taken out by the parties is the suit instituted by the appellant before the original side of the Bombay High Court and the subsequent application for reference to arbitration filed by the Respondent No. 1 under Section 45 of the 1996 Act.

155. The effect of execution of multiple agreements has been discussed by us in some elaboration above. The real intention of the parties was not only to refer all their disputes arising under the agreement which could not be settled despite friendly negotiations to arbitration, but even the disputes which arose in connection with the shareholder/mother agreement to arbitration.

156. Thus, a composite reference was well within the comprehension of the parties to various agreements which were executed on the same day and for the same purpose. There cannot be any doubt to the contention that in terms of Section 9 of the CPC, the courts in India shall have jurisdiction to try all suits of civil nature. Further, this section gives a right to a person to institute a suit before the court of competent jurisdiction. However, the language of Section 9 itself makes it clear that the civil courts have jurisdiction to try all suits of civil nature except the suits of which taking cognizance is either expressly or impliedly barred. In other words, the jurisdiction of the court and the right to a party emerging from Section 9 of the CPC is not an absolute right, but contains inbuilt restrictions. It is an accepted principle that jurisdiction of the court can be excluded. In the case of *Dhulabhai v. State of M.P. and Anr*[15]this Court has settled the principle that jurisdiction of the Civil Court is all embracing, except to the extent it is excluded by law or by clear intendment arising from such law. In *Nahar Industrial Enterprises Ltd. v. Hong Kong & Shanghai Banking Corporation*[16]this

Court has even stated the conditions for exclusion of jurisdiction. They are, (a) whether the legislative intent to exclude is expressed explicitly or by necessary implication, and (b) whether the statute in question provides for an adequate and satisfactory alternative remedy to a party aggrieved by an order made under it.

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

158. In the present case, the court can safely gather definite intention on behalf of the parties to have their disputes collectively resolved by the process of arbitration. Even if different forums are provided, recourse to one of them which is capable of resolving all their issues should be preferred over a refusal of reference to arbitration. There appears to be no uncertainty in the minds of the parties in that regard, rather the intention of the parties is fortified and clearly referable to the mother agreement.

159. It is not the case of any of the parties before us that any of the parties to the present litigation had taken steps before that Court or had invoked the jurisdiction of that court under that system. There is no apparent conflict of interest as of now. The arbitration clause would stand incorporated into the International Distributor Agreement as this agreement itself was Appendix II to the Principal Agreement. This Court in the case of *M.R. Engineers and Contractors Pvt. Ltd. v. Som Datt Builders Ltd*[17]has stated that firstly the subject of reference be enacted by mutual intention, secondly a mere reference to a document may not be sufficient and the reference should be sufficient to bring out the terms and conditions of the referred document and also that the arbitration clause should be capable of application in respect of a dispute under the contract and not repugnant to any term thereof. All these three conditions are satisfied in the present case.

160. The terms and conditions of the International Distribution Agreement were an integral part of the Principal Agreement as Appendix II and the Principal Agreement had an arbitration clause which was wide enough to cover disputes in all the ancillary agreements. It is not necessary for us to examine the choice of forum or legal enforceability of legal system in the present case, as we find no repugnancy even where the main contract is governed by law of some other country and the arbitration clause by Indian law. They both could be invoked, neither party having invoked the former will be no bar for invocation of the latter in view of arbitration clause 30 of the mother agreement.

161. Reliance was also placed on the judgment of this Court in the case of *Deutsche Post Bank Home Finance Ltd. v. Taduri Sridhar*[18]where the Court had declined reference of multiple and multi party agreement. That case is of no help to the appellant before us. In that case, there were four parties, the seller of the land, the builder, purchaser of the flat and the bank. The bank had signed an agreement with the purchaser of the flat to finance the flat, but it referred to other agreement stating that it would provide funds directly to the builder. There was an agreement between the builder and the owner of the land and the purchaser of the land to sell the undivided share and that contained an arbitration clause. The question before the Court was whether while referring the disputes to the arbitration, the disputes between the bank on the one hand, and the purchaser of the flat on the other could be referred to arbitration. The Court, in reference to Section 8 of the 1996 Act, held that the bank was a non-party to the arbitration agreement, therefore, neither the reference was permissible nor they could be impleaded at a subsequent stage. This judgment on facts has no application. The distinction between Section 8 and Section 45 has elaborately been dealt with by us above and in view of that, we have no hesitation in holding that this judgment, on facts and law, is not applicable to the present case. Chloro Controls(I) P.Ltd vs Severn Trent Water Purification ... on 28 September, 2012

162. Thus, in view of the above, we hold that the disputes referred to and arising from the multi-party agreements are capable of being referred to arbitral tribunal in accordance with the agreement between the parties.

163. Another argument advanced with some vehemence on behalf of the appellant was that respondent Nos.3 and 4 were not party to any of the agreements entered into between the parties and their cause of action is totally different and distinct, and their rights were controlled by the agreement of distribution executed by respondent Nos.1 and 2 in their favour for distribution of products of gas and electro- chlorination. It was contended that there cannot be splitting of parties, splitting of cause of action and remedy by the Court.

164. On the other hand, it was contended on behalf of the respondent No.1 that it is permissible to split cause of action, parties and disputes. The mater referable to arbitration could be segregated from the civil action. The court could pass appropriate orders referring the disputes covered under the arbitration agreement between the signatory party to arbitration and proceed with the claim of respondent Nos. 3 and 4 in accordance with law.

165. As far as this question of law is concerned, we have already answered the same. On facts, there is no occasion for us to deliberate on this issue, because respondent Nos. 3 and 4 had already consented for arbitration. In light of that fact, we do not wish to decide this question on the facts of the present case.

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

Answer

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

168. In the facts of a given case, the Court is always vested with the power to delete the name of the parties who are neither necessary nor proper to the proceedings before the Court. In the cases of group companies or where various agreements constitute a composite transaction like mother agreement and all other agreements being ancillary to and for effective and complete implementation of the Mother Agreement, the court may have to make reference to arbitration even of the disputes existing between signatory or even non-signatory parties. However, the discretion of the Court has to be exercised in exceptional, limiting, befitting and cases of necessity and very cautiously. Chloro Controls(I) P.Ltd vs Severn Trent Water Purification ... on 28 September, 2012

169. Having answered these questions, we do not see any reason to interfere with the judgment of the Division Bench of the Bombay High Court under appeal. We direct all the disputes arise in the suit and from the agreement between the parties to be referred to arbitral tribunal and be decided in accordance with the Rules of ICC.

170. The appeals are dismissed. However, in the facts and circumstances of the present case, we do not award costs.

Judgment Referred

[1]*(2003) 5 SCC 0531*
[2]*(2002) 4 SCC 0105*
[3]*(2001) 7 SCC 0473*
[4]*(1999) 5 SCC0651*
[5]*(AIR 1996 SC 2140)*
[6]*1982] 2 Lloyds Rep. 0425*

[7]*1978 Vol. 1 LLR 0225*
[8]*1955 SCR 0862*

[9](2008) 4 SCC0091
[10]*1955 SCR 0862*
[11]*(2005) 8 SCC 0618*
[12]*(2007) 4 SCC 0599*
[13]*(2009) 1 SCC 0267*
[14]*AIR 1969 SC 078*
[15]*(2009) 8 SCC 0646*
[16]*(2009) 7 SCC 0696*
[17]*AIR 2011 SC 1899*