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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: March 03, 2023

\+ ARB.P. 474/2022

ADITYA BIRLA FINANCE LIMITED

..... Petitioner

Through: Mr. Raj Shekhar Rao, Sr. Adv. with Mr. Aseem Chaturvedi, Mr. Ravitej Chilumuri, Ms. Mihika Jalan, Ms. Raddhika Khanna, Ms. Pragya Dahiya and Ms. Aanchal Tikmani, Advs.

versus

SITI NETWORKS LIMITED & ORS.

..... Respondents

Through: Mr. Joy Basu, Sr. Adv. with Ms. Ritwika Nanda, Ms. Akshita Salampuria and Mr. Kanak Bose, Advs. for R-1

Mr. P. Chidambaram, Sr. Adv. and Mr. Sandeep Sethi, Sr. Adv. with Mr. Aman Raj Gandhi, Mr. Vardaan Bajaj, Ms. Bindi Dave and Mr. Pranay Tuteja, Advs. for R-2

Mr. Samar Singh Kachwaha, Ms. Shivangi Nanda and Ms. Kavita Vinayak, Advs. for R-3

AND

\+ O.M.P.(I) (COMM.) 414/2021, I.As. 4739/2022, 6182/2022, 7938/2022 & 10296/2022

ADITYA BIRLA FINANCE LIMITED

..... Petitioner

Through: Dr. Abhishek Manu Singhvi, Sr. Adv. & Mr. Darpan Wadhwa, Sr. Adv. with Mr. Aseem Chaturvedi, Ms. Raddhika Khanna, Mr. Ravitej, Ms. Milika Jalan, Ms. Pragya Dahiya, Mr. Siddhant Kumar, Mr. Shivank Diddi, Mr. Amer Vaid, Ms. Neelakshi Bhadauria and Ms. Ashima Chauhan, Advs.

versus

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

J U D G M E N T

V. KAMESWAR RAO, J

I.A. No. 6182/2022 in O.M.P.(I) (COMM.) 414/2021 (by the petitioner seeking condonation of 6 days delay in filing reply to IA No.4739/2022)

For the reasons stated in the application, the same is allowed. The delay of 6 days in filing reply to the application is condoned and the reply is taken on record.

Application is disposed of.

I.A. No. 7938/2022 in O.M.P.(I) (COMM.) 414/2021 (by the respondent No.2 seeking condonation of 3 days delay in filing written submissions and for taking written submissions on record)

For the reasons stated in the application, the same is allowed and delay of 3 days in filing the written submissions is condoned. The written submissions are taken on record.

Application is disposed of.

Arb.P. 474/2022 & O.M.P.(I) (COMM.) 414/2021

1. By this order, I shall decide the above two petitions as the facts and the subject matter of the petitions arise from the same agreement(s) and the parties in both the petitions are common except to the extent that respondent No.3 in ARB.P. 474/2022 is Essel Corporate LLP. Further, some of the submissions advanced are common to both the petitions. It may be stated that the submissions

advanced by the counsels for the parties and the analysis of the Court shall be narrated separately.

FACTS IN ARB. P. 474/2022

2. The petitioner has preferred the instant petition under Section 11 of the Arbitration and Conciliation Act, ('Act of 1996') with the following prayers:

> *"In the above noted facts and circumstances, it is most humbly prayed before, this Hon'ble Court may be pleased to:-*
>
> *(a) Allow the present Petition and appoint a Ld. Sole Arbitrator for adjudication of the disputes and differences between the Petitioner and the respondent Nos. 1, 2, 3 and 4, in accordance with Clause 12 of CAL read with Clause 33 of the Facility Agreement;*
>
> *(b) Award costs of this Petition as per Section 31 (A) of the Act be paid by the respondents in favour of the petitioner; and*
>
> *(c) Such further or other order or orders and/or direction or directions be given as this Hon'ble Court may deem fit and proper."*

3. It is a case where the petitioner is a company incorporated under the provisions of the Companies Act, 1956, having its registered office at Indian Rayon Compound, Veraval, Gujarat-362266. The Petitioner is registered with the Reserve Bank of India (RBI), under Section 45-IA of the Reserve Bank of India Act 1934, as a Systemically Important, Non-Deposit taking Non-Banking Finance Company (NBFC).

4. Whereas the respondent No.1 i.e., the Siti Networks Limited is a publicly listed company registered under the Companies Act, 1956 and has its registered office at 4th floor Madhu Industrial Estate, Pandurang Budhkar Marg, Worli, Mumbai – 400018. It is stated that the respondent No. 1 is primarily involved in the business *inter alia* of providing broadband services to its consumers.

5. Whereas the respondent No. 2 i.e., Zee Entertainment Enterprises Limited is a publicly listed company registered under the Companies Act, 1956 and has its registered office at 18th Floor, A Wing Marathon Future, N M Joshi Marg, Lower Parel, Mumbai, Maharashtra-400013.

6. It is stated that the respondent No. 1 is the principal borrower as it has availed 'Term Loan / Facility' from the petitioner.

7. As far as involvement of respondent No.2 in the case in hand is concerned, it is the case of the petitioner that respondent No. 2 is the Promoter, Group Company and Related Party of the respondent No. 1 and as such belongs to the Essel Group of Companies which has its headquarters in Mumbai.

8. It is stated that Managing Director ('MD') and promoter of the respondent No.2, who was initially impleaded as respondent No.3, is no more a party to the present petition as his name has been deleted from the array of parties and thus, the Essel Corporate LLP, which is a limited liability partnership incorporated under the Limited Liability Partnership Act, 2008 and which forms a part of the Essel Group of Companies, which was initially impleaded as respondent no.4, has

now become respondent No.3 in the present petition, after filing of the amended memo of parties by the petitioner.

9. It is stated that the present Petition has been filed under Section 11 of the Act of 1996 on behalf of the petitioner seeking appointment of a Sole Arbitrator for adjudication of the disputes and differences which have *inter alia* arisen in relation to the term loan of ₹150,00,00,000/- ('Facility/Term Loan') extended by the petitioner to the respondent No. 1 under the Credit Arrangement Letter dated January 16, 2017 ('CAL') read with the Facility Agreement dated February 23, 2017 ('Facility Agreement'), and Letters dated June 26, 2018 issued by the respondent No. 2, signed by the MD of the respondent No.2 (allegedly, 'Letter of Guarantee 1') and issued on behalf of respondent No. 3 (signed by one, Mr. Himanshu Mody) (allegedly, 'Letter of Guarantee 2').

10. It is the case of the petitioner that CAL and Facility Agreement have been signed by the petitioner and the respondent No. 1. Whereas the Letter of Guarantee 1 has been executed by the the MD and CEO of the respondent No. 2. Whereas the Letter of Guarantee 2 has been executed by one Himanshu Mody, on behalf of the respondent No. 3.

11. It is further the case of the petitioner that Clause 12 of the CAL provides for settlement of disputes through arbitration. The Clause 12 of CAL is reproduced as follows:

> *"Governing Law and Jurisdiction:*
>
> *This document as well as the Financing documents shall be governed by the Indian Law, disputes and/or differences, if any, shall be resolved by Arbitration of a*

Sole Arbitrator (retired high court of Supreme court judge) to be appointed by Lender in accordance with the Arbitration & Conciliation Act, 1996, to be conducted at a place as decided by the arbitrator in English language. List of such judges to be shared with the borrower at the time of documentation."

12. It is stated that Clause 33 of the Facility Agreement also provides for the arbitration clause and it is reproduced as follows:

"33. Arbitration

(i) Notwithstanding anything contained in this undertaking, in case any lender or any other Finance party does not have the benefit of the Recovery of Debts due to Banks and Financial institutions Act, 1993 and the securitisation and Reconstruction of Financial Assets and Enforcement of security interest Act, 2002, then the parties will have a right (and the Borrower expressly agrees on such a right) to refer any dispute arising out of or in connection with this Agreement (including a disputes regarding the existence, validity or termination of this Agreement or the consequences of its nullity) shall be finally resolved by arbitration in accordance with the terms below;

(ii) The arbitration will be conducted as per the Arbitration and Conciliation Act, 1996;

(iii) The Lender or the relevant finance party will have the right to appoint the sole arbitrator and the borrower upfront confirms that it does not have any objection to such appointment and additionally waives its right to object to such appointment;

(iv) The seat of arbitration would be Delhi, India;

(v) The proceedings would be conducted in English and the award provided by the arbitrator would be final and binding on all parties."

13. It is primarily the case of the petitioner that both the CAL and the Facility Agreement are binding upon both the parties.

14. It is further stated that the respondent No.1 had approached the petitioner for financing requirements and pursuant to such request, the petitioner issued the CAL in respondent No.1's favour and thereby a credit facility of ₹150,00,00,000/- was sanctioned and disbursed to the respondent No.1.

15. The initial Interest Rate under the Facility Agreement was as per Schedule I of the Facility Agreement, which was 11% p.a. and with the agreed interest, the entire Facility Funds were duly disbursed to the respondent No.1.

16. It is the case of the petitioner that the respondent No.1 has defaulted in the payment of the term loan. On August 31, 2021, September 30, 2021, October 31, 2021 and November 30, 2021, the respondent No. 1 had submitted Disclosure Letters ('Disclosure Letters') to National Stock Exchange of India Limited and BSE

Limited ('the Stock Exchanges') *inter alia* admitting the default in the payment of the Term Loan to the petitioner and also admitting that the total outstanding amount payable to the petitioner is ₹134,00,00,000/-.

17. It is stated that by way of security, the following security documents were executed: **(a) Deed of Hypothecation**, dated February 23, 2017, by the respondent No. 1 in the petitioner's favour, whereby the respondent No. 1, hypothecated various assets, more particularly defined under the Facility Agreement, including all tangible and intangible current assets and fixed assets, including but not limited to movable furniture and fixtures, insurance contracts and the Interest Service Reserve Account (Deed of Hypothecation); **(b) Demand Promissory Note** dated February 23 ,2017; and **(c) Letter of Continuity** dated February 23, 2017.

18. It is further stated that around April 06, 2018, on account of concerns in relation to the performance of the respondent No.1, the petitioner issued a letter to the respondent No.1 *inter alia* stating that in terms of the provisions of the Facility Agreement, it has decided to increase the 'Spread Interest Rate' and has, as such revised the Interest Rate to 16%.

19. On April 11, 2018, May 15, 2018, May 28, 2018 and May 31, 2018, the respondent No. 1, sent various emails, opposing the increase in Spread Interest Rate, claiming that the same is arbitrary and requested the petitioner to withdraw the Interest Reset Letter. It is the case of the petitioner that even the representatives of the respondent No. 2 were marked on these emails for negotiating the withdrawal of the Interest Reset Letter.

20. On constant persuasions of the respondent No.1, the petitioner agreed to reduce the Interest Rate from 16% to 13%, on the condition that the respondents should comply with the following obligations:

a. That the respondent No. 1 will have to reduce the total exposure in relation to the Term Loan by making the payment of ₹75,00,00,000 on or before 31 December 2018; and

b. That the respondent No. 2 will have to guarantee that payments will be made timely.

21. It is the case of the petitioner that the afore-said arrangement was recorded in the emails dated June 26, 2018 and June 27, 2018 sent by the representatives of the respondent No. 2, wherein the representatives of the Essel group including the respondent No. 2 assured that the MD of the respondent No.2 would provide a letter, to guarantee, assure and ensure that the respondent No. 1 would make payments under the Facility Agreement on the relevant due dates, and that the respondent No. 1 would reduce the exposure by making payment of ₹75,00,00,000 on or before December 31 , 2018.

22. It is stated that pursuant to this, the respondent Nos.2 and 3 issued the alleged Letters of Guarantee dated June 26,2018 to the petitioner, *inter alia* stating the following:

> *a. "We are aware that Aditya Birla Finance Limited (ABFL) has sanctioned and disbursed a Rupee Term Loan Facility of INR150,00,00,000 (Rupees One Hundred and Fifty Crore) ["Facility"]to our group company, Siti Networks Limited, pursuant to Credit Arrangement Letter dated January 16, 2017 bearing reference number ABFL/PFSG/CAL/000894, Facility Agreement dated*

> *February 23, 2017 and other transaction documents in connection therewith.*
>
> ***b. <u>Pursuant to our discussions, we hereby assure you and confirm that we shall ensure that Siti Network Limited services and repays the Facility on the relevant due dates."</u>***
>
> *(Emphasis Supplied)*

23. It is the case of the petitioner that the alleged 'Letter of Guarantee 1', issued by the respondent No.2 was signed and executed by one Punit Goenka, i.e., the MD and promoter of the respondent No.2. Whereas, the alleged 'Letter of Guarantee 2' was signed by one Himanshu Mody, who is the Head – Group Finance and Strategy of the Essel Group. It is further the case of the petitioner that the senior management of the respondent No.2 as well as the Essel Group has made representations to the petitioner that the respondents No. 1 and 2, are group companies, belonging to the Essel Group of Companies and it was on this context that the petitioner insisted that the alleged Letter of Guarantee 1 be issued by the MD of the respondent No.2 on its behalf.

24. It is also the case of the petitioner that since the respondent No.2, under the alleged Letter of Guarantee 1, has undertaken to ensure that payments towards Secured Obligations under the Facility Agreement will be made by the respondent No. 1, on the relevant due dates, therefore, it is also a primary obligor under the Facility Agreement along with the respondent No. 1. Even, in an email dated June 27, 2018, representatives of the respondent No. 2 had themselves

committed to make part pre-payment of the Facility amount disbursed to the respondent no.1.

25. On January 30, 2019, the petitioner issued a letter to the respondent No. 1, stating *inter alia* that the respondent No. 1 is in breach of its financial commitments as it has failed to provide a compliance certificate for maintenance of Security Cover Ratio of 1:25:1 as required under Clause 16.28(iii) of the Facility Agreement. Furthermore, as per email dated June 27, 2018, the respondent No. 1 had committed to reduce its exposure by paying INR 75,00,00,00 by December 31, 2018. However, it is stated that the respondent No. 1 has neither prepaid the Term Loan nor reduced its exposure, which was the basis for resetting the Interest Rate to 13% instead of 16%. So, the petitioner urged the respondent No.1 to cure all its breaches and violations.

26. That on February 07, 2019 (i.e., on the Date of Default), the credit rating of the respondent No. 1 dropped down to three notches. Therefore, on February 07, 2019, the petitioner issued a recall notice to the respondent No. 1 ('Recall Notice 1') *inter alia* stating that the ICRA/ CARE credit rating of the respondent No. 1 has downgraded by three notches as in breach of Clause 16.25 (iii) of the Facility Agreement. Therefore, the petitioner alleged this to be an event of default ('EOD') under Clause 19.2 of the Facility Agreement and demanded the respondent No. 1 to make payment of the entire Secured Obligations on an immediate basis.

27. On the same day, the respondent No. 1 issued a reply to the petitioner stating that all the companies of respondent No. 2 including

the respondent No. 1 are performing well. It was further stated by the respondent No.1 that the downgrade of credit rating by ICRA /CARE is due to decline in share price of other Group Entities and is not based on the performance of the respondent No. 1; It is the case of the petitioner that the respondent No. 1 had expressly acknowledged that its credit rating by ICRA/CARE has dropped by three notches and that the respondent Nos. 1 and 2 are group companies.

28. On February 11, 2019, the petitioner sent another recall notice to the respondent No. 1 ('Recall Notice 2') *inter alia* stating that credit rating by ICRA / CARE has to be maintained at all times and downgrade is an EOD under Clauses 16.25 and Clause 19.2 of the Facility Agreement. Thus, the petitioner requested the respondent No.1 to repay the entire Term Loan along with the Interest Rate and Default Interest on an immediate basis.

29. Thereafter, on February 12, 2019, the petitioner issued a recall notice to the respondent No. 2 as well ('Recall Notice 3') *inter alia* recalling the entire amount under the Facility Agreement, and demanding payment from the respondent No. 2 on an immediate basis while making reference to the Letter of Guarantee 1. It is the case of the petitioner that the respondent No. 2 did not issue any response to the Recall Notice 3 and did not contest its liability in relation to the respondent No. 1.

30. It is further stated that despite the Recall Notices, the respondent Nos. 1 and 2 have failed to repay any amounts to the petitioner in conformity of the Facility Agreement. It is also the case of the petitioner that the respondent No. 2 has failed in performing its

obligations under the Letter of Guarantee 1, which included, ensuring that the respondent No.1 would make payments under the Facility Agreement to the petitioner, on the relevant due dates.

31. It is also the case of the petitioner that apart from the respondent No.1's credit rating by ICRA /CARE being downgraded and its defaults in payment of the Facility, there were various other breaches of the terms of the Facility Agreement committed by the respondent No.1, which includes, "change in the promoter shareholding (in breach of Clause 19.17 of the Facility Agreement) and also the respondent No.1's failure to Maintain Total Debt Equity Ratio and 'Net Debt-to-EBIDTA Ratio' in breach of Clause 16.28 of the Facility Agreement".

32. After that, on March 01, 2019, the petitioner issued a Legal Notice ('Legal Notice 1') to the respondent Nos.1 and 2, *inter alia*, highlighted the EODs and also invoked the guarantee against the respondent No. 2.

33. On March 22, 2019, the respondent No. 1, issued a letter to the petitioner ('Reply Letter 1') *inter alia* assailing that the respondent No.2 is an Obligor under the Facility Agreement and has extended a guarantee for payments there under.

34. In response to Reply Letter 1, on May 16, 2019, the petitioner issued another legal notice ('Legal Notice 2') *inter alia* reiterated the contents of Legal Notice 1 and urged respondent No.1 to adhere with the contents of the former Notice.

35. In response to Legal Notice 2, on May 24, 2019, the respondent No. 1 issued another letter to the petitioner ('Reply Letter

2') *inter alia* stating that the respondent No. 1 is regular in payment of its financial commitments and there are no overdues and also reiterated the submissions made in Reply Letter 1.

36. As a final attempt, on October 18, 2021, the Advocates on behalf of the petitioner issued a letter ('Legal Notice 3') to the respondent No. 2 *inter alia* calling upon the respondent No. 2 to ensure that the respondent No. 1 makes payment of all outstanding dues under the Facility Agreement. However, it is the case of the petitioner that till date the respondent No. 2 has neither made any payment on behalf of the respondent No. 1 nor ensured that the respondent No. 1 makes the payment of the outstanding amount.

37. On October 27, 2021, the respondent No. 2 issued a letter in response to Legal Notice 3 ('Reply Letter 3') addressed to the Advocates of the petitioner, *inter alia* denying that it was liable to make any payments on behalf of the respondent No. 1 and also that it was a guarantor for the Facility granted to the respondent No. 1.

38. It is the case of the petitioner that as the respondent No. 2 has failed to ensure that the respondent No. 1 makes payment on the relevant due dates and fulfil its obligation under the Letter of Guarantee 1 and the Facility Agreement, on December 02, 2021, the petitioner issued another recall notice dated December 02, 2021 ('Recall Notice 4') demanding the total principal outstanding amount under the Facility Agreement of ₹134,00,00,000/-. In the said Notice, the petitioner designated the Letter of Guarantee 1 as a Financing Document in terms of the following clause of the Facility Agreement:

> *"Financing Documents" means this Agreement, the Facility Agent Agreement, any Security Document, any Utilisation Request, the Demand Promissory Note, the Letter of Continuity, the ECS mandate issued by the Borrower in connection with payment/ repayment of the Secured Obligations and any other document designated as such by the Lenders".*

39. It is also the case of the petitioner that the Annual Report of the respondent No. 1 indicates that over the past year itself, the respondent No. 1 has made payment of at least ₹108 crores to the respondent No. 2. The balance sheet of the respondent No. 1 also indicates that the respondent No. 2 and respondent No. 1 have entered into various related party transactions.

40. It is further the case of the petitioner that as per the Deed of Hypothecation, various assets are charged to the petitioner and such a charge in favour of the petitioner is evident from 'Form CHG – 1' dated March 08, 2017 filed by the respondent No. 1 with the Registrar of Companies. It is stated that as such monies of the respondent No. 1 being in the nature of current assets of the respondent No.1, forms part of the hypothecated property and are charged to the petitioner and accordingly cannot be paid to the respondent No.2 in preference to the petitioner.

41. It is also stated that the petitioner has also filed a petition under Section 9 of the Act of 1996, bearing no. O.M.P.(I) (COMM) 414/2021, seeking amounts due towards the facility, be deposited with this court and it is still pending adjudication before this Court.

42. This Court vide order dated December 23, 2021 allowed certain prayers in the aforesaid petition filed by the petitioner and

directed the respondent No. 1 to refrain from making any payments to its related parties. The relevant extract of the order of this Court is reproduced below:

> *"6. There is no dispute that respondent No.1 had entered into the Facility Agreement dated 23.02.2017. Therefore, it is directed that in the meanwhile, respondent No.1 shall not make any payments to any related party in terms of Clause 16.20(iii) of the Facility Agreement dated 23.02.2017, without the express consent of the petitioner."*

43. During the pendency of the afore-said petition, the petitioner invoked the arbitration vide its advocates' notice dated March 23, 2022('Arbitration Notice'), in accordance with Clause 12 of CAL read with Clause 33 of the Facility Agreement, and nominated a retired Judge of the Supreme Court of India as the nominee Ld. Sole Arbitrator and thereby called upon the respondents to confirm the same in order to adjudicate the disputes and differences which had arisen between the parties under the Facility Agreement and other Financing Documents.

44. It is the case of the petitioner that the respondents have not issued any reply to the said Arbitration Notice, therefore, another notice was sent on April 20, 2022, whereby the respondents were warned by the petitioner to an extent that if they would not reply to the said notice then the petitioner would be constrained to take necessary steps for the purposes of appointment of an arbitrator.

45. So as per the petitioner, it is only because of the afore-said conducts of the respondents, that the petitioner is constrained to file the instant petition.

SUBMISSIONS ON BEHALF OF PETITIONER

46. It is the case of Mr. Raj Shekhar Rao, learned Senior Counsel, appearing on behalf of the petitioner that both the parties i.e., the respondent No.1 as well as the respondent No.2, have a direct relationship, as they form a part of the same group of companies i.e., the Essel Group of Companies. He submitted that the Essel Group of Companies has a tight group structure, and is under the common control of certain individuals who direct the policies and employees of the various group companies including respondent Nos. 1 and 2. So, he submitted that all the entities belong to the same group.

47. Reliance has been placed upon the definition of the term 'promoters' under the Facility Agreement, which is reproduced as follows:

> *"Promoters" means Mr. Subhash Chandra and/ or entities owned and/ or Controlled by him.*

48. He submitted that the chairman of the respondent no. 2 as well as the Essel Group of Companies is Mr. Subhash Chandra and whereas Mr. Punit Goenka, who is the CEO of the respondent No. 2, is the son of Mr. Subhash Chandra.

49. He further submitted that bare perusal of the 'Letter of Guarantees' issued by the respondent Nos.2 and 3, shows that in fact, it is admitted by the respondent Nos. 2 and 3 that the respondent No. 1 is their group company. The Letter of Guarantee 1 issued by the respondent No. 2 *inter alia* states the following:

> *"We are aware that Aditya Birla Finance Limited (ABFL) has sanctioned and disbursed a Rupee Term Loan facility of Rs.150,00,00,000/- (Rupees One Hundred & Fifty crore*

only) ["Facility"] to our group company, Siti Networks Limited, ...”

50. He submitted that the Letter of Guarantee 2, issued by the respondent No. 3 incorporates similar language to admit that the respondent No. 1 is a group company of the respondent No. 3 and the respondent Nos. 1, 2 and 3 have time and again admitted, even publicly, and made representations that respondents No. 1, 2, and 3 are group companies.

51. It is his submission that even the Annual Reports for 2016-17 and 2018-19, (i.e. during the relevant points in time when the Facility was granted and Letter of Guarantees were issued, respectively), published by the respondent No. 2 has classified respondent No.1 as: *“Other Related parties consists of companies controlled by key management personnel and its relatives with whom transactions have taken place during the year and balance outstanding as on the last day of the year”*. Further, the respondent No. 1 has also admitted in its Annual Reports for 2016-17and 2018-19 that the respondent No. 2 is a related party.

52. Furthermore, in the annual report of financial year 2020-21, respondent No. 2 has admitted that it had provided commitments for funding shortfalls in Debt Service Reserve Account (DSRA guarantee) in relation to certain financial facilities availed from banks by respondent No. 1.

53. So, it is his primary submission that from the public record it can be ascertained that the respondent Nos.1 and 2 are group

companies and related entities, forming part of the Essel Group of Companies.

54. He substantiated his submission by submitting that the majority of the partners of the respondent No.3 have disclosed in their respective consent forms their email addresses, which includes their domain name as either esselgroup.com and zee.esselgroup.com. He submitted that this indicates that all partners of the respondent No. 3 are persons who are working for the same group.

55. Furthermore, he highlighted that the shareholding pattern for March 2022 quarter of the respondent No. 2, as evident from the Bombay Stock Exchange website, shows that the respondent No. 3 is a promoter shareholder of the respondent No. 2 with 0.02% shareholding. Even the Promoter shareholding in respondent No. 1, at the time of the Facility Agreement in February 2017, as well as at the time of issuance of the Letter of Guarantees, was more than 70% and 65.68%, respectively and the same has been disclosed to the stock exchanges. He submitted that one of the Promoter companies, which had significant shareholding in respondent No. 1 was 'Essel Media Ventures Limited' as it had at least 8.70% shareholding in the respondent No. 1, as on 31 March 2017 i.e., at the time when the first disbursement was made.

56. Moreover, at the time of the execution of the Facility Agreement, the Promoter Shareholding in the respondent No. 2 was approximately 43.07%, and the remaining was held by public shareholding. Thereafter, at the time of issuance of the Letter of

Guarantees, the Promoter Shareholding in the respondent No. 2 was above 40%.

57. He submitted that akin to the respondent No. 1, the Essel Group of Companies, including 'Essel Media Ventures Limited' held at least 10.71% shareholding in the respondent No. 2 as on quarter end of March 2017 (i.e., at the time when the facility was disbursed) and in June 2018 (i.e., at the time when the Letter of Guarantees was issued).

58. He also submitted that there may not be a direct shareholding of the respondent No. 2 in the respondent No. 1, but it can be seen that at the time of the Facility Agreement in February 2017 and also at the time of issuance of the Letter of Guarantees, there was extensive cross shareholding by entities belonging to Essel Group of Companies, in both the respondent No. 1 and the respondent No 2. He submitted that the cross-shareholding pattern between both of these respondents shows that there was unity of ownership and interest at the time of entering into the Facility Agreement and also at the time of issuance of the Letter of Guarantees, indicating that there was a direct relationship between the two entities.

59. He substantiated this by stating that the beneficial owner of the No.2 is Amit Goenka, who is the son of Subhash Chandra, and who is also the Promoter of the respondent No.1. He submitted that such beneficial ownership is evident from 'Form Ben-1', dated November 30, 2019 and 'Form Ben-2' dated December 19, 2019 filed by Amit Goenka and the respondent No. 1 respectively, with the Registrar of Companies.

60. He submitted that the financial obligations and financial commitments made by the respondents on behalf of the respondent No. 1 and vice versa, coupled with the cross-shareholdings, manifests that the respondent No. 1 and respondent No. 2, are but a single economic entity as such commitments cannot be made unless the respondents are a single economic entity.

61. He also submitted that the emails dated June 26, 2018 and June 27, 2018, sent by the representatives of the respondent No. 2, also demonstrates that the entire basis of reduction of interest rate from 16% to 13% was because of the representations and commitments made by the respondents Nos.2 and 3. Furthermore, in an email dated June 27, 2018, the representatives of the respondent No. 2 had themselves committed for the part pre-payment of the Facility amount.

62. So, in a nutshell, one of the many submissions of Mr. Rao is, that the respondents belong to a same group of companies and have a single economic identity. Therefore, all of the respondents should be referred to the adjudicatory process of arbitration.

SUBMISSIONS ON BEHALF OF RESPONDENT NO. 2

63. Whereas it is primarily the case of the respondent No.2 that the petitioner has only sought to implead the respondent No.2 with a sole objective to exert undue pressure and extort monies from it.

64. As far as legal technicalities are concerned, the respondent No.2 has disputed the maintainability of the present petition only against the respondent No.2.

65. Mr. Chidambaram, learned senior counsel appearing on behalf of the respondent No.2, has staunchly argued against impleading

respondent No.2, on the basis of invocation of the Group of Companies doctrine.

66. To substantiate this, he submitted that the respondent No.2 is a public company, listed on the National Stock Exchange and the Bombay Stock Exchange, wherein 96.01 % of the shares are held by public and a meagre 3.99% of the shares are held by the promoters. Similarly, respondent No.1 is also a public company wherein the promoter group holds 6.10% of the shareholding and the remaining 93.90% shares are held by the public. So, it is his submission that such a meagre percentage of shareholding is not sufficient in law, or otherwise, for the promoters to exercise any significant control or influence in public companies or to suggest that there is any prominent commonality in the shareholding pattern which manifests that respondent No.1 and respondent No.2 operate as a single economic entity.

67. Reliance has been placed upon the judgment of the Supreme Court in the case of ***Cox and Kings Limited v. SAP India Private Limited and Another***[1], to contend that the Group of Companies doctrine has been doubted by the Apex Court and thus may not be a good law. He further submitted that since the Supreme Court has questioned the legality of the 'Group of companies' doctrine, the action of the petitioner, seeking to implead the respondent No.2 (being a non-signatory to arbitration agreement) by placing reliance upon the said doctrine is itself under a cloud .

[1] 2022 SCC Online SC 570.

68. He further submitted that since the petitioner has a remedy available under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('the SARFAESI Act') and The Recovery of Debts due to Banks And Financial Institutions Act, 1993 ('the RDDBFI Act'), so it cannot be permitted to take recourse to the arbitration proceedings. To substantiate this argument, he relied upon Clause 33 of the Facility Agreement, which has already been reproduced above in paragraph 12.

Whilst relying upon this Clause, he submitted that recourse to arbitration is available to the petitioner only in cases where the petitioner has no remedy either under the RDDBFI Act or the SARFAESI Act and as long as even one of the two statutory remedies is available with the petitioner, the recourse to arbitration proceedings is invalid.

69. He substantiated his afore-mentioned argument by submitting that the petitioner is a Non-Banking Financial Company ('NBFC') and as per the notification dated February 24, 2020, issued by the Ministry of Finance, an NBFC, defined under Section 45 - I (f) of the Reserve Bank of India Act, 1934, having assets worth ₹100 crores and above, is entitled to enforce its security interest in secured debts of ₹50 Lakhs and above, as financial institutions for the purposes of the said Act, i.e. SARFAESI Act.

70. He submitted that since the loan granted by the petitioner is secured by way of security documents enumerated in Clause 9 of the CAL, so by default, the remedies under the SARFAESI Act are

available with the petitioner and as such the petitioner should be precluded from invoking the arbitration clause.

71. To crystallize his contention that the instant case does not fall within the ambit of exceptional circumstances under which the group-company doctrine can be invoked to compel a non-signatory to arbitrate. He submitted the following contentions:

(A) That the respondent No.2 is a non-signatory to the arbitration Clauses enumerated in the Facility Agreement and the CAL, and therefore cannot be compelled to arbitrate in the absence of the mutual intent of the parties. Reliance is placed upon Section 7 of the Act of 1996, to contend that the existence of the arbitration agreement between the parties is a *sine qua non* for reference of the disputes between parties to arbitration and in the instant case there is no arbitration agreement between the petitioner and the respondent No.2.

(B) That both, respondent No.1 and respondent No.2 are not related parties and there is also no direct relationship / nexus between the two entities. Whilst relying upon Section 2(76) of the Companies Act, 2013, it has been submitted that the respondent No.2 is an independent and a separate legal entity and both respondent No.1 and respondent No.2 are not related parties in conformity with Section 2(76) of the Companies Act 2013. To crystallize that the respondent No.1 and No.2 are not related parties, he raised the following arguments:

Ba) That none of the directors or managers of the respondent No.2 are directors in the respondent No.1 .

Also, none of the relatives of the directors in respondent No.2 are directors in respondent No.1, or vice versa. Further, none of the director or manager in either companies, is a director or holds along with his relatives, more than two percent of its paid-up share capital, in another company;

Bb) That the Board of Directors, Managing Director or Manager of the respondent No.2 do not act in accordance with the advice, directions or instructions of the board / directors of respondent No.1 and vice versa. The respondent No.2, therefore does not have control or significant influence over respondent No.1 and vice versa;

Bc) That the respondent No.2 and respondent No.1 are neither holding /subsidiaries nor associate companies and also do not fall under Section 2(76)(viii) of the Companies Act, 2013;

Bd) That since the sanction of the loan by the petitioner to respondent No.1 in January 2017, there have been neither any common directors nor any common key managerial persons ('KMPs') in respondent No.1 and respondent No.2. Further, none of the KMPs of respondent No.2 have been directors in respondent No.1 and vice versa.

(C) That the letter dated June 26, 2018 alleged to be a Letter of Guarantee, is merely a Letter of Comfort ('LoC') and even

the loan transactions are not part of a composite transaction. He substantiated this in the following manner:

Ca) That bare perusal of the LoC would show that the limited assertion made by the respondent No.2 was to an extent that it shall ensure that the respondent No.1, services and repays the Facility on the due dates and the respondent No.2 never took upon itself the obligation to service or repay the debt in the event of respondent No.1's failure to do so, which is a key ingredient under Section 126 of the Indian Contract Act,1872, that deals with the Contract of Guarantee.

Cb) That the petitioner vide letters dated February 12, 2019 and October 18, 2021, called upon the respondent No.2 only to ensure that the respondent No.1 clears all the dues in connection with the facility and the respondent No.2 itself was not asked to repay dues. He submitted that if the petitioner would have truly believed the LoC extended by the respondent No.2 to be a guarantee, it would have called upon the respondent No.2 to repay the alleged dues.

Cc) That in the email dated November 28, 2018, addressed by the petitioner to the respondent No.2, the alleged letter of guarantee was referred to as the letter of assurance.

Cd) That even the LoC does not form a part of the composite transaction. He submitted that neither the

correspondence exchanged nor the loan documents, indicate any mutual intent of the parties to bind the respondent No.2 to the said transaction.

Ce) That the existence of the loan transaction and its execution by and between the petitioner and the respondent No.1 was not dependent upon the execution or performance of any obligation by the respondent No.2. This is evident from the fact that the LoC extended by the respondent No.2 was much later in time than the execution of the loan transaction between the petitioner and respondent No.1.

Cf) That the respondent No.2 did not undertake any obligation at the time of execution of the loan transaction, by and between the petitioner and respondent No.1, and in fact, the LoC did not exist at the time of advancing the loan facility to the respondent No.1.

Cg) That mere reference to the Facility Agreement does not bind the respondent No.2 to the arbitral Clause stipulated in the Facility Agreement. Reliance has been placed upon the judgment of the Supreme Court in ***M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd.,***[2] , to argue that a general reference to a different contract will not be sufficient to incorporate the arbitration clause from the referred contract into the contract under consideration. He submitted that there

[2] (2009) 7 SCC 696.

should be special reference which shall indicate the mutual intent of the parties to incorporate the arbitration clause from another contract into the contract under consideration, which is clearly absent in the instant case.

(D) Furthermore, it was submitted that the payments made by the respondent No.1 to respondent No.2 were in the ordinary course of business and in terms of their *inter se* contractual obligations. To crystallize this, he raised the following arguments:

Da) That the respondent No.2 is a broadcaster and a global media and entertainment conglomerate, which broadcasts media content. On the other hand, respondent No.1 is a Distribution Platform Provider (hereinafter, 'DPO') to various broadcasters, including respondent No.2. In terms of the Telecommunication (Broadcasting & Cable) Services Interconnection (Addressable Systems) Regulations, 2017 ('Inter-connection Regulations'), Interconnection Agreements have been executed between respondent No.1 and respondent No.2. As part of its business operations, respondent No.1 avails signals of television channels of respondent No.2, for re-transmission of the same to consumers / subscribers, for consideration in terms of the subscription fees. The transaction between respondent No.1 and respondent No.2 are undertaken at arm's length basis and as mandated under the Inter-connection Regulations.

Db) That during the FY 2020 - 2021, the respondent No.1 paid a sum of ₹108 Crores to respondent No.2 in terms of the Interconnection Agreement. However, the said amount is much lower than the total outstanding amount which is owed to respondent No.2 by respondent No.1. In fact, as per the audited Financial Statement for the FY 2020 -21, the respondent No.1 had admittedly shown an amount of ₹197.50 Crores as Trade Payables to the respondent No.2.

Dc) That the respondent No.1 made the payments to respondent No.2 after getting the same approved by the Agency for Specialized Monitoring ('ASM'), i.e., KPMG which has been appointed by the Joint Lenders Forum ('JLF') of which the petitioner is an active member.

Dd) That the payments made by the respondent No.1 to respondent No.2 were not held in trust for the petitioner. According to him, respondent No. 2 cannot be held to ransom by the terms of an agreement between the petitioner and respondent No.1, particularly when the monies owed to respondent No. 2 are towards and in respect of services contractually already rendered and continue to be rendered by it to the respondent No.1. It has been submitted that under no circumstances can the petitioner's rights to recover its dues from respondent No.1 take precedence over rights available with respondent No.2.

De) That dues owed to respondent No. 2 by respondent No.1, do not fall within the ambit of Subordinate Claims in terms of the Facility Agreement, as these payments are required to be made by respondent No. 1 to respondent No. 2 in the ordinary course of business as consideration for the signals provided by respondent No.2.

Df) That the monies owed to respondent No.2 do not fall under the definition of Subordinate Claims, as respondent No.2 has not provided any security for the loan availed by respondent No.1. Thus, it is not an 'obliger' in terms of the Facility Agreement. The term ‘subordinate claim’ has been defined in the Facility Agreement and which is reproduced as follows:

> *“Subordinated Claims, means all present and future Financial Indebtedness incurred by the Obligers (Other than the Facility) from any entity of the group whether direct or indirect, including interest payment, or any payment on account of any default or acceleration or any premature payment, charges, cost, fees expenses, indemnities, however, evidenced, whether, as a principal, surety, guarantor, or otherwise."*

Further, the monies owed to respondent No.2 are not in the capacity of being the principal / surety / guarantor. He submitted that the expression "or otherwise" under the said definition ought to be interpreted in light of the principles of *ejusdem generis*, and the said term cannot be interpreted to include vendor payments. Lastly, he submitted that the respondent No.2 is not a group entity of respondent

No.1 and therefore, the monies owed by respondent No.1 to respondent No.2 are not covered within the scope of the definition.

SUBMISSIONS ON BEHALF OF RESPONDENT NO.3

72. It is also the primary case of the respondent No.3 that the present petition is not legally maintainable specifically against it.

73. It is the case of the respondent No.3 as contended by Mr. Samar Singh Kachwaha, learned counsel appearing on behalf of the respondent No.3, that the respondent No.3 being a non-signatory to any of the agreements executed between the petitioner and the respondent No.1, it cannot be impleaded in the instant petition.

74. He submitted that the petitioner in December 2021 had filed a petition under Section 9 of the Act of 1996, bearing OMP (Comm.) 414 of 2021 relating to the same transaction and the same is pending adjudication before this Court. However, respondent No.3 was not even impleaded as a party therein for the obvious reason that respondent No.3 has no connection whatsoever with the transactions pertaining to the remaining parties. He submitted that it is a trite law that the threshold of impleading third parties / non-signatories to a Section 9 petition of the Act of 1996 is much lower than in the case of a Section 11 petition.

75. He further emphasized that the respondent No.3 is neither a signatory to any purported arbitration agreement contained either in the CAL or the Facility Agreement. He submitted that as per Section 7 of the Act of 1996, the existence of the arbitration agreement between the parties is a *sine qua non* for reference of the disputes between parties to arbitration. Thus, without existence of an arbitration agreement

between respondent No.3 and the petitioner, the petitioner cannot compel respondent No.3 to participate in the arbitration proceedings.

76. It has further been submitted that Section 7(5) of Act of 1996, mandates that a reference in a contract to a document containing the arbitration clause would also constitute an Arbitration Agreement if the contract is in writing and reference to the Arbitration Agreement is such so as to make the arbitration clause a part of the contract. However, in the instant case there is no such document issued by respondent No.3 which demonstrates its intention to get incorporated through an arbitration clause in the agreements executed between the respondent No.1 and the petitioner. It was submitted that the only document executed by respondent No.3 is the letter dated June 26, 2018 and even the said document does not demonstrate the intention of respondent No.3 to be bound by any arbitration agreement with the petitioner. He submitted that the Supreme Court has time and again clarified that the intention of a non-signatory to be bound by the arbitration clause ought to be express and specific. This is clearly not the case in relation to respondent No.3. He has relied upon the following judgments to contend the same:

(a) M.R. Engineers & Contractors (P) Ltd.[3];

(b) S.N. Prasad Hitek Industries (Bihar) Limited v. Monnet Finance Limited and others[4];

(c) MSTC Ltd. v. Omega Petro Products Pvt Ltd And Ors[5];

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[3] Supra.
[4] (2011) 1 SCC 320.
[5] MANU/MH/0166/2018.

(d) STCI Finance Ltd. v. Shreyas Kirti Lal Doshi And Anr.[6];

(e) STCI Finance Ltd. v. Sukhmani Technologies Pvt. Ltd. and Ors[7].

77. He has also majorly relied upon the judgment of the coordinate bench of this Court in ***Sukhmani Technologies Pvt. Ltd. and Ors[8].*** to contend that once a non-signatory is dragged to arbitral proceedings by a signatory party, there must be very clear evidence that the non-signatory is, in law, bound by the arbitration agreement. Substantially, reliance has also been placed upon another judgment of this Court in ***Shreyas Kirti Lal Doshi and Anr.[9]*** to contend that the respondent No.3 cannot be sent to the process of arbitration.

78. He further submitted that respondent No.3 was nowhere in the picture at the time of sanction of the alleged term loan to respondent No.1 and finds no reference in the original facility documents/agreements. In fact, a perusal of the CAL and the Facility Agreement would reveal that the Comfort Letter / alleged guarantee from respondent No.3 did not even exist at the time of execution of the aforesaid agreements. Accordingly, it is his submission that the issuance of the said LoC had no bearing on the transaction between the petitioner and respondent No.1.

79. It is also his submission that the petitioner also never called upon respondent No.3 to fulfill its purported obligations to pay as a guarantor / or invoked the purported guarantee and it is only now, by

[6] MANU/DE/0078/2020.
[7] 2016 SCC OnLine Del 6650.
[8] Supra.
[9] Supra.

falsely claiming the letter dated June 26, 2018 to be a guarantee in the captioned petition, the petitioner is seeking to implead respondent No.3 as a guarantor, which clearly reflects its malafide intent.

80. He submitted that all the emails exchanged between the parties and the contents of the LoC dated June 26, 2018, would reveal that respondent No.3 never took upon itself the obligation to service or repay the debt in the event of respondent No.1's failure to do so.

81. He also relied upon the judgment of the High Court of Bombay in the case of ***Yes Bank Ltd. v. Zee Enterprises Ltd.***[10] to contend that in terms of the said judgment, the alleged Letter of Guarantee 1 cannot be construed as a Guarantee but it is only a LoC, as it did not conform with the contours of Section 126 of the Indian Contract Act, 1872.

82. He then relied upon Section 3 of Maharashtra Stamp Act, 1958 to contend that every instrument executed within the State of Maharashtra needs to be stamped at the rates mentioned in Schedule I of the said Act and since the alleged Letter of Guarantee 1, is not stamped as such in terms of the said Act, the same is inadmissible in evidence and cannot be acted upon.

83. He also submitted that since the Supreme Court of India has questioned the legal validity of the 'Group of companies' doctrine as expounded in the ***Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.***[11] and subsequent judgments, the action of the petitioner in seeking to implead respondent No.3 (being a non-signatory to arbitration agreement) in the captioned matter, placing

[10] LD-VC-IA NO. 01 of 2020 in LD-VCSUIT NO. 120 Of 2020.
[11] (2013) 1 SCC 641.

reliance on the said Group of Companies doctrine is wholly misplaced and thus the instant petition deserves to be rejected on this ground alone.

84. He submitted that *de hors* ***Cox and Kings Limited*** [12] Judgment, the reliance of the petitioner on the Group of Companies doctrine is misplaced and, the said doctrine is not applicable to respondent No.3 for the following reasons: -

(A) That respondent No. 3 is not only a non-signatory but also never participated in the negotiation process during the drafting /execution of the agreements between the petitioner and respondent No.1;

(B) That there was no express or implied consent or mutual intention of respondent No.3 to be bound by the arbitration agreement between respondent No.1 and the petitioner. In this regard, it is submitted that neither the correspondence exchanged between the parties, nor the circumstances surrounding the loan transaction between respondent No.1 and the petitioner, nor the initial transaction documents like CAL and/or the Facility Agreement demonstrate any intention of respondent No.3 to be bound by any arbitration agreement;

(C) That the petitioner has misconstrued the LoC to be a guarantee, which does not indicate any undertaking or specific reference by respondent No. 3 to be bound to an arbitration agreement;

[12] Supra.

(D) That there was no composite transaction involving the petitioner, respondent No.1 and respondent No.3 as the LoC finds no reference in the original facility documents and was given much later in time and had no bearing on the loan transaction between the petitioner and respondent No.1. The said letter did not constitute a security and was, at the highest, a comfort afforded to the petitioner. The said letter does not indicate assumption of any liability or onus by respondent No.3.

85. He further submitted that just because respondent No.3 holds 0.02% share holding in the respondent No.2, that would not mean that the respondent No.2, and respondent No.3 are single economic entities or alter egos. He submitted that there are no direct shareholdings of respondent No.3 in respondent No.1 and respondent No.3 is not a promoter company of respondent No.1, which clearly demonstrates that the two entities are different economic entities. He contended that in the absence of any shareholding in respondent No.1 and a negligible shareholding in respondent No.2, it is incomprehensible how the principles of single economic entity and/or Group of Companies doctrine can be invoked in relation to the respondent No.3. So, he argued that there is no recognisable ground to bind a non-signatory to an arbitration clause, in the present facts and circumstances.

86. He also submitted that the petitioner's action of taking recourse to arbitration is premature in view of the availability of a remedy under the SARFAESI Act.

87. It is also his case that an interpretation to an effect that the petitioner can designate any document as financing document is seriously flawed in as much as the said interpretation stands in direct contrast with the doctrine of privity of contract. He submitted that there has to be *consensus ad idem* between the parties. A party cannot unilaterally bind another party by exercising power that is granted under an agreement to which the third party is not even a signatory. He further submitted that the petitioner has not designated the LoC (Letter of Guarantee 2) sent by respondent No.3 as 'Financing Document' and therefore, there is nothing on record that binds the respondent No. 3 to CAL and the Facility Agreement.

88. It is also the submission of Mr. Kachwaha that the LoC sent by the respondent No.3 does not fall under any of the enlisted categories for it to be considered as 'security document' or document creating a 'Security Interest'. So, he submitted that it cannot be said that the said LoC though not designated by the petitioner as a Financing Document still qualifies as a Financing Document.

89. It is also his case that the petitioner never addressed any communication to Mr. Punit Goenka concerning the alleged amounts due to it under the CAL or the Facility Agreement. The letters, communications and legal notices that were addressed by petitioner to respondent No. 1 neither mentions respondent No. 3 nor the LoC issued by respondent No. 3. So, he submitted that no cause of action accrues in favour of the petitioner against respondent No. 3 for the petitioner never asserted to have any right/claim against the respondent

No.3. It was for this reason that Mr. Punit Goenka was also not made a Party to the Section 9 petition.

90. So, it is his submission that the grounds raised by the petitioner to invoke arbitration against respondent No.3 are insufficient and thus it should not be referred to arbitration.

REJOINDER SUBMISSIONS

91. Submissions made by Mr. Rao to demonstrate that the respondent No.3 should also be sent to arbitration are in the following manner:

(A) That prima facie perusal of the CAL read with the Facility Agreement for any disputes arising out of and in relation thereto and the Financing Documents, i.e., Letter of Guarantee 2, shows that there is a clear intent to arbitrate and an agreement to arbitrate does exist and this is sufficient for the purposes of the present petition, which is limited to only see whether an arbitration agreement exists.

(B) He submitted that as per the terms of the CAL read with the Facility Agreement, Financing Documents are not limited to documents which are designated as such by the Lender i.e. the petitioner. Hence, the argument of the respondent No. 3 stating that the Letter of Guarantee 2 has not been designated as Financing Document by the petitioner is irrelevant. As per the terms of the CAL read with the Facility Agreement, Financing Documents also include documents in relation to Security / Security Documents. He further submitted that the definition of the term 'Security' under the Facility Agreement

inter alia includes documents creating a Security Interest. Reliance has been placed upon the definition of the term Security Interest under the Facility Agreement which is as follows:

> *"Security Interest" means:*
>
> *(i) a mortgage, charge, pledge, hypothecation, lien or other encumbrance securing any obligation of any Person;*
>
> *(ii) any arrangement under which money or claims to money, or the benefit of, a bank or other account may be applied, set off or made subject to a combination of accounts so as to effect discharge of any sum owed or payable to any Person; or*
>
> *(iii) any other type of preferential arrangement (including any title transfer and retention arrangement) having a similar effect."*

(C) He submitted that the very definition of Security Interest includes such other preferential arrangements (except mortgage, hypothecation, or arrangements under which money may be applied, set off, etc.) which have similar effect of either:

(i) securing any obligation of any Person; or (ii) the effect of discharge of any sum owed or payable to any Person.

(D) He submitted that Letter of Guarantee 2 is a preferential arrangement, as under it, respondent No. 3 has assured and ensured the payment of the sums owed by respondent No. 1 to

the petitioner on the relevant due dates in preference to other secured or unsecured creditors, in consideration for and in exchange of, the reduction in interest rate from 16% to 13%. Hence, Letter of Guarantee 2 has a similar effect of securing the obligation of respondent No.1 to the petitioner.

(E) He also submitted that at the very least, respondent No. 3 has, by undertaking that respondent No. 1 would make payment on relevant due dates, provided a preferential arrangement, having the similar effect as to the discharge of sums payable to the petitioner.

(F) So it his submission that the Letter of Guarantee 2 is a document creating a Security Interest and is thus a Security Document and a Financing Document, in terms of the Facility Agreement.

(G) He submitted that any allegations that failure to implead respondent No.3 in the proceedings under Section 9 of the Act of 1996 reflects that respondent No.3 has no connection to the case and / or that no case is made out against respondent No.3, is incorrect. It is his case that the petitioner had sought interim protection against respondent Nos.1 and 2 under Section 9 petition, as respondent No. 2 had been fraudulently siphoning funds away from respondent No. 1, in breach of its obligations under the Facility Agreement and the Letter of Guarantee 1. At that stage, the petitioner opted to not seek any interim protection against respondent No.3, but the same does not, in

any manner, dilute the obligations of respondent No.3 under Letter of Guarantee 2.

(H) He further submitted that the respondents' contention that recourse to arbitration is available to the petitioner only in the absence of remedies available under RDDBFI Act or SARFAESI, is incorrect. He argued that from the express language of Clause 33 of the Facility Agreement, it is evident that the remedy of arbitration is not available to the petitioner only if it has remedy under the RDDBFI Act 'and' SARFAESI. The usage of the word 'and' indicates that the remedies ought to be jointly available to the petitioner for it to not have the remedy of arbitration. The availability of either remedy under either of the statutes, i.e., either under RDDBFI Act or under SARFAES Act is not sufficient to deny the petitioner recourse to arbitration. He substantiated his submission in the following manner:

(Ha) The petitioner does not have any remedy under the RDDBFI Act as it is not covered within the scope of application of the said Act. In such circumstances respondents cannot contend that arbitration is not available to the petitioner.

(Hb) In any event, it is submitted that the remedies available under SARFAESI Act and under the Act of 1996 are different – SARFAESI Act deals with enforcement of security, and the same does not preclude the remedy of arbitration. Moreover, the remedy under SARFAESI Act is

for enforcement of security interest, and not for recovery of amounts.

(Hc) From the terms of arbitration agreement under Clause 12 of CAL read with terms of the arbitration agreement under Clause 33 of Facility Agreement, the intention of parties to refer their disputes to arbitration even in relation to Financing Documents is evident. That Clause 33 of the Facility Agreement uses words of widest amplitude while explaining the disputes that are to be referred to arbitration i.e., *"any dispute arising out of or in connection with"* the Facility Agreement.

(Hd) He further argued that the arbitration clause envisages arbitration as a mode for resolving disputes under CAL and / or Facility Agreement as well as Financing Documents. In terms of the CAL and the Facility Agreement, Financing Documents include Security Documents i.e., those documents which create a Security Interest. As enunciated aforesaid, the Letter of Guarantee 2 which was executed on behalf of respondent No. 3 for creating a Security Interest is a Security Document and hence a Financing Document, under the CAL read with the Facility Agreement and therefore the disputes in relation to the same may be referred to arbitration. So, it is his case that there is a valid and binding arbitration clause between the petitioner and

respondents for referring the present disputes to arbitration under the CAL read with the Facility Agreement.

(I) He submitted that even though respondent No. 3 is a non-signatory, it is bound by the arbitration Clause in CAL read with the Facility Agreement as the parties are a part of the same group and there is implied intent of the parties to arbitrate. He contended that respondent No. 1 and respondent No. 3 have a direct relationship as they form a part of the same Group of Companies i.e., the Essel Group of Companies. Moreover, Essel Group of Companies has a tight group structure, and is under the common control of certain individuals who direct the policies of the various group companies including respondent No. 1 and 3.

(J) He also submitted that in the instant case the respondent No.3 had assured and ensured the payments on behalf of respondent No. 1 and it had also undertaken to make payments on behalf of respondent No.1 upon the failure of respondent No. 1 making payment to the petitioner. Thus, in light of the assurance provided by respondent No.3 under the letter dated June 26, 2018 (i.e.,the Guarantee), it would squarely fall within the definition of guarantee under Section 126 of the Indian Contract Act 1872.

(K) So, on the afore-said grounds, he urged this Court to refer respondent No.3 as well to the process of adjudication of disputes through arbitration.

92. To counter Mr. Chidambaram's two-fold submissions on the maintainability of the petition on the grounds that the Group of Companies doctrine cannot be invoked because of ***Cox and Kings Limited***[13] and also that recourse to arbitration cannot be taken into when remedies under the SARFAESI and RDDBFI Acts are available to the petitioner, Mr. Rao submitted that unless the decision of the Supreme Court is not modified or overruled, the doctrine as it stands today ought to be applied since the petitions filed under Section 11 of the Act of 1996, cannot remain in limbo and justice between the parties at hands can also not to be allowed to remain in a state of suspended animation. As far as recourse to arbitration is concerned, Mr. Rao submitted that the usage of the word 'and', mentioned in Clause 33 of the Facility Agreement indicates that the remedies ought to be jointly available to the petitioner for it not to have the remedy for arbitration. It is also being submitted that anyhow the petitioner does not have any remedy under the RDDBFI Act and moreover the remedies available under SARFAESI Act and the Act of 1996 are different. Reliance has been placed upon the judgment of the Supreme Court in the case of ***M.D. Frozen Foods Exports Pvt. Ltd. & Ors. vs. Hero Fincorp Ltd.***[14], to contend the same.

[13] Supra.
[14] (2017) SCC Online SC 1211.

93. Mr. Rao further submitted that the arbitration clause envisages arbitration as a mode for resolving disputes under CAL and/or Facility Agreement, as well as Financing Documents. In terms of the CAL and the Facility Agreement, Financing Documents include those documents which are designated by the lender. In the present case, the alleged Letter of Guarantee 1, dated June 26, 2018 which was executed on behalf of the respondent No. 2 by reason of being designated by the petitioner as a financing document under its letter dated December 02, 2021, is a Financing Document under the CAL read with the Facility Agreement and therefore the disputes in relation to the same may be referred to arbitration.

94. With regards to the contention of Mr. Chidambaram that since respondent No.2 is non-signatory to the arbitration agreement thus cannot be impleaded in this arbitration petition, Mr. Rao staunchly argued that despite respondent No.2 being non-signatory to the arbitration agreement, it is still bound by the arbitration clause as the parties are part of the same group and there is implied intent of the parties to arbitrate.

95. He submitted that the terms of the Facility Agreement including Clause 16.21, makes the intent *ex-facie* clear that it was the Essel Group of Companies, including respondent No. 1 and 2, which were bound with respect to various obligations under the Financing Documents. The Facility was sanctioned and disbursed *inter-alia* on the mutually agreed premise that no payment shall be made by respondent No. 1 to respondent No. 2 till the repayment of the Facility. Further, even if any such amount is received by respondent No. 2 from

respondent No. 1, such amounts were to be held in trust for and on behalf of the petitioner and paid to the petitioner on demand. The intention to bind respondent No. 2 apart from being manifested in the Facility Agreement, is also seconded by the respondent No. 2 issuing the Letter of Guarantee 1 and issuance of Letter of Guarantee 2 by the Essel Corporate LLP (i.e., respondent No.3).

96. He submitted that in fact, the petitioner had granted the loan under the Facility Agreement to respondent No. 1 only after due verification of the credit worthiness of the entire group of companies and on the basis of representations made under the Facility Agreement in relation to the Group of Companies. The respondent No. 2 even qualifies as a 'Promoter' and a 'Group' company under the Facility Agreement.

97. Mr. Rao then elaborated the direct relationship between the respondent No.1 and 2 with the following facts:

(A) In its annual reports, respondent No. 1 has stated that respondent No. 2 is an "Enterprises owned or significantly influenced by Promoter/Promoter Group".

(B) In the financial statements of the respondent No. 1 as well as the financial statements of respondent No. 2, respondent No. 2 has been identified as a related party of respondent No 1 and vice versa.

(C) Mr. Chandra is the Chairperson Emeritus of the Essel Group of Companies.

(D) Mr. Punit Goenka, who is the eldest son of Mr. Chandra, is the Managing Director and Chief Executive Officer of respondent No. 2.

(E) The Annual Report for FY 2020-21 published by respondent No. 2 evidently discloses that Mr. Chandra and Mr. Goenka are members of the board of the directors of respondent No. 2.

(F) Mr. Chandra and Mr. Goenka are as such hold significant management control and are responsible for the day-to-day management of respondent No. 2 and take the policy decisions on behalf of respondent No. 2.

(G) It is also admitted that Mr. Chandra is the Promoter of respondent No. 1.

(H) At the time of the Facility Agreement in February 2017 as well as at the time of issuance of the Letter of Guarantee, the promoter shareholding was more than 70% and 65.68%, respectively, in respondent No. 1 and was approximately 43.07% and more than 40% respectively, in respondent No. 2.

98. It is also the case of Mr. Rao that both the respondent No.1 as well as the respondent No.2 are related parties. To substantiate this argument, he pointed out that in the financial statements of the respondent No. 1 as well as the financial statements of respondent No. 2, respondent No. 2 has been identified as a related party of respondent No. 1 and vice versa.

99. He submitted that the law as it stands today in relation to group of companies doctrine is well settled and would continue to be binding. It is his submission that the interest of justice cannot be kept at bay pending the final adjudication of an issue. To contend this, he has taken the aid of the following judgments:

(a) K.P. Remadevi and Anr vs. Veena U Nair[15];

(b) State of Rajasthan v M/s R S Sharma & Co.[16];

(c) Ashok Sadarangani and Ors vs. Union of India[17].

100. He further submitted that under the Companies (Accounts) Rules, 2014 (enacted pursuant to Sections 129 and 133 of the Companies Act 2013), the financial statements have to be in the form specified in Schedule III to the Companies Act, 2013 and comply with Accounting Standards or Indian Accounting Standards ("Ind AS") as applicable. The Central Government has notified the Indian Accounting Standards ("Ind AS") under Section 133 of the Companies Act 2013, which are prescribed as the applicable accounting standards under Rule 3 of the Companies (Indian Accounting Standards) Rules 2015, framed under Section 469 of the Companies Act, 2013. Further, Rule 4 of Companies (Indian Accounting Standards) Rules 2015, imposes an obligation upon every company and its auditors to comply with the Ind AS specified in the Annexure, for preparation of their financial statements. 'Ind AS 24', which is a part of the Annexure, provides for related party disclosures and definition of a "related

[15] 2021 SCC Online Ker 338.
[16] (1988) 4 SCC 353.
[17] AIR 2012 SC 1563.

party". As such, all the Ind AS, more particularly Ind AS 24, and accounting rules, are made under and pursuant to the Companies Act, 2013 and as such are within the ambit of / reference to Companies Act, 2013 and in turn within the ambit of the Facility Agreement. In this context, the use of the words "meaning ascribed to the term in the Act" in the definition of 'Related Party' under the Facility Agreement is of significance.

101. He further submitted that the financial statements of the respondent No. 2, have been prepared in accordance with Section 129 read with Schedule III and Section 133 of the Companies Act, 2013 and the Rules made thereunder. He also submitted that the financial statements of respondent No. 1, have also been prepared in accordance with Section 133 of the Companies Act, 2013 and the Rules made thereunder. He contended that the respondent Nos. 1 and 2, have admitted in their financial statements that the financial statements have been prepared in accordance with Ind AS notified under Section 133 of Companies Act 2013. So, it is his submission that as such, the admissions regarding their relationship as a "related party" in the financial statements would have to be construed as admission regarding their relationship as "related party" under the Companies Act 2013.

102. In order to substantiate that respondent No.1 and 2 are related parties, Mr. Rao made the following submissions:

(A) That the respondent No. 1 is a body corporate whose board of directors managing director / manager is accustomed

to act on the advice, directions and / or instructions of Mr. Punit Goenka, the Managing Director and CEO of respondent No. 2 as well as Mr. Subhash Chandra, the Chairman Emeritus of respondent No. 2. He submitted that this fact is evident from a bare perusal of the Letter of Guarantee, which has been signed by Mr. Punit Goenka himself. He submitted that it could have been impossible for Mr. Goenka to provide assurances regarding the payment obligations of respondent No. 1, if the board of directors of respondent No. 1 was not accustomed to act in accordance with the with the directions and / or instructions of Mr. Goenka and / or his family.

(B) That the email dated June 27, 2018 sent by representatives of the respondent No. 2 from domain of zee.esselgroupc.om in which respondent No. 2 has assured prepayment from respondent No. 1, could only be made if respondent Nos. 1 and 2 have been acting jointly. So, he submitted that the respondent No. 2 exercises influence over respondent No. 1, and respondent No. 1 is accustomed to act on advice, instructions, or directions of respondent No. 2.

(C) That the Annual Reports of respondent No. 1 notes that respondent No. 2 is one of the "Enterprises owned or significantly influenced by Promoter/Promoter Group," identified under the head "Related party transactions".

(D) That the Board of Directors/managing director/ manager of respondent No.1 is accustomed to act in accordance with advise or direction or instruction of Mr. Puneet Goenka and/or

Mr. Subhash Chandra, which fact is also evident from the profiles of the directors/manager of respondent No.1. He submitted that several directors of respondent No. 1 are directors in other Group companies and / or have previously been directors of Group companies of respondent No. 1 and 2. Of the present directors, Ms. Kavita Kapahi is presently a director in respondent No. 1 as well a company called Shirpur Gold Refinery Limited, which is under the indirect control of Mr. Punit Goenka. Further, Mrs. Shilpi Asthana is a director in respondent No. 1 as well as a director in a company, Diligent Media Corporation Limited, which is again under the indirect control of the Goenka family.

(E) That the directors / managers of respondent No. 1 have worked with and/or earned their livelihood working with the various Essel/Zee group of companies over a long period of time, wherein Mr. Puneet Goenka, Mr. Subhash Chandra together with their relatives are promoters and hold significant ownership/influence. He submitted that in this backdrop, the holding of office by such persons as directors/managers of respondent No. 1, reflects that respondent No.1's Board of Directors/ managing directors/ manager are controlled by Mr. Punit Goenka, the managing director of respondent No. 2 and as such is also accustomed to act as per the advice and directions of the respondent No. 2 through Mr. Punit Goenka. He urged the Court that a purposive interpretation to the term

'related party' be given, to prevent the mischief sought to be perpetrated by the respondents.

103. So, it his submission that the afore-said conduct of the parties reflects that the parties, including respondent Nos.2 and 3 always had the intention to be bound by the arbitration clauses under Clause 12 of CAL read with Clause 33 of the Facility Agreement. In order to crystallize this submission, he has relied upon the following judgments:

(a) Oil and Natural Gas Corporation Limited vs. M/s Discovery Enterprises Private Limited[18]***;***

(b) Eveready Industries India Limited vs. KKR India Financial Services Limited and Ors.;[19]

(c) Cheran Properties Limited vs. Kasturi and Sons Limited and Others;[20]

(d) Fernas Construction Co. Inc. vs. ONGC Petro Additions Limited;[21]

(e) Mahanagar Telephone Nigam Ltd vs. Canara Bank & Anr.[22]

104. It is also the case of Mr. Rao that the letters of guarantee have allowed multiple benefits to the whole Essel Group. According to him, in furtherance of reduction in interest rate of 3% per annum, Essel Group has gained about ₹20,00,00,000/- by saving on interest till date.

[18] Civil Appeal No.2042 of 2022, decided on April 27,2022.
[19] 2022 SCC Online Del 395.
[20] (2018) 16 SCC 413.
[21] 2019 SCC OnLine Del 8580.
[22] (2020) 12 SCC 767.

He submitted that after enjoying the benefits of said ₹20,00,00,000/- on the basis of issuance of the alleged Letters of Guarantee, respondent No. 2, now cannot be allowed to wriggle out of its obligations. He argued that the alleged Letters of Guarantee, allowed continued enjoyment of the Facility by respondent No. 1 and it is only on the basis of the issuance of Letter of Guarantee 1 by respondent No. 2 that the respondent No. 1 has continued to enjoy the Facility granted by the petitioner. So, he concluded that undeniably, the Letter of Guarantee 1 issued by respondent No. 2 forms part of the composite transaction of the granting Facility to respondent. No. 1 by the petitioner.

105. He further submitted that the respondent No. 1's credit rating rationale is on the basis of the market capitalization of the listed entities of Essel Group (which includes respondent No. 2). Hence respondent No.1 has raised various credit facilities on the basis of strength of the financials of its Group, including the respondent No. 2. Moreover, one of the conditions in the Facility Agreement is that in case the credit rating of the respondent No. 1 is downgraded, the petitioner has certain rights in accordance with the terms of Facility Agreement. He submitted as the credit rating of respondent No. 1 was dependent on the respondent No. 2's financial strength, the credit extended to respondent No. 1 was on the basis of composite financial strength of respondent No. 1 and 2. He then submitted that even the shareholding pattern of respondent No.1 and 2 reflects that there was unity of ownership.

106. He further argued that denial by respondent No.2 that Mr. Dinesh Kanodia was its employee is irrelevant to the scope and

purpose of the present Petition. He submitted that in any event, it is not the respondent No. 2's contention that Mr. Dinesh Kanodia was not its representative and or was not authorised to act on behalf of respondent No.2 and further, at this belated stage, i.e., almost three years after providing assurances and representations, respondent No.2 cannot deny its relation with Mr. Dinesh Kanodia, whose email address expressly had respondent No. 2's domain name, and in fact he had been employed with several Essel Group Companies and used to act as per the instructions / directions of Mr. Punit Goenka and/or his family.

107. To establish that the letter of Guarantee 1 dated June 26, 2018 is not merely a LoC as contended by Mr. Chidambaram, Mr. Rao submitted that in the said letter respondent No.2 had specifically undertaken obligations on behalf of respondent No.1 and also expressly stated that it assures and ensures that respondent No.1 will make payments on the relevant due dates. He submitted that it is a settled law that while determining whether a Comfort Letter imposes contractual obligations upon the issuer, the test is to ascertain the true intention of the parties from a close textual analysis of the terms of the letter and while doing so the ordinary rules of construction and interpretation relating to contracts would apply. To substantiate this contention, reliance has been placed upon the following set of judgments:

(a) Tiong Woon Project and Contracting PTE Ltd vs. Naftogaz India Pvt. Ltd. and Ors.[23];

[23] 2016 SCC OnLine Del 697.

(b) Lucent Technologies Inc. vs ICICI Bank Ltd & Ors.[24]***;***

(c) Yes Bank Ltd.[25]

108. He further submitted that it is also a settled law that *prima facie,* in respect of commercial transactions, there is a presumption that the parties have intention to create legal relations and the onus of proving the absence of such, rests with the party who asserts that no legal effect is intended.

109. It is his submission that in the Letter of Guarantee 1, the respondent No. 2 has not only provided a comfort letter to the petitioner but has also given an assurance to the petitioner regarding the payments of respondent No. 1. To decipher the term 'assurance', reliance has been placed upon the **Black Law's Dictionary**[26], where, the word 'assure' has been defined in in the following manner:

> ***"Assure.*** *To make certain and put beyond doubt. To declare, aver, avouch, assert, or ensure positively. To declare solemnly; to assure to any one with design of inspiring belief or confidence. Used interchangeably with "insure" in insurance law. In real property documents it means a warranty; and* ***in business documents, generally, it means a pledge or security.*** *Utilities Engineering Institute v. Kofod, 185 Misc. 1035, 58 N.Y.S.2d 743, 745."*

110. He submitted that in **Ramanatha Aiyyar's Law Lexicon**, the word 'assurance' has been given the following meaning:

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[24] 2009 SCC Online Del 3213.
[25] Supra.
[26] SIXTH EDITION.

> *"…'Assurance' in contract means 'making secure' "insure'. It means the act of assuring; a declaration tending to inspire full confidence."*

111. Moreover the term 'assurance' has been given the following meaning in the **Shorter Oxford English Dictionary**:

> *"An, engagement; pledge or guarantee (law) the conveyance of lands or tenements by deed, a legal evidence of conveyance of property."*

112. In **Webster's New International Dictionary**, the following meaning has been assigned to the word 'assurance':

> *"Act of assuring, as by personal engagement; a pledge or guarantee, also, a declaration tending to inspire full confidence …"*

113. Moreover, it has been extensively submitted that that the contention of the respondent No.2, to an extent that the payments made by the respondent No.1 to the respondent No. 2, were made towards interconnection agreement and/or were pursuant to ASM's approval, is irrelevant and incorrect. To substantiate this contention, he submitted the following:

> **(A)** That the respondent No. 2 has admitted that the payments to it by respondent No. 1 are voluntary contractual payments and do not form a part of their statutory obligations.
>
> **(B)** That payments made to respondent No. 2 by respondent No.1 under the Interconnection Agreement were in breach of the terms of the Facility Agreement, being Clauses 15.3, 16.4, 16.20, and 16.21.

(C) At the time of Interconnection Agreement, which was entered into much after (i) the Facility Agreement, (ii) Deed of Hypothecation and (iii) Letter of Guarantee, parties were aware of their obligations under the Facility Agreement and their obligations under Clause 6.5 of Deed of Hypothecation. The assets of respondent No. 1 including monies of respondent No.1 were charged to the petitioner under the Deed of Hypothecation. The assets are charged to petitioner and utilisation of the proceeds therefrom can be done as per the instruction of the petitioner in terms of the Deed of Hypothecation. The charge filings with the Registrar of Companies (as CHG-1 form) has been done in accordance with the Companies Act, 2013. Section 80 of the Companies Act, 2013 specifically sets out that any person acquiring property or assets over which charge has been registered in accordance with Section 77, such person shall be deemed to have the notice of the charge from the date on which the charge was registered. Hence, it is his submission that respondent No. 2 was aware of the fact that the assets of respondent No. 1 including monies of respondent No. 1 had been charged to petitioner and hence it could not have any claim over it.

(D) That under Facility Agreement, Subordinate Claims include all present and future amounts owed and due by respondent No. 1 from any entity of Group (including respondent No. 2). For a claim to be a Subordinate Claim, it is not limited to payments being made to a principal / surety /

guarantor. The word “including” makes the clause illustrative and not exhaustive. The words "or otherwise" in no manner limits the clause to payments being made to a principal / surety / guarantor as it would render payments in relation to costs, fees, indemnities in the said clause, otiose.

(E) That in any event, any allegation that payments to respondent No. 2 were approved through ASM – KPMG are false as there was no intercreditor agreement executed and / or no proposal for restructuring the respondent No. 1’s debt was accepted. He submitted that written permission was given by petitioner authorizing Axis Bank to act on the petitioner’s behalf by itself or through Agency for Specialised Monitoring (“ASM”) in any manner, including to amend and/ or waive the terms and conditions of the Facility Agreement. Any waiver of obligations under Facility Agreement has to be in writing (Clause 28). He further submitted that as per the circular issued by Reserve Bank of India on June 07, 2019, in cases where Resolution Plan is to be implemented because of the occurrence of the default, all lenders would have to enter into an inter-creditor agreement (‘ICA’). He submitted that ICA is mandatory only where resolution plans are agreed by the lenders of defaulting companies. So, as the ICA was not entered into among the lenders of respondent No.1, it is evident that there is no resolution plan pending consideration and therefore the petitioner can accordingly take action in

terms of the Facility Agreement and the other Financing Documents.

114. It is also his submission that any payments made by the respondent No.1 to respondent No.2 are subordinate to the secured obligations (which includes repayment of facility) of the petitioner. He further submitted that any payments, if made to the respondent No.2 are to be held in trust for the petitioner. To substantiate this contention, he raised the following arguments:

(A) Under Clause 16.21(i) of the Facility Agreement, respondent No. 1 has undertaken on its own behalf as well as other members of the Group (including respondent No. 2), that the Financial Indebtedness incurred by it from respondent No. 2 are subordinate to the Secured Obligations (inter alia being the repayment of Facility) of the petitioner under the Facility Agreement.

(B) Under Clause 16.21(iii) of the Facility Agreement, if any amounts are received by entity of the Group towards payment of Subordinate Claims, prior to the payment of Facility and other Secured Obligations to the petitioner, such amounts that are received would be held in trust for and on behalf of the petitioner and shall be handed over to the petitioner. Therefore, any amounts payable by respondent No. 1 to respondent No. 2 under any agreement including the Interconnection Agreement, would be Financial Indebtedness and thus Subordinate Claims.

(C) While payments may be due to respondent No. 2 for any reason whatsoever, any payments made by respondent No. 1 to respondent No. 2 including but not limited to the amounts admitted or disclosed in the Annual Report for FY 2020-21 of ₹108,00,00,000 are held in trust for the petitioner. As such, it is the legal obligation and liability of the respondent No. 2, to return such sums (held in trust for the petitioner), to the petitioner.

ADDITIONAL SUBMISSIONS ON BEHALF OF RESPONDENT NO.2

115. According to Mr. Chidambaram, the entire claim of the petitioner is based on three documents: (a) CAL dated January 16, 2017, between the petitioner and respondent No.1; (b) Facility Agreement dated February 23, 2017, between the petitioner and respondent No.1; and (c) Deed of Hypothecation dated February 23, 2017 by respondent No.1 in favor of the petitioner and the respondent No.2 is not a party to any of these three documents.

116. That the petitioner has dragged respondent No.2, into this litigation based on a letter dated June 26, 2018 issued by it. It is his submission that such a letter is a mere letter of comfort. It is not a letter of guarantee within the meaning of Section 126 of the Indian Contract Act 1872 and the same letter of comfort was issued one year and five months after the execution of the Facility Agreement.

117. That respondent No.2 was a member of the Essel Group. On March 31, 2019, the promoters of Essel Group held 38.2% equity in respondent No.2. The holding reduced to 4.02% on September 30,

2020 and further to 3.99% on March 31, 2021. So it is his submission that respondent No.2 ceased to be a member of the Essel Group by September 30, 2020. Similarly, respondent No.1 was also the member of the Essel Group. On September 30, 2020, the promoters of Essel Group held 37.54% equity in respondent No.1. The holding reduced to 7.31% by December 31, 2020 and further to 6.10% by March 31, 2021. So he submitted that the respondent No.1 also ceased to be a member of the Essel Group by December 31, 2020.

118. He also submitted that it is not uncommon for a company belonging to a group ceasing to be a group company as a result of sale, demerger etc. In this case, he argued that, respondent No.1 and respondent No.2, ceased to be group companies when the promoters diluted their stake to single digits. He gave following examples of such scenarios:

> **a.** Takeover of Eveready Battery Company Inc. by Burman Family
> **b.** [Dabur] from Khaitan Family Group (Williamson Magor Group);
> **c.** DHFL[Dewan Housing Finance Corporation Limited] acquisition by the Piramal Group;
> **d.** Lyka Labs Ltd. acquisition by IPSA laboratories Limited:
> **e.** Heineken Group acquisition of United Breweries Limited (UBL);
> **f.** Arcelormittal acquisition of Essar Steel India Limited (ESIL).

119. He further submitted that the captioned Section 9 Petition under the Act of 1996, was filed on December 21, 2021 and mere reading of the definitions will make it clear that, on that date,

respondent No.2 was not an affiliate; the promoters of Essel Group had no control over respondent No.2; respondent No. 2 was not a member of the Essel Group; respondent No.2 was not an obliger; respondent No.2 did not create any security obligation; respondent No.2 did not create any security interest in favor of the petitioner (lender) and respondent No.2 was not a security provider.

120. He submitted that as far as the Deed of Hypothecation dated February 23, 2017 is concerned; what is hypothecated are the properties mentioned in Schedule II thereto. Schedule II refers to the current assets of respondent No.1 (which is the borrower). The amounts payable by respondent No.1 to respondent No.2 are not the current assets of respondent no.1; they are the current liabilities of respondent No.1 and hence are not included and could not be included, in Schedule II.

121. As far as the letter of comfort dated June 26, 2018, is concerned, the petitioner in its Recall Notice 1 dated February 07, 2019 and Recall Notice 2 dated February 11, 2019, issued notices only to respondent No.1. It is only the Recall Notice 3 dated February 12, 2019 which was marked to respondent No.2 and, even in this notice, the petitioner only requested respondent No.2 to ensure that payments are made by respondent No.1 to the petitioner. It is in the 4th Recall Notice dated December 02, 2021 that the petitioner purported to refer to the letter of comfort as a financing document without specifically designating the said letter as a financing document.

122. It is his submission that the petitioner in the Section 9 petition, by a sleight of hand, has claimed that the Recall Notice 4 dated

December 02, 2021, designated the letter of guarantee as a financing document. He submitted that the letter dated June 26, 2018 was not, at all, designated as a financing document.

123. He further submitted that the respondent No.2 is a trade creditor of respondent No.1. By the end of 2020-21, the outstanding from respondent No.1 to respondent No.2 was ₹197.5 crores and amounts are still due for the subsequent periods. It his submission that respondent No.2 has filed recovery proceedings against respondent No.1 before the **Telecom Disputes Settlement and Appellate Tribunal** (TDSAT), which is the statutory adjudicating authority.

124. That with effect from October 2020, some payments were made by respondent No.1 to respondent No.2, but this was entirely under the supervision of the ASM, set up by all the lenders of respondent No.1 including the petitioner. Nevertheless, there is a balance in the account-receivable by respondent No.2 from respondent No.1.

125. He has vehemently argued that the letter dated June 26, 2018 was not a letter of guarantee but merely a letter of comfort. To crystallie this, he has relied upon the following judgments:

(a) ***Yes Bank Ltd.***[27]***;***

(b) ***United Breweries (Holding) Ltd. v. Karnataka State Industrial Investment and Development Corporation Limited and Ors.***[28]

[27] Supra.
[28] 2011 SCC Online Kar 4012.

126. It is also his submission that respondent No.2 is not a party to the arbitration agreement within the meaning of Section 7(5) of the Act of 1996. The mere reference in the letter of comfort to the Facility Agreement will not attract the arbitration clause in the Facility Agreement. Reliance has been placed upon the following judgments to contend the same:

(a) M.R. Engineers & Contractors (P) Ltd.[29]***;***

(b) Shreyas Kirti Lal Doshi and Anr. [30]***;***

(c) MSTC Ltd.[31]

127. He submitted that the respondent No.2 is not a related party to respondent No.1. He further submitted that it is true that in the annual reports of respondent No.2 and respondent No.1, there is a reference of each being a related party of the other. Nevertheless, the Facility Agreement defines related party as having the meaning in the context of the Companies Act, 2013 and Section 2(76) defines the same. It his submission that no part of that definition applies to respondent No.2 in its relationship with respondent No.1. Moreover, the opinion of an independent firm of auditors, namely Ernst & Young, after an elaborated analysis, on April 04, 2022, has come to the conclusion that respondent No.1 and respondent No.2 are not related parties. Similar opinion has been obtained by respondent No.1 from another chartered accountant firm, namely, DNS Associates. Both firms /experts have analyzed the issue of related party under the (i) the Companies Act, (ii)

[29] Supra.
[30] Supra.
[31] Supra.

SEBI LODR (Listing Obligations and Disclosure Requirements) and (iii) the Indian Accounting Standards and reached the conclusion that both respondent No.1 and respondent No.2 are not related parties.

Whereas, Mr. Sandeep Sethi, learned Senior Advocate, also appearing on behalf of the respondent No.2 has made the following submissions:

128. He submitted that the if the petitioner's and respondent No.1 's intent was to bind respondent No.2 in relation to the loan transaction, they could very well have done at the time of advancement of loan, however, they chose not to do so, which clearly demonstrates that respondent No.2 is not a party to the loan transaction with respondent No.1.

129. He further submitted that the LoC has created no legal obligations and such a letter is not actionable and thus no reliefs can be claimed in terms thereof before the Arbitrator and /or in Court.

130. He submitted that a deed of guarantee is required to be stamped under the provisions of the relevant Stamp Acts, however, it is his submission that in the instant case the LoC is not stamped. He further contended that a company is also required to, prior to issuing a guarantee, present the same before the Board of Directors, who would then have to pass a special resolution under Section179(3) of Companies Act, 2013 and the same has not been done in the instant case. In fact, it is his case that the petitioner has also never insisted upon these requirements, which shows that the said letter was always understood even by the petitioner to be a LoC and not a guarantee.

131. He submitted that as per the definition of "Financing Document" in the Facility Agreement, the petitioner cannot be allowed to designate any document / letter, at any point of time as a guarantee.

132. It has been submitted that the High Court of Calcutta, in the case of ***Mcleod Russel India Limited vs. IL and FS Financial Services Limited and Ors.***[32] has held that a LoC is not a guarantee, which would oblige the issuer to be pursued for any default on the part of the principal debtor. It was further observed in the said judgment that the theory of lifting the corporate veil can be used to chase a calcitrant corporate entity and hold it accountable, for when it seeks to escape the dragnet by citing its independent juristic identity. But it is only in a grave case of egregious fraud or gross impropriety that a corporate entity is chased, its corporate veil is lifted and its identity barred. However, in the present case, there are no acts or allegations of egregious fraud or gross impropriety on part of respondent No.2

133. He concluded by submitting that the petitioner has sought to implead respondent No.2 in the instant petition despite being a non-signatory solely with an intent to exert pressure because of its proposed merger with Sony Pictures. He contended that though the facts of the case have no direct or indirect relationship with respondent No.2's merger with any entity still the petitioner has sought prayer for an injunction upon respondent No.2 from entering into any merger. This clearly shows malice on the part of the petitioner.

[32] APO 143 of 2019, GA 2167 of 2019 in CS 177 of 2019.

FACTS AND SUBMISSIONS ON BEHALF OF PETITIONER IN OMP (I) (COMM) 414/2021

134. The present petition has been filed by the petitioner under Section 9 of the Act of 1996, seeking *inter alia*, the following interim reliefs:-

> *"In light of the above facts and circumstances, pending the completion of the arbitration proceedings and making and implementation of the arbitral award, it is respectfully prayed that this Hon'ble Court may be pleased to:*
>
> *(i) Pending the hearing and final disposal of the arbitration proceedings and enforcement of the Award therein, this Hon'ble Court be pleased to direct Respondents Nos. 1 and 2 to deposit the Overdue Principal Amount as per the terms of the Facility Agreement read with Letter of Guarantee, and as admitted by Respondent No. 1 in the Disclosure Letters, with this Hon'ble Court;*
>
> *(ii) that in the alternative and pending the hearing and final disposal of arbitration proceedings and enforcement of the Award therein, direct the Respondents to deposit bank guarantees for Overdue Principal Amount under the Facility Agreement, and as admitted by Respondent No. 1 in the Disclosure Letters, with the Hon'ble Court;*
>
> *(iii) In meanwhile and pending the grant reliefs clauses (a) and (b)above, let no bank accounts of the Respondent No. 1 and Respondent No. 2 be allowed to be dealt with for any amounts;*
>
> *(iv) that in the alternative and pending the hearing and final disposal of arbitration proceedings and enforcement of the Award therein, Respondent No. 2 be directed to deposit the total amount of at least INR 108,00,00,000 (Rupees One Hundred and Eight Crores), which it has fraudulently diverted away from Respondent No. 1 without making any payments towards the Secured*

Obligations in breach of the Facility Agreement read with the Letter of Guarantee, with this Hon'ble Court;

(v) pending the deposit of INR 108,00,00,000 (Rupees One Hundred and Eight Crores) or any other additional payment made by Respondent No. 1 to Respondent No. 2, with this Hon'ble Court, in the event any money is infused in the Respondent No 1and/or Respondent No 2, by way of issuance of securities, scheme of arrangement, merger, amalgamation and/or otherwise, direct Respondent No. 1 and Respondent No. 2, to first deposit a sum of INR 108,00,00,000 (Rupees One Hundred and Eight Crores) received from the said issuance of securities, scheme of arrangement, merger, amalgamation and/or otherwise, with this Hon'ble Court;

(vi) pending the hearing and final disposal of the arbitration proceedings and enforcement of Award therein, restrain the Respondents from entering into any merger, compromise, restructuring, change of control, scheme or other arrangement which has a direct or indirect bearing on the assets, liabilities or cash flow of the Respondent Nos. 1 or 2 in any manner, without the permission of this Hon'ble Court;

(vii) pending the hearing and final disposal of the arbitration proceedings and enforcement of Award therein, restrain Respondent No. 1 from making any further payments to Respondent No. 2 and/or transferring any assets to Respondent No. 2, prior to making payments towards the Secured Obligations of Respondent No. 1 under the Facility Agreement to the Petitioner;

(viii) pending the hearing and final disposal of the arbitration proceedings and enforcement of the Award therein, restrain Respondent No. 2 from appropriating / receiving any funds from Respondent No. 1;

(ix) pending the hearing and final disposal of the arbitration proceedings and enforcement of Award therein,

restrain the Respondents, acting by themselves or through their servants ,agents, representatives, and/or all other persons claiming by, through or under them, from selling, transferring, alienating ,relinquishing or creating any third-party rights or interests including charges in respect of all their assets, whether held directly or otherwise;

(x) pending the hearing and final disposal of the arbitration proceedings and enforcement of Award therein, direct the Respondents to disclose on oath details of all assets, moveable or immoveable, tangible or intangible, in which the Respondents have any direct or indirect interest whatsoever, and to disclose their respective Income Tax Returns, Statement of Account of all110bank accounts held by each of the Respondents and Statement of Holdings in any DEMAT Accounts held by each of the Respondents, for the past 3 (three) financial years.;

(xi) Pass ad-interim reliefs in relation to prayers (a) to (j);

(xii) Grant costs of this Petition; and

(xiii) Pass such further or other orders as maybe necessary in the facts and circumstances of the present case."

135. It is apposite to mention here that the facts as noted in the Arb. P. 474/2022, being common to this petition, they are not being reiterated. It is only facts and submissions which are distinct and confined to the nature of the reliefs sought in the instant petition are being noted and considered hereinafter.

136. Primarily the present petition has been filed by the petitioner *inter alia* seeking deposit of (or security for) the amount due and outstanding i.e., ₹1,34,00,00,000/- to the petitioner from the respondents and also restraint has been sought particularly against

respondent No.1 from making any further payments and/ or transferring any assets to respondent No.2, prior to making payments to the petitioner. It is the case of the petitioner that the respondent No.1 has paid at least ₹108,00,00,000/- to respondent No.2. It is also petitioner's apprehension that the respondents have deliberately entered into transactions in an attempt to prevent respondent No.1 from servicing the loan and making payment of amounts payable to the petitioner.

137. So, in view of respondents committing multiple breaches of the terms of CAL read with the Facility Agreement and other Financing Documents, including Letters of Guarantees, the petitioner has filed the present petition seeking interim reliefs as mentioned above in paragraph 134.

138. It is also the case of the petitioner and so contended by Dr. Abhishek Manu Singhvi and Mr. Darpan Wadhwa, learned senior advocates, appearing on behalf of the petitioner in this petition, that under the Facility Agreement the amounts due and payable, on behalf of respondent No.1, to its group companies (including respondent No. 2) are Subordinated Claims and till the full and final payment of Secured Obligations is made to the petitioner, respondent No. 1 cannot make payments towards such Subordinated Claims. It is also their case that payments to respondent No.2 can only be made after respondent No.1 discharges its obligations and makes full payment of the Secured Obligations to the petitioner.

139. It is stated that the respondent No.2 has siphoned funds away from respondent No.1 by making payments of huge amounts to itself

and has thus deliberately prevented respondent No.1 from making any payments towards the Secured Obligations.

140. It is further stated that from the date of entering into Facility Agreement, respondent No. 1 and respondent No. 2, have entered into various transactions with group companies, wherein respondent No. 1 has made payment of huge amounts (at least ₹108 crores) to respondent No. 2, which has led to the default in payment by respondent No. 1 to the petitioner. It is their submission that payment of these amounts to respondent No. 2 by respondent No.1 is not only in blatant breach of the Financing Documents but also unjustified considering the substantial haircuts proposed to the petitioner in the restructuring process of respondent No.1. Moreover, both the respondents have been acting in concert to transfer and siphon the funds available with respondent No. 1 to respondent No. 2 to prevent the petitioner from recovering the amounts due under the Facility Agreement. It is further their case that the respondent No. 2 has unjustly enriched itself at the expense of respondent No. 1 and has left no funds at the disposal of respondent No. 1 to service the Term Loan and hence the respondent No. 2 has been directly responsible for respondent No. 1's failure to service the Term Loan.

141. It is also stated that respondent No. 2, despite being aware of the terms of Facility Agreement and knowing that any payments made to itself are Subordinated Claims, that can only be paid after servicing the Term Loan, has continued to blatantly divert the funds of respondent No. 1 to itself. As such, respondent No. 2 has acted in a

manner that is completely contrary to the assurances given under the Facility Agreement and the Letter of Guarantee 1.

142. Furthermore, on March 01, 2019, the petitioner issued a Legal Notice to respondent No.1, *inter alia*, highlighting the EODs and invoking the guarantee against the respondent No.2. Specifically, it was stated in such Notice that the respondent No.1 was required to maintain Internet Service Reserve Account ('ISRA') and having not been done so, it has to be construed as an EOD under Clauses 19.2 and 19.11 of the Facility Agreement. It was further stated that respondent No.1 has also breached the Debt Cap under Clause 17(ii) of the Facility Agreement by securing debt facility of ₹2,100,00,00,000/-.

143. Thus, both the respondents were advised to cure such defects under the Facility Agreement and Financing Documents. It is also their case that the respondents, despite having acknowledged the receipt of multiple Legal Notices, have willfully neglected/failed to make payments due and payable to the petitioner in conformity of the agreements.

144. It is also their case that owing to failure of respondent No. 1 in making any payments towards any of its loans, on June 26, 2020, the lenders of respondent No.1 sought to convene a meeting to discuss the restructuring plan ('Restructuring Plan 1') for respondent No. 1.

145. That on April 26, 2021, Lenders of respondent No. 1, had meetings to discuss Restructuring Plan 1 'for the transfer of exposure of respondent No. 1, to National Asset Reconstruction Company Limited and also to give haircuts to the Lenders'. However, the Lenders unanimously rejected that proposal.

146. Thereafter, on September 03, 2021, Edelweiss proposed a revised restructuring plan ('Restructuring Plan 2') for respondent No. 1. In the Restructuring Plan 2, there was no undertaking for upfront payment and the loan was sought to be restructured with a tenure of 6 to 16 years. Whereas, sustainable debt was sought to be paid at 8% interest and unsustainable debt with 16 years tenure at zero coupon interest rate. Therefore, on the above-terms, the petitioner along with other Lenders rejected the proposed Restructuring Plan 2.

147. It is their submission that, as on date, no debt restructuring plan has been approved by the Lenders of respondent No. 1 for the resolution of respondent No. 1. However, it is also their case that it is an admitted fact that respondent No. 1 does not have any assets or sufficient cash flow to make payments towards the Secured Obligations to the petitioner. Despite this, the respondent No. 2 has transferred at least ₹108 crores from respondent No. 1 to itself, to the detriment of the petitioner and completely contrary to its obligations and terms of the Facility Agreement read with the Letter of Guarantee 1.

148. It has been submitted that in the Restructuring Plan 2, the Lenders proposed a plan wherein barely any amounts were recoverable from respondent No. 1 and the lenders would have had to take a massive haircut (ranging from 57% to 75%).

149. Furthermore, it is their submission that while the respondent No. 1 has no funds to service the loans extended by the petitioner, it has been continuously making payments of huge amounts to respondent No. 2, which indicates that respondent No. 2 has been

fraudulently entering into related party transactions with respondent No. 1, to siphon funds away from respondent No. 1 and at the same time has defrauded the Lenders by proposing restructuring plans with huge haircuts.

150. In crux, it is their case that the respondents have time and again:

(i) Defaulted in the payment of *inter alia* the Secured Obligations under the Facility Agreement; and

(ii) Breached material terms of the Facility Agreement read with the Letters of Guarantee.

151. So in view of foregoing, by way of the Recall Notices, the petitioner recalled the entire outstanding amount under the Facility Agreement and as such, the Overdue Principal Amount became due and payable to the petitioner on an immediate basis. It is their submission that the respondent No.1 has not made any payment to the petitioner in relation to the Overdue Principal Amount.

152. Furthermore, in order to substantiate the fact that the respondent No.1 has breached material terms in the Facility Agreement, the following averments are made:

(A) Failure to maintain Security Ratio:

(Aa) That under Clause 16.28 of the Facility Agreement, respondent No.1 was required to maintain a Security Cover Ratio of 1:25:1, which is the Minimum Security Ratio, at any time prior to the Final Settlement Date.

(Ab) That from the Annual Report of respondent No.1, it is evident that the valuation of the Hypothecated Properties is ~ INR 750 crores. The total outstanding debt of respondent No. 1, including the term loan (principal only) and the working capital (principal only) is ~INR 902crores. Hence, as on March 31, 2021, the security cover is 0.83x, which is less than the Minimum Security Ratio of 1:25:1, that is required to be maintained by respondent No. 1 under the Facility Agreement.

(Ac) Further, respondent No. 1 has failed to provide the compliance certificate to reflect that respondent No. 1 has maintained a Minimum Security Ratio of 1:25:1, even though the petitioner has requested it to do so. So, it is their case that the failure to maintain Minimum Security Cover Ratio of 1:25:1 under Clause 16.28 of the Facility Agreement is in breach of Clause 19.2 of the Facility Agreement and hence it is also an EOD.

(B) Failure to maintain ISRA

(Ba) That under Clause 16.15 of the Facility Agreement, respondent No. 1 was required to maintain ISRA ('Interest Service Reserve Amount'), which is defined as follows:

"Interest Service Reserve Amount" means the amount equivalent to the Interest due for 1 (one) Financial Quarter."

(Bb) That respondent No. 1 has failed to maintain ISRA for the entire outstanding interest amount after the Recall Notices were issued and thus it is in breach of the terms of the Facility Agreement.

(C) Breach of Debt Cap

(Ca) That bare perusal of the Index of Charges, as available on the website of Ministry of Corporate Affairs, indicates that respondent No.1 has availed/created debt facilities of ₹2,100,00,00,000/-. Thus, respondent No. 1 has breached the Debt Cap of ₹1,500,00,00,000/- provided under Clause 17(ii) of the Facility Agreement by incurring and securing debt facilities.

(D) Fall in Credit Rating of respondent No.1

(Da) That under Clause 16.25 of the Facility Agreement, respondent No. 1 was required to maintain a credit rating of 'ICRAA-/ CARE A- However, on February 07, 2019, the credit rating of respondent No.1 got dropped down to three notches. So, it has been submitted that the respondent No.1 has failed to maintain credit rating of ICRAA-/CARE A-, throughout the subsistence of the Facility, as required under Clause 16.25 of the Facility Agreement and this also constitutes as an EOD under the Facility Agreement.

(E) Creation of Security Pledge over shares of corporate Obligors

(Ea) That it was being submitted that the increase in pledge shareholding from 34.94% as on March 31, 2017 to 54.28% as on March 31, 2018, is clearly in breach of Clause17 (v) of the Facility Agreement and thus it also constitutes an EOD under Clause 19.2 of the Facility Agreement.

(F) Change in Shareholding

(Fa) That it has been submitted that as per Clause 19.17 of the Facility Agreement, any change in the shareholding pattern as in Schedule V of the Facility Agreement also constitutes as an EOD.

(Fb) That the promoter Group has diluted its shareholding in respondent No.1 from staggering 73.57% (at the time of the Facility Agreement), to a mere 6.10%, presently. In addition to this and in clear breach of the terms of Facility Agreement, respondent No. 2 has diluted its shareholding in respondent No.1 to less than 51% as on September 30, 2020.

(Fc) So it is their case that there has been a substantial change in shareholding pattern in contrary to what is specified under Schedule V of the Facility Agreement. Therefore, this is also an EOD under Clause 19.17(iii) of the Facility Agreement.

(G) **Breach in Material Terms of the Facility Agreement by respondent No.2**

(Ga) That in clear breach of the terms of the Facility Agreement, respondent No.2's group companies have diluted its shareholding in respondent No. 1 from staggering 73.57% (at the time of the Facility Agreement), to a mere 6.10% presently. The dilution of respondent No. 2's shareholding in respondent No. 1 also clearly depicts mala fide on the part of the parties.

(Gb) That respondents No.1 and 2, together, have committed the following breach of the material terms of the Facility Agreement:

- Under the Facility Agreement, payments to the petitioner for the Secured Obligations have to be made in priority to any payments to respondent No. 2 and the claims of respondent No. 2 are subordinate to the Secured Obligations of respondent No. 1, in light of the Clauses 16.20 and 16.21 of the Facility Agreement;
- The aforesaid Clause 16.21 is binding on respondent No. 2 (even though it is not a signatory to the Facility Agreement) in light of the definitions of 'Group', 'Affiliate', 'Subordinated Claims' and 'Financial Indebtedness' stipulated in the Facility Agreement.
- It has also been averred that under the Facility Agreement, all Financial Indebtedness of respondent No. 2 (and operational debt due to

group entities) is entirely subordinate to the Secured Obligations. Moreover, upon occurrence of an EOD (which has occurred under the Facility Agreement), no payments was allowed to be made to respondent No. 2 till payment of the Secured Obligations remains outstanding.

- It is also their case that despite the same, respondent No. 1 has continued to make payments to respondent No. 2, well after the Date of Default and thus respondents No. 1 and 2 are in breach of the Clause16.20 and 16.21 of the Facility Agreement.

153. It is stated that the respondent No. 1, in the Disclosure Letters, has admitted that a sum of ₹134,00,00,000/- is outstanding towards the principal amount, under the Facility Agreement against the petitioner. By way of the Recall Letters, the petitioner has recalled the entire outstanding amount under the Facility Agreement and as such admittedly, an amount of ₹134,00,00,000/- is due and payable to the petitioner.

154. It is further stated that the respondent No.2 is the primary obligor under the Facility Agreement along with respondent No. 1. Thus, respondent No. 2 is liable for the due discharge of the respondent No. 1's obligations under the Facility Agreement including *inter alia* the repayment of the Overdue Principal Amount.

155. That on the basis of the afore-said breaches and violations of the Facility Agreement as well CAL and also because of the apprehension that the respondents may *inter alia* create third-party interest over petitioner's assets or dispose of such properties , the petitioner has been constrained to file the present petition.

SUBMISSIONS ON BEHALF OF RESPONDENT NO.1

156. On the other hand it is the case of the respondent No.1 and so contended by Mr. Joy Basu, learned Senior Advocate, appearing on behalf of the respondent No.1, that seven Lenders of the respondent No. 1, including the petitioner have time and again, come together to discuss structuring proposal of the ongoing loans / facilities of the respondent No.1. It is their case that the aforementioned seven Lenders, including the petitioner have regularly conducted multiple 'Joint Lenders' Meetings'.

157. Furthermore, the Minutes of the Joint Lenders Meeting, dated April 15, 2021, manifests that the petitioner had given its in-principle approval for proceeding with a resolution plan.

158. It has also been submitted that the petitioner in the instant Petition has deliberately failed to disclose the fact that on behalf of the Joint Lenders, including the petitioner, the Lenders have appointed 'KPMG India Private Limited' as an 'ASM', for undertaking specialised monitoring assignment of the respondent No. 1.

159. That on August 28, 2020, the Axis Bank on behalf of the seven lenders had appointed the ASM. In terms of the appointment, the ASM examined the accounts of the respondent No. 1 from March, 2020 onwards.

160. It is further submitted that the ASM had been bestowed with the following scope of work:

i. Review of historical cash flow;

ii. Analyse source and application of funds;

iii. Cash Outflow Monitoring:

- Analyse utilization in creditor's repayment/repayment of Term borrowings, Loans and Advances.

- Analyse capital drawings, if any/ interest/dividend payouts /redemption of debentures, if any/shares buy back, if any

- Inter Corporate transactions and/ or related party transactions

- Have oversight on company's adherence to the quarterly cash budget submitted by the company

- Pre- authorization of payments above an agreed upon threshold

- To monitor overall payments of the company as directed by Lenders

iv. Non – cash Parameters.

161. It is his case that the afore-mentioned scope of work demonstrates that all the payments above the threshold amount of ₹50,000/- by the respondent No. 1 are pre - authorised by the ASM. Furthermore, any payments to related parties are also monitored and pre- approved by the ASM. Moreover, the ASM is also required to analyse the utilisation in creditor's repayment/repayment of Term borrowings, Loans and Advances.

162. Therefore, the Lenders including the petitioner through the ASM is already monitoring the accounts and the transactions of the respondent No.1. It is their submission that even the payments to the Lenders are being approved by the Lenders itself.

163. So, it has been argued that the accounts and transactions of the respondent No. 1 are already under the scrutiny of the Lenders including the petitioner. Furthermore, payments made by the respondent No. 1 in the normal course of business are pre- approved by the ASM. It is further stated that the payments made by the respondent No. 1 to the respondent No. 2, in the normal course of business under contractual liabilities, have also been pre -approved by the ASM. Thus, the bald allegations of the petitioner in the Petition in respect of alleged siphoning of funds by the respondent No. 1 and / or any fraudulent transactions are baseless and untenable.

164. It is also his argument that the respondent No. 1 is a Multi–System Operator, granted registration under the Cable Television Networks (Regulation) Act, 1995. Also, it is *inter-alia*, engaged in the re-transmission of television signals of the broadcasters ultimately to the subscribers through its affiliate Local Cable Operators. It is stated that the respondent No. 2 is a Broadcaster of television signals. It is further stated that the respondent No. 1 and the respondent No.2 are both 'service providers' in terms of the regulations promulgated under the Telecom Regulatory Authority of India Act, 1997 ('TRAI Act') and the business of the respondent No.1 and the respondent No.2 in respect of transmission and re-transmission of signals are highly regulated under the aegis of the TRAI Act and the regulations framed

thereunder. Moreover, the regulatory framework under the TRAI Act is founded on the principles of non –discrimination, non – exclusivity, non – arbitrariness, fair play and level playing field. It is his submission that in terms of the mandate of the 'Telecommunication (Broadcasting & Cable) Services Interconnection (Addressable Systems) Regulations, 2017' ('Interconnection Regulations') issued under the TRAI Act and the regulations framed thereunder, every broadcaster like the respondent No. 2 is obligated to provide signals to every distributor of channels like the respondent No. 1, save and except for reasons as provided in the Interconnection Regulations. Likewise, every distributor of channels like the respondent No. 1 is obligated to carry the channels of any broadcaster like the respondent No. 2, save and except for reasons as provided in the Interconnection Regulations.

165. So, it is his case that as per the mandate of the Interconnection Regulations and the fundamental principles of the broadcasting and cable television network, the business of the respondent No. 1 and the respondent No. 2, as a Broadcaster and a Multi – System Operator / Distributor, is subject to the compliance of the TRAI Act and the regulations framed thereunder.

166. It is further his submission that there is no agreement and/or understanding between the parties, which is in contravention and violation of the TRAI Act and regulations thereunder and / or the fundamental principles of the sector. So, he submitted that no party can seek a relief in the court of law, which potentially frustrates the

purpose, principles and provisions of a statutory framework i.e., the TRAI Act.

167. He submitted that in terms of the mandate of the Interconnection Regulations, the respondent No. 2 and the respondent No. 1 have executed the 'Interconnection Agreement / Reference Interconnect Offer' *inter alia*, for the transmission of the signals of the respondent No. 2 to the respondent No. 1. It is his submission that the respondent No. 1 and the respondent No. 2 are obligated under the Interconnection Regulations to execute an Interconnection Agreement/Reference Interconnect Offer and are bound by the same.

168. That pursuant to the execution of the Interconnection Agreement/ Reference Interconnect Offer and in terms thereof, the respondent No. 2 has raised monthly invoices on the respondent No. 1.

169. He further submitted that the payments made by the respondent No. 1 to the respondent No. 2 are in the ordinary course of business, in respect of and under the subscription invoices raised by the respondent No. 2 pertaining to the Interconnection Agreement and the transmission of signals by the respondent No. 2 to the respondent No. 1.

170. He also submitted that as per the scope of work of the ASM, the payments made by the respondent No. 1 to the respondent No. 2 have been preapproved by the said Agency. Thus, the allegation of the petitioner that the respondent No. 1 has siphoned money is baseless and false.

171. He also submitted that as per the invoice of the respondent No. 2 dated December 08, 2021, the respondent No. 1 has an outstanding

of ₹137,30,81,103.80/- against subscription dues to the respondent No. 2.

172. It is his case that in view of the above, the respondent No. 1 is obligated under the Interconnection Agreement / Reference Interconnect Offer to pay monthly subscription dues to the respondent No. 2. Furthermore, in terms of the Interconnection Regulations, the respondent No. 1 can at best be entitled to 35 % of the MRP of the channels and not a penny more. It is submitted that any relief restraining the respondent No. 1 from making any subscription payment to the respondent No. 2 would render the respondent No. 1 retaining 100 % of the MRP, which is in gross violation of the Interconnection Regulations.

173. It is also his submission that the reliefs as sought by the petitioner, *inter alia* seeking restraint on the payment of any dues including subscription dues by the respondent No. 1 to the respondent No. 2, if granted, shall frustrate the very objective and fundamentals of the TRAI Act, the regulations thereunder and the Interconnection Agreement / Reference Interconnect Offer.

174. He also argued that construing and reading the Clauses of the Facility Agreement, in a manner so as to place a complete embargo on subscription payments by the respondent No. 1 to the respondent No. 2, thereby allowing the respondent No. 1 to retain 100 % of the MRP, shall be in express violation of the Interconnection Regulations.

175. Furthermore, such an embargo will also lead to the possible disconnection of the signals of the respondent No. 2 on the platform of the respondent No. 1, thereby frustrate the scheme of the statutory

framework under the TRAI Act. It is his submission that no party, by mutual agreement, can enter into any arrangement, which leads to a violation of the law and /or prevents/ prohibits two service providers from discharging their obligations under the TRAI Act and the Regulations thereunder. He submitted that in the event that two parties do enter into any such agreement, such an agreement will be void, *non-est* in law and liable to be struck down. Thus, it has been submitted that the petitioner cannot be entitled to any relief, which leads to the express violation of the Interconnection Agreement and furthermore, which restrains and/or prevents and/or obstructs the respondent No.1 from discharging its obligations under the TRAI Act, the Regulations framed thereunder and the Interconnection Agreement executed in terms of the regulations.

176. He further submitted that the disconnection of signals by the respondent No. 2 to the respondent No. 1 shall also affect subscribers of the respondent No. 1, as the subscribers shall be prevented from viewing / availing the channels of the respondent No. 2. Furthermore, such an action shall also adversely affect the business of the respondent No. 1 in the highly competitive business environment, as the subscribers may start opting for signals from other MSO/ Distributing Platform and the respondent No. 1 will lose its subscriber base, leading to irreversible and irreparable damage to the business of the respondent No. 1. Moreover, on November 25, 2021, the respondent No. 2 has also issued a Legal Demand Notice, whereby it has called upon the respondent No.1 to make a payment of Rs147, 14,94,213/- to the respondent No.2.

177. So, it is his primary and fundamental case that the petitioner is not entitled to any of the reliefs sought for, in the present petition and as such the instant petition is liable to be dismissed at the outset.

178. That Mr. Basu, has specifically and particularly made the following submissions against the reliefs sought by the petitioner:

(A) It has been argued that such reliefs as sought in prayer (i), (ii) and (iii), are not maintainable in law. He submitted that the powers exercised by this Court under Section 9 of the Act of 1996, is guided by the underlying principles, which governs the exercise of an analogous power in the Code of Civil Procedure, 1908 ('CPC') under Order XXXIX Rules 1 & 2 and Order XXXVIII Rule 5 of the CPC.

(B) He submitted that the reliefs as sought by the petitioner in prayer (i) to (iii) *inter alia* seeking directions from this Court to secure the alleged outstanding amounts payable by the respondent No. 1 to the petitioner, are in the nature of an order of attachment before judgment and therefore, the guiding principles of the provision of Order XXXVIII Rule 5 of the CPC should govern the adjudication and determination of the aforementioned reliefs. He further submitted that the grant of a relief for securing any amounts, prior to an arbitral award, is in the nature of an order of attachment before judgment, which is a drastic and extraordinary power and therefore, it is imperative that all the necessary conditions and ingredients of Order XXXVIII Rule 5 CPC must be satisfied. He submitted that it is a trite law that twin conditions are required to be

satisfied in order to seek reliefs under Order XXXVIII Rule 5 of the CPC, which are as under :

(i) Firstly - the petitioner has to establish that it has a strong *prima facie* case in its favour; and

(ii) Secondly – it has to establish that the respondent No. 1 is attempting to remove or dispose of his assets with the intention of defeating the decree which may be passed in favour of the petitioner.

179. It is his submission that for an order, in the nature, as provided under Order XXXVIII Rule 5 CPC, to be passed - this Court has to be satisfied by affidavit or otherwise that :

i. The respondent No. 1 has an intention to obstruct or delay the execution of any decree that may be passed against it;

ii. And to achieve the aforementioned, the respondent No. 1 is about to dispose of the whole or any part of its property, or, is about to remove the whole or any part of its property from the local limits of the jurisdiction of this Court.

180. He further submitted that the requirement under Order XXXVIII Rule 5 CPC warrants the petitioner to 'establish' that the respondent No. 1 is alienating/disposing of his assets with the intention to defeat any award/decree. It his submission that for the purposes of this provision, mere speculation or bald averments/allegations cannot suffice and only the actual verifiable knowledge at the end of the

petitioner with proof thereof will suffice. It is also his submission that the petitioner has failed to establish that the respondent No.1 is disposing/alienating his assets. In fact, from the averments of the petitioner in the Petition, it shall be evident that the allegations of the petitioner are merely speculative in nature.

181. He submitted that merely having a just or valid claim or a *prima facie* case, will not entitle the petitioner to an order of attachment before judgment, unless the petitioner also establishes that the respondent No. 1 is attempting to remove or dispose of its assets with the intention of defeating the decree/ award that may be passed against it. He also submitted that even where the respondent is removing or disposing his assets, an attachment before judgment cannot be issued unless the petitioner satisfies the Court that it has a *prima facie* case. Thus, it is stated that unless the twin conditions are satisfied, the relief for securing the amount cannot be granted by this Court.

182. It is further his case that in the instant petition, the petitioner has failed to establish that it has a *prima facie* case in its favour. Furthermore, it has also failed to establish, on affidavit or otherwise, that the respondent No. 1 is seeking to dispose / alienate its assets from the local limits of jurisdiction of this Court with the intention of defeating any award/decree, and for reasons thereof, the petitioner is not entitled to any relief which is in the nature of relief as provided under Order XXXVIII Rule 5, CPC. Therefore, it is his case that the instant petition is liable to be dismissed. Reliance has been placed upon the following judgments to contend the same:

(A) Adhunik Steels Ltd. vs. Orissa Manganese and Minerals (P) Ltd.[33];
(B) Nimbus Communications Ltd. vs. Board of Control for Cricket in India[34];
(C) BMW India Private Limited vs. Libra Automatives Private Limited and Others[35];.
(D) Tata Advanced Systems Limited vs. Telexcell Information Systems Limited[36];
(E) Natrip Implementation Society vs. IVRCL Limited[37];
(F) Beigh Construction Company Private Limited vs. Varaha Infra Limited[38];
(G) Raman Tech. & Process Engg. Co. vs. Solanki Traders[39];
(H) C.V. Rao vs. Strategic Port Investments KPC Ltd.[40]

183. He further argued that the reliefs sought in the prayer, particularly in clauses (iv) and (v) of the Petition are also not maintainable and as the same are in the nature of pre- deposit of amount before the passing of an arbitral award. He submitted that the same also amounts to an order of attachment before judgment and as stated above, the petitioner again has to satisfy the conditions laid down in Order XXXVIII Rule 5 of the CPC.

184. To substantiate this, he submitted that the petitioner is the part of the Joint Lenders' Meeting, compromising of Seven Lenders of the respondent No.1 and from the Minutes of Joint Lenders' Meeting as

[33] (2007) 7 SCC 125.
[34] 2012 SCC OnLine Bom 287.
[35] 2019 SCC OnLine Del 9079.
[36] 2020 SCC OnLine Del 1716.
[37] 2016 SCC OnLine Del 5023.
[38] 2021 SCC OnLine Del 3439.
[39] (2008) 2 SCC 302.
[40] MANU/DE/2033/2014.

well as the Restructuring Proposal dated September 03, 2021, it follows that the representatives of the petitioner have been actively participating in the Joint Lenders Meeting and was also part of the decision whereby the decision, restructuring the debt of the respondent No.1 was approved. He submitted that the Lenders of the respondent No.1 including the petitioner are still even discussing the modalities for the restructuring of the outstanding loans of the respondent No.1.

185. It is also his case that the ASM appointed by the Joint Lenders, including the petitioner, has approved the payments made by the respondent No. 1 to the respondent No. 2 in the ordinary course of business.

186. Thus, he urged this Court, on the afore-said grounds, that such reliefs as sought by the petitioner should not be granted.

187. He submitted that the relief sought in the prayer clause (vi) of the present Petition is also in the nature of pre – emptive relief holding the respondent No. 1 hostage. He further submitted that the petitioner has failed to establish that it has a prima facie case in its favour and also that the respondent No. 1 is attempting to remove or dispose off its assets with the intention of defeating any award/decree, and for reasons thereof, the petitioner is not entitled to any relief.

188. It is his submission that the reliefs as prayed for by the Petitioner in prayer (vii) to (ix), if granted, would completely disrupt the business of the respondent No.1 and it has also been submitted that the reliefs sought for, are in violation of TRAI Act and the regulations framed thereunder.

189. He substantiated his submission by stating that the payments made to the respondent No. 2 are against the subscription dues towards the subscription of the channels of the respondent No. 2 in terms of the Reference Interconnect Offer/Interconnection Agreement entered in compliance with the Interconnection Regulations issued by the Telecom Regulatory Authority of India and the invoices raised by the respondent No. 2 in terms of said Interconnection Agreement to the respondent No.1.

190. He submitted that as per the mandate of the Interconnection Regulations and the Interconnection Agreements/ Reference Interconnect Offer executed between the respondent No. 1 and respondent No. 2, on the failure of the respondent No.1 to discharge the outstanding subscription dues towards the respondent No. 2, against the monthly subscription invoices, the respondent No. 2 will be entitled to disconnect the signals / transmission of signals to the respondent No.1. He submitted that disconnection of the signals by the respondent No. 2 shall immensely and adversely affect the business of the respondent No. 1 in the highly competitive business environment, as the subscribers may start opting for signals from other MSO / Distributing Platform, so as a result the respondent No. 1 will lose its subscriber base, leading to irreversible and irreparable damage to the business of the respondent No. 1.

191. He argued that the payment made to the respondent No.2 are essential for running the business of respondent No. 1and sustaining it, as a going concern. He also submitted that the payments made to the

respondent No. 2 are for the broadcast of its television channels to the subscribers which is also done in the larger interest of the public.

192. So, he urged the Court to not to grant such reliefs in favour of the petitioner because of afore-mentioned reasons.

SUBMISSIONS ON BEHALF OF RESPONDENT NO.2

193. Whereas it is the case of respondent No.2 and so contended by Mr. P. Chidambaram and Mr. Sandeep Sethi, learned Senior Advocates, appearing on behalf of the respondent No.2, that the instant petition is not legally maintainable specifically against respondent No.2. So, the following objections have been taken up by them against the maintainability of the instant petition qua respondent No.2:

(A) that respondent No.2 is neither a signatory nor has it ever expressed any intention to be bound by any arbitral proceedings;

(B) that respondent No.2 being a non-signatory cannot be compelled to arbitrate without a specific arbitration agreement and in the absence of a clear intent by the parties to bind it;

(C) instant case does not fall under the exceptional circumstances under which non-signatories can be compelled to arbitrate (or group-company doctrine can be invoked);

(D) there is no direct relationship between the respondent No.1 and respondent No.2 as both are neither affiliates nor any sister concerns;

(E) reliance has been placed upon the judgment of the Coordinate Bench of this Court in the case of ***Shapoorji Pallonji and Co. Pvt. Ltd. vs. Rattan India Power Ltd. and***

Another[41]**,** the judgment of the Division Bench of the High Court of Calcutta in ***Mcleod Russel India Limited***[42] and the judgments of the Supreme Court in the cases of ***Mahanagar Telephone Nigam Ltd.***[43] & ***Chloro Controls India (P) Ltd.***[44], to contend that both the respondent No.1 as well as respondent No.2, do not form part of the same group in accordance with the principles laid down by the Courts in the above cases for invoking the Group of Companies doctrine;

(F) reliance has also been placed upon the recent judgment of the Supreme Court in the case of ***Cox and Kings Limited***[45], to contend that the existing principles pertaining to invocation of Group of Companies doctrine have been referred by the Supreme Court in the afore-said case to a Larger Bench. Therefore, the same doctrine should not be relied upon by this Court, until the Larger Bench decides upon the validity of the same;

(G) that the fact of existence of business relations between the respondent Nos.1 and 2, was known to the petitioner since the loan amount was advanced by the petitioner to the respondent No.1. The petitioner was also aware about the existence of the Interconnection Agreements between the respondent Nos.1 and 2;

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[41] 2021 SCC Online Del 3688.
[42] Supra.
[43] Supra.
[44] Supra.
[45] Supra.

(H) partial payments made by the respondent No.1 to respondent No.2, were with the prior approval of the ASM, which was specifically engaged by the Joint Lenders Forum with the responsibility of monitoring overall payments/ cash flows of the respondent No.1;

(I) that vide *ad-interim* order dated December 23, 2021, passed by this Court, the payments from respondent No.1 were stopped and thereby the respondent No.2 was constrained to issue a disconnection notice on February 02, 2022, to the respondent No.1 and also to protect its interest, it has also initiated recovery proceedings under Section 14 and 14A of the TRAI Act before Telecom Disputes Settlement and Appellate Tribunal (TDSAT), specifically seeking recovery of outstanding dues of approx ₹213 crores from respondent No.1 under the Interconnection Agreement and other Agreements for the billings done till February 28, 2022;

(J) that LoC provided by the respondent No.2 to the petitioner and the loan transaction between respondent No.1 and the petitioner are not a part of the composite transaction;

(K) that the performance of the agreements between respondent No.1 and the petitioner was not predicated on the aid/execution/performance of any obligation by respondent No.2;

(L) that contrary to the petitioner's case, respondent No.2 did not approach the petitioner to seek concessions and reset of the interest rate and the said letter was not a precondition for

reduction in interest rate. In fact, the said LoC had no bearing on the decision of the petitioner, as even after receipt of the said Letter, the petitioner did not revert/reset the interest rate to the original rate of 11 %, but brought it down only to 13%;

(M) that the petitioner's contention that the said LoC issued by respondent No.2 makes a reference to the Facility Agreement, which was entered into between the petitioner and respondent No.1, is an indicator of the transactions being composite, is meritless. It has been submitted that Section 7(5) of the Act of 1996 also provides that a reference in a contract to a document containing the arbitration clause could constitute as an Arbitration Agreement if the contract is in writing and reference to the Arbitration Agreement is such so as to make the arbitration clause a part of such contract. It is stated that the use of word 'such' in Section 7(5) of the Act of 1996, clearly indicates that the clause seeking to incorporate an arbitration agreement contained in any other document must clearly and expressly indicate the intention of the parties to do so. To contend this, reliance has been placed upon the judgment of the Supreme Court in the case of ***M.R. Engineers & Contractors Private Ltd.***[46]**.** It has further been submitted that as per the ratio of the afore-said judgment, a mere general reference to another contract cannot be said to be sufficient enough to incorporate an arbitration clause and thereby a reference should of such a nature indicating the mutual

[46] Supra.

intention of the parties to incorporate an arbitration clause from another document into the contract. It is stated that in the instant case, the LoC makes reference to the Facility Agreement only for limited and general purpose. Moreover, he has also taken the aid of the judgment of the High Court of Bombay in the case of ***MSTC Ltd.***[47] and the judgment of this Court in the case of ***Shreyas Kirti Lal Doshi and Anr.***[48] for the same proposition;

(N) that there is no direct commonality of the subject matter, which will demand composite transactions to take place between the respondent Nos.1 and 2. So, it is amply clear that the transaction between the petitioner and respondent No.1 is neither of composite nature, nor is of a type wherein the performance of the mother agreement may not be feasible without the aid, execution, and performance of the supplementary or ancillary agreements, for achieving the common object. Further, it is not the case here that the composite reference of respondent No.2 to the arbitration between respondent No.1 and the petitioner will serve the ends of justice;

(O) that respondent Nos.1 and 2 are not related parties as per Section 2(76) of the Companies Act,2013;

(P) that it is into public knowledge that respondent No.2 is seeking a merger with Sony Pictures and this information has

[47] Supra.
[48] Supra.

been in the public domain since September 22, 2021. Even though the facts of the case have no direct or indirect relationship with the said merger, the petitioner has expressly sought prayers in the petition seeking an injunction on the said merger. Thus, the filing of the instant Petition against respondent No.2 at such an advanced stage, which is not even a party/guarantor to the loan transaction between respondent No.1 and the petitioner, makes it evident that the petitioner wants to stall the merger of respondent No.2 and is trying to hold respondent No.2 at ransom;

(Q) that the recourse to arbitration is available to the petitioner, only in cases wherein it does not have an option of taking recourse under the RDDBFI Act or SARFAESI Act. To contend the same, reliance has been placed upon the judgment of the High Court of Madhya Pradesh in the case of ***Aditya Birla Finance Ltd. vs. Carnet Elias Fernandes Yemalayam***[49].

(R) that the petitioner has misconstrued the LoC to be a guarantee. Reliance has been placed upon the judgment of High Court of Bombay in the case of ***Yes Bank Ltd.***[50]**,** as well as judgment passed by the Division Bench of High Court of Karnataka in the case of ***United Breweries (Holding) Ltd.***[51]**,** to contend that the letter dated June 26, 2018 is merely a LoC and not a Letter of Guarantee. It is submitted that in fact, the said Letter falls only under the former category, is well known and

[49] (2019) 1 MPLJ 471.
[50] Supra.
[51] Supra.

even understood, by the petitioner itself and the same is evident from the following facts:

(Ra) that vide Recall Notice 3, dated February 12, 2019 addressed by the petitioner to respondent No.2 , the petitioner informed that it had recalled the facility advanced to respondent No.1 and that the entire amount was due and payable on immediate basis. Under the said letter, the petitioner requested that in line with the 'commitment' communicated vide the letter dated June 26, 2018, respondent No.2 has to 'ensure' payment. Notably, the term 'guarantee' was conspicuously absent in the said communication. There was also no demand for the outstanding amount to be paid by respondent No.2.

(Rb) that in a communication dated October 18, 2021, addressed by the Advocates of the petitioner to respondentNo.2, once again respondent No.2 was called upon to 'ensure' that respondent No.1 clears all its dues in connection with the Facility Agreement. Once again, the petitioner did not call upon the respondent No.2 to repay the dues in connection with the Facility. It is a trite law that the liability of a guarantor is co-extensive with the borrower, and hence had respondent No.1 truly believed the LoC to be a guarantee, it would have called upon respondent No.2 to repay the alleged dues.

The fact that the same was not done, reveals the true understanding of the petitioner qua the said Letter.

(S) that as per Section 179(f) of the Companies Act 2013, the board of a company can exercise powers qua giving guarantees in respect of loans, by passing board resolutions. Surely, the petitioner being a premier non-banking financial institution in our country is equipped with legal and financial services and is aware of this provision. Yet, it never insisted on such a board resolution being passed /provided by the respondent No.2. It is his submission that this leads to an inescapable conclusion that the petitioner also understood the letter dated June 26, 2018 to be a comfort letter (for which no board resolution is required) and not as a guarantee.

(T) that the LoC is not stamped as it should have been, had it been a guarantee and this evinces that it was clearly understood by the parties that the LoC was not an instrument of guarantee. Furthermore, Section 3 of the Maharashtra Stamp Act 1958, requires every instrument executed within the State of Maharashtra to be stamped at the rates mentioned in Schedule I of the said Act. Therefore, a 'letter of guarantee' is liable to be stamped as per Article 5(h)(A)(iv)(b) of the Schedule I, and the stamp duty payable on a Letter of Guarantee is as under:-

> *"(b) If the amount exceeds Rupees Ten Lakh – 0.2% of the amount agreed in the contract."*

(U) Also as per Section 34 of the afore-said Act, no instrument chargeable to stamp duty is admissible in evidence or can otherwise be acted upon unless it is duly stamped. Thus, it has been submitted that even if the LoC is construed to be a Letter of Guarantee, it cannot be acted upon by this Court unless the same is duly stamped and thus this Court is duty bound to impound the said document.

REJOINDER SUBMISSIONS

194. It is Dr. Singhvi and Mr. Wadhwa's primary submission that the letter dated June 26, 2018 is not mere a LoC, but a Guarantee. To substantiate this submission, he has taken the aid of the following judgments:

(A) Tiong Woon Project & Contracting PTE Ltd.[52]***;***
(B) Lucent Technologies Inc.[53]***;***
(C) Yes Bank Ltd.[54]***.***

195. It has also been submitted that the respondent No.2 always had the intention to be bound by the arbitration clause stipulated as Clause 12 under the CAL read with Clause 33 of the Facility Agreement. To substantiate this argument, reliance has been placed upon the following judgments:

(A) Eveready Industries India Limited vs. KKR India Financial Services Limited and Another[55]***;***

(B) Cheran Properties Limited[56]***;***

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[52] Supra.
[53] Supra.
[54] Supra.
[55] 2022 SCC Online Del 395.
[56] Supra.

(C) Fernas Construction Co. Inc.[57];

(D) Mahanagar Telephone Nigam Ltd[58].

(E) Ameet Lalchand Shah and others vs. Rishabh Enterprises and another[59]

196. Reliance has also been placed upon the judgment of the Supreme Court in the case of ***Renusagar Power Co. Ltd. vs. General Electric Company and another[60]***, to contend that anyhow, the arbitrator is competent enough to decide its own jurisdiction and it is a trite law that Courts should refer the disputes in case of doubt.

197. It has also been submitted that in any case, relief against third parties can be granted under Section 9 of the Act of 1996. To prove this submission, Mr. Wadhwa has taken the aid of the following judgments:

(A) ***Sterling and Wilson International FZE v. Sunshakti Solar Power Projects Private & Ors.[61];***

(B) ***Blue Coast Infrastructure v. Blue Coast Hotels[62].***

198. It has further been argued that the contentions of the respondent No.2 to the effect that the payments made by the respondent No.1 to respondent No.2, were towards the Interconnection Agreement/ or were pursuant to ASM's approval, are false and incorrect. To crystallize this, the following submissions are made:

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[57] Supra.
[58] Supra.
[59] (2018) 15 SCC 678.
[60] (1984) 4 SCC 679.
[61] O.M.P.(I) (COMM.) 460/2018 and I.A. Nos. 9313/2019, 9356/2019.
[62] 2020 SCC OnLine Del 1897.

(A) that the Interconnection Agreement was entered into on a voluntary and mutual basis and obligations arising therefrom are contractual and moreover the same is not a statutory contract. Any contention that the payments are towards statutory contract are incorrect in law and fact, and misleading. To contend this reliance has been placed upon the judgment of the Supreme Court in the case of ***India Thermal Power Limited v. State of M.P. & Ors.***[63];

(B) that the Interconnection Agreement conflicts with the Facility Agreement and the Deed of Hypothecation. It is his submission that the Interconnection Agreement was entered into much after the execution of **(i)** the Facility Agreement, **(ii)** Deed of Hypothecation and **(iii)** Letters of Guarantee. Further, Interconnection Agreement was extended from time to time, even after the Date of Default. Moreover, at the time of entering into the Interconnection Agreement, respondents No. 1 and 2 were aware about their obligations under the Facility Agreement read with CAL. Moreover, the Interconnection Agreement were in conflict with, **(A)** Clause 15.3 (iii) of the Facility Agreement (as per which respondent No. 1 and respondent No. 2 had an obligation to ensure that the performance of the Financing Documents (including the Facility Agreement) does not come in conflict with any subsequent agreement or instrument at a future date); **(B)** Clause 16.21 of the Facility Agreement (which provides that

[63] (2000) 3 SCC 379.

until the date of final settlement, all the Subordinated Claims would be deemed to be subordinate to the Secured Obligations payable to the petitioner); **(C)** Clause 6.5 of Deed of Hypothecation (under which the respondent No. 1 was prohibited from taking any action that would prejudice the rights of the petitioner with respect to Hypothecated Properties i.e., cash flow of respondent No 1); and **(D)** Clause 16.20 (under which respondent No. 1 was barred from making payments to related parties after the Date of Default).

(C) that Lenders of respondent No 1 did not execute any ICA and/or not accepted any proposal for restructuring respondent No 1's debt. In fact, at the meeting of the lenders of respondent No. 1, held on April 15, 2021, the Lenders were given 7 days to revert on the ICA. Subsequently, no ICA was signed, and as such nothing binds the petitioner in this regard. It is his further submission that no permission was given by petitioner authorizing the Axis Bank to act on the petitioner's behalf by itself or through any ASM in any manner whatsoever. He submitted that even assuming that the said sums were paid by respondent No. 1 to respondent No. 2, after the approval of ASM, nevertheless, the same having been paid prior to the payments to the petitioner, should be held in trust for the petitioner and as such ought to be handed over by respondent No. 2 to the petitioner. So, it his submission that all the monies otherwise due to respondent No. 2 from respondent No.1 (past and future) (and at the very least ₹108

crores, wrongfully paid by respondent No. 1 to the respondent No. 2) ought to be deposited with this Court, whether by respondent No. 2 (who holds such money in trust for the petitioner) or respondent No 1. He further submitted that once the monies being deposited, the petitioner ought to be allowed to withdraw the said amounts against a bank guarantee. Additionally, it is his submission that the sums/amounts being deposited with this Court, by respondent No. 1, in terms of orders dated March 28, 2022 and April 22, 2022, also be allowed to be withdrawn and handed-over to the petitioner.

199. Reliance has also been placed upon the following judgments to contend that this Court has, whilst adjudicating a petition filed under Section 9 of the Act of 1996, enough and wide powers to grant all reliefs, which have been specifically sought by the petitioner through the instant petition:

(A) Essar House Private Limited vs. Arcellor Mittal Nippon Steel India Limited[64]

(B) Valentine Maritime Ltd. vs. Kreuz Subsea Pte Limited and Another[65]***;***

200. To the contention of Mr. Chidambaram and Mr. Sethi, that since the petitioner has a remedy available under SARFAESI and RDDBFI Act, to proceed against the respondents, therefore, it cannot invoke arbitration, it is the case of Mr. Wadhwa, that the provisions of

[64] 2021 SCC OnLine Bom 149.
[65] 2021 SCC OnLine Bom 75.

SARFAESI Act provide a remedy in addition to the provisions of Act of 1996 and moreover, SARFAESI proceedings are in nature of enforcement proceedings, while arbitration is an adjudicatory process. So, he argued that the petitioner is within its rights, under the Law as well as under the terms of the Facility Agreement, to take recourse to the process of arbitration. To crystallize this contention, reliance has been placed upon the following judgments:

(A) ***M.D. Frozen Foods Exports Private Limited and Ors.***[66]***;***

(B) ***Securities and Exchange Board of India vs. Rajkumar Nagpal & Ors.***[67]

201. Moreover, he has taken the aid of the recent judgment of the Supreme Court in the case of ***N.N. Global Mercantile Private Limited vs. Indo Unique Flame Limited and Others***[68] to contend that even though the Letter of Guarantee, as alleged by the respondents, is unstamped, still the Arbitration Clause contained in the Facility Agreement read with CAL, can be enforced and disputes be referred to arbitration. Moreover, he also taken the aid of the judgment of the High Court of Bombay in the case of ***IREP Credit Capital Pvt. Ltd. vs. Tapaswi Mercantile Pvt. Ltd. and Another***[69], to contend that argument raised by the respondents to the effect that the present petition cannot be entertained because of non-stamping of the document is totally incorrect. It is their submission, that in view of the afore-said position

[66] Supra.
[67] Civil Appeal No. 5247 of 2022, decided on August 30th, 2022.
[68] (2021) 4 SCC 379.
[69] 2019 SCC Online Bom 5719.

of law, the issue of non-stamping of a document cannot have any bearing on a petition filed under Section 9 of the Act of 1996.

202. It is also his submission that the respondent No.1 as well as respondent No.2, are part of a same group and thus, the Group of Companies doctrine should be applied in order to seek reliefs even against respondent No.2. To demonstrate that both the respondents are part of a same group and are also related parties, reliance has been placed upon the following judgments:

(A) ***Chloro Control India Private Limited***[70]***;***
(B) ***Oil and Natural Gas Corporation Ltd.***[71]***;***
(C) ***Eveready Industries India Limited***[72]***;***
(D) ***Fernas Construction Co. Inc.***[73]***;***
(E) ***Cheran Properties Limited***[74]***;***
(F) ***Mahanagar Telephone Nigam Ltd.***[75]***;***
(G) ***KKR India Private Financial Services Limited & Anr. vs. Williamson Magor & Co. Limited & Ors.***[76]

203. Submissions have also been made that even though the aspect of Group of Companies doctrine, as enshrined in the judgment of the Supreme Court in the case of ***Chloro Control India Private Limited***[77], has been referred to a larger bench in ***Cox and Kings Limited***[78], the said doctrine still holds the field, as Justice between the parties in a particular case, should not hang in a suspended animation, until a

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[70] Supra.
[71] Supra.
[72] Supra.
[73] Supra.
[74] Supra.
[75] Supra.
[76] MANU/DE/2119/2020.
[77] Supra.
[78] Supra.

Larger Bench decides a reference. To contend the same, reliance has been placed upon the judgments of the Supreme Court in the cases of ***State of Rajasthan***[79], ***Ashok Sadarangani and Ors.***[80] and of the High Court of Kerela at Ernakulam in ***K.P. Remadevi and Anr.***[81]

ANALYSIS IN ARB. P. 474/2022

204. Having heard the learned counsels for the parties and perused the record, the issue which arises for consideration / decision in this petition is whether the parties herein are required to be referred to the arbitration by appointing an Arbitrator.

205. There is no dispute that in so far as the petitioner and respondent No.1 are concerned, they are governed by CAL and Facility Agreement. The Clauses 12 and 33 of the CAL and Facility Agreement respectively, which I have already reproduced in paragraphs 11 and 12, reveal normal arbitration clauses for referring the dispute for adjudication by a retired Judge of a High Court or a Supreme Court.

206. At the outset, the plea that needs to be decided is the one raised by Mr. Chidambaram for respondent No.2, inasmuch as the arbitration clauses are not applicable as the petitioner has a remedy available under the RDDBFI Act and the SARFAESI Act. A perusal of Clause 33 of the Facility Agreement reveals that it is in the eventuality that the lender (petitioner herein) does not have the benefit of the RDDBFI and SARFESI Acts, then, the parties will have a right to refer any dispute arising out or in connection with the Facility Agreement, to the arbitration. In support of his submission, Mr. Chidambaram has relied

[79] Supra.
[80] Supra.
[81] Supra.

upon the Notification dated February 24, 2020 issued by the Ministry of Finance which stipulates, an NBFC having assets worth ₹100 Crores and above is entitled to enforce its security interest in secured debts of ₹50 Lakhs and above under the SARFAESI Act. This submission of Mr. Chidambaram was contested by Mr. Rao by stating that the petitioner does not have the remedy under the RDDBFI Act and the remedy available under the SARFAESI Act is for enforcement of security and not for recovery of the amount and the same does not preclude the remedy of arbitration. He laid stress on the word *"and"* in Clause 33 of the Facility Agreement to contend that petitioner cannot take recourse to arbitration only when remedies under both the SARFAESI Act and RDDBFI Act are available to it. His submission was, as the remedy of RDDBFI Act is not available and even the SARFAESI Act is only to enforce the security and not recovery of money, and the remedy under SARFAESI is in addition to arbitration and as such the disputes need to be resolved through the process of arbitration. Mr. Chidambaram has not contested the submission of Mr. Rao that the petitioner does not have the remedy under the RDDBFI Act. Even the SARFAESI Act is for enforcement of security and not for recovery of the money due. If that be so, Mr. Rao is justified in laying stress on the fact that under Clause 33, the remedy of arbitration shall be available if the remedy of both the RDDBFI Act and SARFAESI Act are not available to a lender. Even the Notification dated February 24, 2020 as referred to by Mr. Chidambaram which I reproduce hereunder does not really help the case of the respondent No.2 for relegating the petitioner to the process available under the

SARFAESI Act as the notification confer the jurisdiction to certain NBFC to enforce the security interest in secured debts of ₹50 Lakhs and above:

> "*MINISTRY OF FINANCE*
>
> *(Department of Financial Services)*
> *NOTIFICATION*
> *New Delhi, the 24th February, 2020*
>
> *S.O. 856(E).—In exercise of the powers conferred by sub-clause (iv) of clause (m) of subsection (1) of section 2 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002), and in supersession of the notifications of the Government of India, Ministry of Finance numbers S.O. 2641(E), dated the 5th August, 2016, S.O. 4176 (E) dated the 27th August, 2018, and S.O. 5391(E) dated 24th October, 2018, except as respects things done or omitted to be done before such supersession, the Central Government hereby specifies such nonbanking financial companies as defined in clause (f) of section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934), having assets worth rupees one hundred crore and above, which shall be entitled for enforcement of security interest in secured debts of rupees fifty lakh and above, as financial institutions for the purposes of the said Act.*
>
> *[F. No. 31/52/2018-DRT]*
> *VANDITA KAUL, Jt. Secy."*

207. The Supreme Court in ***M.D. Frozen Foods Exports Pvt. Ltd. & Ors.***[82] on which reliance has been placed by Mr. Rao has held, the remedy under SARFAESI Act is in addition and not in derogation to the RDDBFI Act, which is an alternative remedy available to the lender for recovery of money. The Supreme Court also held that the

[82] Supra.

remedy for recovery of money and the remedy under the SARFAESI Act can proceed simultaneously. Hence this submission of Mr. Chidambaram is liable to be rejected. The reliance placed by Mr. Chidambaram on the judgment in the case of ***Aditya Birla Finance Ltd.***[83], has no applicability, in view of the judgment of the Supreme Court in ***M.D. Frozen Foods Exports Pvt. Ltd. & Ors.***[84]**.** In any case, the said judgment is distinguishable on facts.

208. Now coming to the issue which falls for consideration in this petition, which is, whether all the parties including respondent Nos. 2 and 3 are required to be referred to arbitration when admittedly the respondent Nos. 2 and 3 are not the signatories to the CAL and Facility Agreement.

209. Before I deal with the issue it is important to refer to the latest opinion of the Supreme Court in the case of ***Oil and Natural Gas Corporation Limited***[85]**,** wherein the Supreme Court has culled out the law as was existing before it rendered the Judgment in ***Chloro Controls India (P) Ltd.***[86]**,** wherein the Court evolved the doctrine of Group of Companies and also the subsequent judgments rendered by it on the said doctrine. The Supreme Court in ***Oil and Natural Gas Corporation Limited***[87] has in paragraph 26 has culled out the factors for deciding whether a company within a group of companies would be bound by the arbitration agreement in the following manner:-

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[83] Supra.
[84] Supra.
[85] Supra.
[86] Supra.
[87] Supra.

> *"26 In deciding whether a company within a group of companies which is not a signatory to arbitration agreement would nonetheless be bound by it, the law considers the following factors:*
> *(i) The mutual intent of the parties;*
> *(ii) The relationship of a non-signatory to a party which is a signatory to the agreement;*
> *(iii) The commonality of the subject matter;*
> *(iv) The composite nature of the transaction; and*
> *(v) The performance of the contract.*
> *Consent and party autonomy are undergirded in Section 7 of the Act of 1996. However, a non-signatory may be held to be bound on a consensual theory, founded on agency and assignment or on a non-consensual basis such as estoppels or alter ego. These principles would have to be understood in the context of the present case, where ONGC's attempt at the joinder of JDIL to the proceedings was rejected without adjudication of ONGC's application for discovery and inspection of documents to prove the necessity for such a joinder."*

210. I may also state here that this Court in its opinion in the case of ***KKR India Private Financial Services Limited and Ors.***[88] has, by referring to the judgments of the Supreme Court in ***Chloro Controls India (P) Ltd.***[89]***, Cheran Properties Limited***[90]***, Mahanagar Telephone Nigam Ltd.***[91] and other judgments, culled out the following factors for invoking the Group of Companies doctrine:-

i. Section 9 cannot be confined only to the parties to the arbitration agreement.

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[88] Supra.
[89] Supra.
[90] Supra.
[91] Supra.

ii. 'Group Companies Doctrine', is an exception whereby arbitration agreement binds a non-party or a non-signatory as well;

iii. The arbitration agreement entered into by one of the companies in the group and the non-signatory affiliate, or sister, or parent concern is held to be bound by the arbitration agreement, if the facts and circumstances of the case indicate a mutual intention of all parties to bind both the signatories and non-signatory affiliates in the group, or;

iv. This Doctrine gets attracted when a non-signatory entity on the Group, was engaged in the negotiation or performance of the commercial contract, or made statements indicating its intention to be bound by the contract, or;

v. In cases where there is a tight group structure with strong organizational and financial links, so as to constitute a single economic unit, or a single economic reality, especially when funds of one company is used to financially support or re-structure other members of the group, or;

vi. Doctrine can be invoked to bind non-signatory affiliate of a parent company or inclusion of a third party to arbitration, where there is a direct relationship between the party which is a

signatory to the arbitration agreement or there is direct commonality of the subject matter

vii. Even if all parties to the *lis* were not signatory to all the agreements, but none of the Companies was a stranger to these transactions; parties intended, executed and implemented a composite transaction.

211. That apart, this Court in the case of ***Shapoorji Pallonji and Co. Pvt. Ltd.***[92]**,** had referred a non-signatory to arbitration under certain eventualities. In this regard, I deem it appropriate to reproduce paragraphs 23, 25, 26, 27, 28, 30, 31 and 33 of the judgment:

> *"23. In addition to the above, the Supreme Court had also referred to the Group of Companies doctrine and applied the same for compelling certain parties to arbitrate in that case.*
>
> *xxx xxx xxx*
>
> *25. In several cases, implied consent is used as a basis to hold that non-signatories are bound by the arbitration agreement. It is well settled that in cases where the signatory is an agent of the principal (non-signatory), the principal can be compelled to arbitrate even though it is not a party to the agreement. This rests on the principle that the arbitration agreement may not have been signed by the non-signatory but was executed on its behalf. This*

[92] Supra.

principle is applied, essentially, in cases where the agent-principal relationship is established between the signatory and non-signatory and it is established that the signatories had acted under the authority of the principal. There are several cases where the Courts have found the conduct of the signatory and its principal to be sufficient evidence of their relationship.

26. The Courts/Arbitral Tribunals have also in some cases imputed implied consent on the part of the non-signatory and held the non-signatory to be bound by the arbitration agreement. These are typically cases where the Courts/Arbitral Tribunals have found that the non-signatories have played an active role in negotiations and are directly involved in the contract. In Gvozdenovic v. United Air Lines, Inc.,: MANU/FESC/0273/1991 : 933 F.2d 1100, 1105 (2d. Cir. 1991) the Court held that "where a party conducts itself as it were a party to a commercial contract, by playing a substantial role in negotiations and/or performance of the contract, it may be held to have the impliedly consented to be bound by the contract".

27. There are also cases where third party beneficiaries of a contract may be compelled to arbitrate. Similarly, in cases such as assignment or succession, the assignees or successors interest may be compelled to arbitrate

although, they were not original signatories to the arbitration agreement.

28. There exists another set of cases where the Courts have compelled non-signatories to arbitrate by disregarding their corporate facade or where the Courts have found the signatory to be an alter ego of the non-signatory or vice versa. In Barcelona Traction, Light and Power Company Ltd.: (1970) ICJ Rep. 3, the International Courts of Justice had explained the doctrine of piercing the corporate veil in the following words:

> *"the process of 'lifting the corporate veil' or 'disregarding the legal entity' has been found justified and equitable in certain circumstances or for certain purposes. The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as creditor or purchaser, or to prevent the evasion of legal requirements or of obligations."*

xxx xxx xxx

30. Courts in several jurisdictions have drawn heavily on the principle of estoppel and have compelled non-signatories to arbitrate.

> *31. In Avila Group Inc. v. Norma J. of California: 426 F. Supp. 537 (S.D.N.Y. 1977) the court found that a party cannot assert the existence of a valid contract to base its claims and at the same time deny the contract's existence to avoid arbitration. The court observed that "to allow [plaintiff] to claim the benefit of [a] contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act."*
>
> *xxx xxx xxx*
>
> *33. In addition to the above, the Courts have also applied the Group of Companies doctrine to compel a non-signatory to an Agreement to arbitrate. The Group of Companies Doctrine was first applied in the case of Dow Chemical v. Isover-Saint-Gobain (1984 Rev Arb 137). The said doctrine rests on the concept of a 'single economic reality'."*

212. Similarly, in ***Mahanagar Telephone Nigam Ltd.***[93], the Supreme Court had applied the Doctrine of Group of Companies and held that the CANFINA (a non-signatory party therein) was undoubtedly a necessary and proper party in the arbitration proceedings. The relevant paragraphs 10.2 to 10.8 are reproduced as under:

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93 Supra.

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

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

10.4. The doctrine of "group of companies" had its origins in the 1970s from French arbitration practice. The "group of companies" doctrine indicates the implied consent to an agreement to arbitrate, in the context of modern multi-party business transactions. It was first

propounded in Dow Chemical v. Isover-Saint-Gobain [Dow Chemical v. Isover-Saint-Gobain, 1984 Rev Arb 137 : (1983) 110 JDI 899] , where the Arbitral Tribunal held that:

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

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

arbitration agreement and the non-signatory entity on the group has been engaged in the negotiation or performance of the commercial contract, or made statements indicating its intention to be bound by the contract, the non-signatory will also be bound and benefitted by the relevant contracts.

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

10.7. The group of companies doctrine has also been invoked in cases where there is a tight group structure with strong organisational and financial links, so as to constitute a single economic unit, or a single economic reality. In such a situation, signatory and non-signatories have been bound together under the arbitration agreement. This will apply in particular when the funds of

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

10.8. The "group of companies" doctrine has been invoked and applied by this Court in Chloro Controls (India) (P) Ltd. v. Severn Trent Water Purification Inc., with respect to an international commercial agreement. Recently, this Court in Ameet Lalchand Shah v. Rishabh Enterprises, invoked the group of companies doctrine in a domestic arbitration under Part I of the 1996 Act."

213. Now coming to the issue whether respondent Nos.2 and 3 can be referred to arbitration along with petitioner and respondent No.1. The same has to be seen in the facts of this case, specifically, from two perspectives: (1) the perspective of the CAL and the facility agreement and; (2) the effect of the two letters dated June 26, 2018 issued by the respondent Nos.2 and 3 to the petitioner. On the first issue, the submissions of Mr. Rao are the following:-

i. The respondent No.1 as well as respondent No.2, have a direct relationship, as they form a part of the same group of companies i.e., the Essel Group of Companies.

ii. The Essel Group of Companies has a tight group structure, and is under the common control of certain individuals who direct the policies and employees of various group companies including respondent Nos. 1 and 2.

iii. Under the facility agreement the promoters means Mr.Subhash Chandra and/or entities owned and/or controlled by him.

iv. The Chairman of the respondent No.2 as well as respondent No.3 is Mr. Subhash Chandra and whereas Mr.Punit Goenka, who is the CEO of the respondent No. 2, is the son of Mr. Subhash Chandra.

v. The annual reports of 2016-17 and 2018-19 published by the respondent No.2 have classified the respondent No.1 as *"other related parties consist of companies controlled by Key Management Personnel and its relatives with whom transactions have taken place during year and balance outstanding as on the last day of the year"*.

vi. The respondent No.1 has also admitted in its annual reports for 2016-17 and 2018-19 that the respondent No.2 is a related party.

vii. In the annual report of financial year 2020-21, the respondent No.2 has admitted that it has provided commitments for funding shortfalls in Debt Service Reserve Account in relation to certain financial facilities availed from banks by respondent No. 1.

viii. The majority of the partners of the respondent No.3 have disclosed in their respective consent forms, their email addresses, which includes their domain

name as either EsselGroup.com or Zee.EsselGroup.com.

ix. The shareholding pattern for March, 2022 quarter of respondent No.2, as evident from Bombay Stock Exchange website shows that the respondent No.3 is a promoter shareholder of the respondent No.2 with 0.02% shareholding.

x. The promoter shareholding in respondent No.1 at the time of facility agreement in February, 2017 as well as at the time of issuance of letter of guarantees was more than 70% and 65.8% respectively.

xi. That one of the promoter companies which is significant shareholder in respondent No.1 was Essel Media Ventures Ltd. as it had at least 8.70% shareholding in the respondent No.1 as on March 31, 2017 i.e., at the time when the first disbursement was made.

xii. At the time of the execution of the facility agreement, the promoter shareholding in the respondent No.2 was approximately 43.07% and the remaining was held by public shareholding. Thereafter, at the time of issuance of letter of guarantees the promoter shareholding in the respondent No.2 was above 40%.

xiii. The common company of the Essel Group of Companies viz., Media Ventures Ltd. held at least

10.71% shareholding in respondent No.2 as on quarter end of March, 2017 and in June, 2018.

xiv. So, at the time of issuance of letters of guarantee there was extensive cross shareholding by entities belonging to the Essel Group of Companies in both the respondent No.1 and the respondent No.2.

xv. Cross shareholding pattern between both the respondents shows that there was unity of ownership and interest at the time of entering into the facility agreement and also at the time of issuance of letters of guarantee indicating that there was a direct relationship between the two entities.

xvi. The beneficial owner of the respondent No.2 is Amit Goenka who is a son of Mr. Subhash Chandra, who is also the promoter of respondent No.1.

xvii. The financial obligations and financial commitments made by the respondents on behalf of the respondent No.1 and vice versa couple with cross shareholding manifest that the respondent Nos.1 and 2 are but a single economic entity as such commitments cannot be made by these respondents unless they are a single economic entity.

xviii. The letters of guarantee issued by respondent Nos.2 and 3 show that the said respondents have admitted that the respondent No.1 is the part of a Group.

xix. The letters of guarantee issued by respondent Nos.2 and 3 incorporates similar languages to admit that the respondent No.1 is a group company of the respondent Nos.2 and 3.

214. The aforesaid stand of Mr. Rao was contested by Mr.Chidambaram (whose submission have been adopted by Mr.Kachwaha with regard to respondent No.3) by stating that the respondent No.2 being non signatory, cannot be compelled to arbitrate in the absence of mutual intent of the parties. According to him, the existence of arbitration agreement is a *sine qua non* for a reference of dispute under Section 7 of the Act of 1996.

215. The plea of Mr. Chidambaram with regard to Section 7 is clearly unsustainable in view of the judgment of the Supreme Court in ***Chloro Controls India (P) Ltd.***[94]**,** wherein the Supreme Court had by noting the position under the English law [wherein the Courts have applied doctrine of Group of Companies by evolving a principle that a non-signatory party could also be subjected to arbitration, provided the transactions were within the Group of Companies and there was a clear intent of the parties to bind both the signatory as well as non signatory parties], held that the non-signatory or third party could be subjected to arbitration without their prior consent in an exceptional case. The Court is required to examine these exceptions from the touchstone of its direct relationship to the party signatory to the arbitration agreement, commonality of the subject matter and the agreement

[94] Supra.

between the parties forming part of a composite transaction. The Court also held that the transaction should be of composite nature where performance of the other agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreement for achieving the common object. It was further held that the Court would also have to examine whether a common reference of such parties to arbitration would serve the ends of justice.

216. Once the above exercise is completed and the Court answers the same in the affirmative, the reference of even a non-signatory party would fall within the aforesaid exceptional case. So, in that sense, it is not correct for Mr. Chidambaram to argue that existence of arbitration agreement is a *sine qua non* for reference of a dispute under Section 7 of the Act of 1996.

217. Surely, the plea whether the facts of the present case would entail the invocation of Group of Companies doctrine, the same shall be examined by this Court in the facts as projected by the Counsels in their submissions, herein after.

218. Before I proceed further on the above issue, it is important to consider the plea of Mr. Chidambaram for the respondent No.2 and also of Mr. Kachwaha for the respondent No.3, based on the judgment of the Supreme Court in ***Cox and Kings Limited***[95]**,** that Supreme Court has doubted the doctrine of Group of Companies as laid down in ***Chloro Controls India (P) Ltd.***[96] and other subsequent judgments. According to them, the same being not a good law, and also the instant

[95] Supra.
[96] Supra.

petition seeking impleadment of respondent Nos.2 and 3 by the petitioner placing reliance upon the said doctrine being under the cloud, the same is required to be dismissed qua the said respondents.

219. It is true that in ***Cox and Kings Limited***[97], the Court has referred to a Larger Bench, the following questions for consideration:-

> **(A)** Whether the Group of Companies doctrine should be read into Section 8 of the Act or whether it can exist in Indian jurisprudence independent of any statutory provision?
>
> **(B)** Whether the Group of Companies doctrine should continue to be invoked on the basis of the principle of "single economic reality"?
>
> **(C)** Whether the Group of Companies doctrine should be construed as a means of interpreting the implied consent or intent to arbitrate between the parties?
>
> **(D)** Whether the principles of alter ego and/or piercing the corporate veil can alone justify pressing the Group of Companies doctrine into operation even in the absence of implied consent?

220. But the fact remains that till such time the ***Chloro Controls India (P) Ltd.***[98] and subsequent judgments are overruled, the judgment in the ***Chloro Controls India (P) Ltd.***[99] shall continue to operate the field and this position of law has been clarified by this Court in the

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[97] Supra.
[98] Supra.
[99] Supra.

case of ***Brinda Karat v. State (NCT of Delhi)***[100]**,** paragraph 123 which I reproduced as under:-

> *"123. As held in State of Maharashtra v. Sarva Shramik Sangh [State of Maharashtra v. Sarva Shramik Sangh, (2013) 16 SCC 16 : (2014) 3 SCC (L&S) 320] , it is an established principle of law that until a judgment which has been referred to a larger Bench is overruled, the said judgment occupies the field and continues to operate as a good law. This would continue until the larger Bench decides the matter reliance is placed."*
>
> *(Emphasis supplied)*

221. So it follows, the issue with regard to applicability of Group of Companies doctrine has to be considered and decided in terms of the judgment in ***Chloro Controls India (P) Ltd.***[101] and other judgments rendered by the Supreme Court and as followed by this Court.

222. In fact, it is the case of the respondent Nos.2 and 3 that the respondent No.1 is a group company of the respondent Nos.2 and 3. The same is clear from the letters dated June 26, 2018 written by the said respondent Nos.2 and 3. It is also the conceded case that the chairman of the Essel Group of which the respondent Nos.1 and 2 form part of, is Mr. Subhash Chandra whose shareholding in respondent No.1 was more than 70% at the time of execution of the CAL and the Facility Agreement and 65.83% at the time of issuance of letters dated June 26, 2018 respectively. Even the promoter group's shareholding in respondent No.2 was approximately 43.07% on the date of execution of the facility agreement. I must state here that Mr. Chidambaram contested the submission of Mr. Rao by stating that the promoter group

[100] (2022) 4 HCC (Del) 154.
[101] Supra.

has currently 3.99% and 6.10% of the shareholding in the respondent Nos.1 and 2 respectively. But the fact is, there cannot be any denial that the respondent Nos.1 and 2 are part of Essel Group of companies and as such they are single economic entity and as such related party. That apart, it was Mr. Rao's submission that at the time of execution of the facility agreement in the year 2017 and also at the time of issuance of letter of guarantees (according to Mr. Rao) there was extensive cross shareholding by the entities belonging to Essel group of companies in both respondent Nos.1 and 2. So, in that sense, there is indirect shareholding in the respondent No.1. It is clear from the letters dated June 26, 2018 issued by the respondent Nos.2 and 3, that they have described the respondent No.1, as part of their Group i.e., Essel Group of Company. So, the argument advanced by Mr. Chidambaram is at variance with the stand taken in the letter sent by the respondent Nos. 2 and 3 to the petitioner. Moreover, Mr. Rao is also justified in highlighting the following facts to show the *inter-se* relationship between respondent Nos.1, 2 and 3:

Sl. No.	**FACTS REVEALING *INTER-SE* RELATIONSHIP BETWEEN RESPONDENT NOs.1, 2 AND 3**
1.	Letter dated June 26, 2018 issued by respondent No.2 *inter-alia* records as follows:- **"*We are aware that Aditya Birla Finance Limited (ABFL) has sanctioned and disbursed a Rupee Term Loan facility of Rs.150,00,00,000/- (Rupees One Hundred & Fifty crore only) ["Facility"] to our group company, Siti Networks Limited, …"*** ***(emphasis supplied)*** Even, a similar letter was issued by respondent No.3, which

	also incorporates the aforesaid language. This reveals that the letters issued by the respondent Nos.2 and 3, reflect the admission on the part of respondent Nos. 2 and 3 that respondent No.1 forms part of their Group Company.
2.	Mr. Subhash Chandra is the Chairperson Emeritus of the Essel Group of Companies and respondent No.3 forms the part of the same.
3.	The perusal of the annual reports of respondent No.2 for the FY-2016-17, 2018-19 and 2020-21 reveal that Mr. Subhash Chandra is also the Chairman Emeritus as well as Key Managerial Personnel of the respondent No.2.
4.	Similarly, the annual reports of respondent No.1 for FY-2016-17, 2018-19 and 2020-21 identify Mr. Subhash Chandra as a "Key Management Person" and respondent No.2 as "Enterprises owned or significantly influenced by key management personnel or their relatives". This fact signifies that respondent Nos.1, 2 and 3 are under the common control.
5	There is also a cross shareholding by Essel Group of Companies in respondent Nos.1 and 2, which indicates that there is a direct relationship between the two entities. The fact reveals that in February, 2017 i.e., at the time of execution of the Facility Agreement, the promoter shareholding of the Essel Group in the respondent No.1 was above 70% and in

	respondent No.2 was above 40%. Even, at the time of issuance of the letters dated June 26, 2018, the promoter shareholding in respondent No.1 was 65.8% and in respondent No.2 was above 40%. Moreover, there is also a common company viz. Essel Media Venture Ltd. which also has at least 8.70% stake in respondent No.1 and 10.71% stake in respondent No.2.
6	Mr. Puneet Goenka, is the Managing Director and CEO of respondent No.2.
7	The beneficial owner of the respondent No.2 is Mr. Amit Goenka, who is the brother of Mr. Puneet Goenka.
8	Even, majority of the partners of the respondent No.3, have the domain name of esselgroup.com or zee.esselgroup.com, which indicates that they operate under the direct control of the Essel Group of Companies.
9	Mr. Himanshu Mody (who issued the Letter dated June 26, 2018, on behalf of the respondent No.3), is identified by respondent No.3, as the head of the group, finance and strategy department of the Essel Group.
10	The respondent Nos.1 and 2 have admitted that they are related parties. The annual reports of respondent No.1 for financial year 2016-17, 2017-18 and 2020-21 reveal the same. Similarly, annual reports of respondent No.2 for financial year 2016-17, 2017-18 and 2020-21 also reveal the same.

11	In their annual reports the respondent No.1 has stated that respondent No.2 is an "Enterprise owned or significantly influenced by promoter / promoter group" and whereas respondent No.2 has stated that respondent No.1 forms a part of *"other related parties consist of companies controlled by key management personnel and its relatives with whom transactions have taken place during the year and balance outstanding as on the last day of the year."*
12	Also, the respondent No.2 gave payment commitments on behalf of the respondent No.1, through an email sent by the domain name zee.esselgroup.com. This suggests that respondent No.2, would not have been privy to such information and would not have been able to give such assurances, unless respondent Nos.1 and 2 were operating as a single economic entity and part of the same group. This also suggests that respondent No.1 was accustomed to act as per the advice of Mr. Puneet Goenka and / or Mr. Subhash Chandra and / or respondent No.2 and / or Essel Group.

223. At this stage, a reference is also made to the judgments relied upon by the counsels for the respondents.

224. In ***MSTC Ltd.***[102]**,** which is a Judgment of the Bombay High Court, the Court was concerned with an application filed under Section 8 of the Act of 1996. The case of the defendants therein was that the matter in the summary Suit filed by the plaintiff therein was the subject

[102] Supra.

matter of an arbitration agreement and thus the parties be accordingly referred to arbitration. The summary Suit therein was filed by the plaintiff claiming to be the creditor in an agreement dated August 27, 1998 entered into with defendant No.1 for purchase of goods along with a Supplementary Agreement dated January 16, 1999. The plaintiff's case under the two agreements was that the liability to repay the loan was owed by the defendant No.1 to it as a principal debtor while defendant No.3 was liable under a personal guarantee to secure those dues. The plaintiff's suit was specifically for non-payment of those dues under the main agreement by the defendant No.1 and also for non-payment of the dues by defendant No.3 under the personal guarantee. Whereas, the case of the defendants was that the main agreement between plaintiff and defendant No.1 for supply of goods contained the arbitration clause and thus main claim of the plaintiff arising out of that agreement is covered by the arbitration agreement, thus, the parties must be referred to arbitration under Section 8 of the Act of 1996. The Court after hearing the submissions of both the sides, negated the plea on behalf of the defendants by holding that the arbitration clause being entered into only between the creditor and the principal debtor and not with the guarantors, all the parties including the guarantors thus cannot be referred to arbitration.

225. In so far as, ***Shreyas Kirti Lal Doshi and Anr.***[103] is concerned, this Court held that agreement which stands as a surety for the performance of the contract between the principal debtor and the lender, although linked to the principal contract is an independent

[103] Supra.

contract and unless the arbitration agreement stipulated in the principal contract is incorporated in the agreement of surety by a specific reference, the surety cannot be said to be bound by the arbitration agreement. In the said judgment, this Court while considering the application filed by the defendant under Section 8 of the Act of 1996 for referring the parties to the arbitration between the lender and borrower and also by referring to the Judgment of the Bombay High Court in ***MSTC Ltd.***[104]**,** had rejected the said application.

226. Whereas insofar as the judgment in the case of ***M.R. Engineers & Contractors (P) Ltd.***[105] is concerned, the said judgment was in the context of incorporating an arbitration clause from the main contract into a sub-contract (which did not contain the arbitration clause). The Supreme Court held that unless a clear or specific indication that the main contract in entirety including the arbitration agreement was intended to be made applicable to the sub-contract between the parties, the arbitration clause in the main contract cannot form part of that sub-contract. Similarly, in ***S.N. Prasad Hitek Industries (Bihar) Limited***[106] the Supreme Court rejected the contention that since the liability of the principal debtor and guarantor was joint and several, the guarantor should also be compelled to join the arbitration proceedings, even though it was not a signatory to the loan agreement executed between the creditor and the principal debtor, which stipulated the arbitration clause.

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[104] Supra.
[105] Supra.
[106] Supra.

227. The above-judgments have been relied upon by the respondents to contend that since the respondent Nos.2 and 3 are non-signatory to the CAL and the Facility Agreement, they cannot be referred to arbitration. Suffice to state that the above judgments have no applicability to the facts of this case, more so, when the reference is sought on the basis of the judgment of the Supreme Court based on ***Chloro Controls India (P) Ltd.***[107]**.**

228. Now coming to the issue as to whether the letters dated June 26, 2018, as described by Mr. Rao, are letters of Guarantee, as against the submission of Mr. Chidambaram that they are merely letters of comfort, the position of law being well settled inasmuch as a document has to be read as a whole in a commercial sense and by applying ordinary rules of constructions and interpretation relating to contracts, a letter of comfort can be treated as a letter of guarantee but to be so it must conform to the provisions of Section 126 of the Indian Contract Act, 1872. This Court in ***Lucent Technologies Inc.***[108] paragraph 96 has held as under:

> *"96. In the instant case, the defendant no. 1 is asserting that the plaintiff had executed valid guarantees to secure financial facilities advanced by it to the defendant no. 2. A contract of guarantee is a contract to perform the promise, or discharge the liability of a third person in case of its default, as defined under Section 126 of the Indian Contract Act, 1872. As per Section 127 of the said Act,*

[107] Supra.
[108] Supra.

anything done or any promise made, for the benefit of the principal debtor, may be sufficient consideration to the surety for giving the guarantee."

229. The judgment of ***Lucent Technologies Inc.***[109] was considered by the Bombay High Court in ***Yes Bank Ltd.***[110]. The Court after considering the letter of comfort therein, issued by the same respondent as in this case i.e., respondent No.2, has in paragraph 66 held as under:

"66. Applying any of the principles cited, whether in Lucent Technologies, Banque Brussels, or United Breweries, the LoC cannot be said to be more than what it is; nor can Zee be said to have taken on a burden beyond the LoC. A guarantee in Indian law requires a commitment or the assumption of obligation to pay off the debt of another upon default. The guarantor stands surety for the repayment of the debt. If the debtor fails to repay, the creditor need look no further than the surety or guarantor."

230. In the case in hand, on perusal of the letters dated June 26, 2018, it can be seen that there is no assurance in the letters that respondent Nos.2 and 3 shall pay the credit facility to the petitioner on the failure of respondent No. 1 to repay the petitioner. In the absence of such stipulation the letters do not meet the requirement of Section

[109] Supra.
[110] Supra.

126 of the Indian Contract Act, 1872. This I say so because the letter only states that the respondent Nos.2 and 3 shall assure and confirm that the petitioner is repaid the facilities on the relevant due dates.

231. Reading the documents in their plain terms, the intent being clear, the same cannot be construed as letters of guarantee which necessarily requires, as per Section 126 of the Indian Contract Act, 1872, a promise to discharge the liability of a third person in case of his default.

232. Having said, the question still be, whether the respondent Nos.2 and 3 cannot be referred to arbitration at all. The answer shall be that they can be, because the case of the petitioner in the notice invoking arbitration is the following:-

> *"4. Under the terms of the Facility Agreement, ABFL had the discretion to reset Interest Rate and on 6 April 2018, ABFL issued a letter to reset the Interest Rate from 11% to 16%. However, Siti and Respondent No. 2 requested ABFL to reconsider its decision. ABFL, pursuant to request made by Respondents, had agreed to revise the Interest Rate from 16% to 13% inter alia only on the condition that Mr Punit Goenka on behalf of Zee gives a letter assuring that Siti services and repays the Facility. Consequently, Zee issued a Letter dated 26 June 2018 (signed by Pun it Goenka) ("Letter of Guarantee"). Letter of Guarantee inter alia stated that "pursuant to our discussions, we hereby assure you and confirm that we shall ensure that Siti Network Limited services and repays the Facility on the relevant due dates." Another letter dated 26 June 2018 was also given by Essel Corporate LLP (on behalf of the Essel Group) assuring and confirming payments from Siti Networks towards the Facility.*
>
> *xxx xxx xxx*

> *9. Despite the various opportunities afforded to Siti and Zee in good faith, no payments have been made to ABFL under the Financing Documents, including but not limited to CAL or Facility Agreement. Further, Zee, despite being a guarantor/Obligor has failed to ensure that Siti makes payment to ABFL and / or hold in trust for and handover payments paid to it to ABFL as per the terms of the Facility Agreement. As such, amounts in relation to the Facility continue to remain outstanding and payable until this day."*
>
> *(Emphasis supplied)*

233. The above would reveal that the claim of the petitioner in the notice is that the respondent Nos.2 and 3 have failed to ensure that respondent No.1 makes payment to the petitioner and / or hold in trust for and handover payment paid to it by the petitioner as per the facility agreement.

234. It is seen that the case of the petitioner is also that the respondent Nos.2 and 3 shall ensure the enforcement of the letters of comfort issued by them. In other words, the claim of the petitioner in that sense is seeking compliance / performance of the letters of comfort issued by respondent Nos.2 and 3. Such a claim can be maintainable before the arbitrator only when the respondent Nos. 2 and 3 are parties before the Arbitrator.

235. One of the submissions of Mr. Sethi was that letters of comfort have not created any legal obligation and as such the letters are not actionable and thus no relief can be claimed in terms thereof before the Arbitrator and / or before this Court.

236. I am unable to agree with this submission of Mr. Sethi. On facts, as noticed from the letters of comfort dated June 26, 2018, the

same were issued after the parties herein had held discussions. The discussions as contended by Mr. Rao entailed in reduction of interest rate by 3% per annum resulting in gain of substantial amount by the Essel Group. Also, the contents of letters being that the respondent Nos.2 and 3 assures and confirms to respondent No.1 that they shall ensure respondent No.1 repays the facility on the relevant due dates, are the statements made in the midst of a commercial transaction; which are also promissory in character and thus enforceable. So, in that sense there was an intention to create a legal relation by the parties as the conduct of the parties is always a guide to the construction of a contract as held by the Supreme Court in the case of ***The Godhra Electricity Co. Ltd. v. The State of Gujarat & Ors.***[111].

237. Insofar as the submission of Mr. Sethi that the Deed of Guarantee requires to be stamped under the provisions of the relevant Stamp Acts and in this case the letters of comfort are not stamped as per Section 3 of the Maharashtra Stamp Act, 1958 and as such cannot be construed as a letters of guarantee, is concerned, as I have already held that the letters dated June 26, 2018 are not letters of Guarantee and also it is the conceded case of Mr. Chidambaram and Mr. Sethi that the letters are letters of comfort which do not required to be stamped, this plea of Mr. Sethi is liable to be rejected.

238. In view of my above discussion and the fact that Mr. Basu has not contested the existence of the arbitration clauses between petitioner and respondent No.1 and the fact that disputes have arisen in terms of CAL / Facility Agreement, the petitioner and the respondent Nos. 1, 2

[111] (1975) 1 SCC 199.

and 3 are referred to Arbitration. Accordingly, this Court appoints Justice L. Nageswara Rao, a Former Judge of Supreme Court of India (Mob. No.9810035984), as the sole Arbitrator, who shall adjudicate the disputes between the parties, through claims and counter claims, if any. He shall give his disclosure under Section 12 of the Act of 1996. The learned Arbitrator can fix the fee to conduct arbitration proceedings in consultation with the counsel for the parties.

ANALYSIS IN OMP (I) (COMM) 414/2021

239. In so far as the issues raised in this petition are concerned, I have already reproduced the prayers, made above, which would depict the claims of the petitioner in this petition. It is primarily the respondent No.1 which has contested the prayers made by the petitioner in this petition. Whereas, the respondent No.2, through Mr. Chidambaram and Mr. Sethi had reiterated their submissions on the maintainability of the present petition qua the respondent No.2, on the basis of the submissions which I have already noted in Arb. Pet. 474/2022.

240. So the submissions of Mr. Basu, on behalf of the respondent No.1, are primarily the following:

A. The petitioner along with the other lenders had regularly conducted 'Joint Lenders' Meeting' to discuss the structuring of the proposal of the ongoing loans/ facilities of the respondent No.1;

B. They have even appointed 'KPMG India Private Limited' as an Agency for Specialized Monitoring ('ASM') to examine the accounts of the respondent No.1 from March 2020

onwards, to monitor the Cash Out, to monitor overall payments of the company as directed by the lenders etc.;

C. The payments above ₹50,000/- made by the respondent No.1, are pre-authorised by such ASM which includes monitoring of related party transactions, i.e., between respondent Nos.1 and 2, which are also pre-approved and pre-authorized by the ASM;

D. The respondent No.1 is registered as a Multi-System Operator under the Cable Television Network (Regulations) Act, 1995, whereas respondent No.2 is a broadcaster and both the respondent No.1 and the respondent No.2 are 'service providers' as per the regulations promulgated under the TRAI Act. So, the business between both the respondent Nos. 1 and 2 is subject to the compliance of the TRAI Act and the regulations framed thereunder;

E. Therefore, no party can seek a relief in the court of law, which potentially frustrates the purpose, principles and provisions of a statutory framework i.e., the TRAI Act;

F. In terms of the mandate of the Interconnection Regulations, the respondent Nos.1 and 2 have executed the Interconnection Agreement and in pursuant thereto, respondent No.2 has raised monthly invoices on the respondent No.1. Thus, the payments made by the respondent No.1 to respondent No.2 are in the ordinary course of the business which pertains to the Interconnection Agreement;

G. Moreover, the respondent No.1 has an outstanding balance of ₹137,30,81,103.80/- against subscription dues to the respondent No.2;

H. The respondent No.1, in terms of the Interconnection Regulations, can be best entitled to only 35% of the MRP. So, granting any relief restraining respondent No.1 from making any subscription payment to respondent No.2 would render respondent no.1 retaining 100% of the MRP, which is in gross violation of Interconnection Regulation and will also frustrate the very objectives and fundamentals of the TRAI Act;

I. No party, by mutual agreement, can enter into an arrangement which prohibits two service providers from discharging their obligations under the TRAI Act and in the event such an agreement/arrangement is entered into, the same shall be void and *non-est* in law;

J. The disconnection of signals by the respondent No.2 shall also affect the subscribers of the respondent No.1 as the subscribers shall be prevented from availing the channels of the respondent No.2. So this way, the business of the respondent No.1 shall be adversely affected;

K. The powers exercised by this Court under Section 9 of the Act of 1996 are guided by the underlying principles which govern the exercise of analogous powers under Order XXXIX Rule 1 and 2 and Order XXXVIII Rule 5 of the CPC;

L. The relief sought by the petitioner are in the nature of order of attachment before judgment and as such principles of

Order XXXVIII Rule 5 CPC, as enshrined under the said Order should be fulfilled.;

M. So, it is a trite law that twin conditions are required to be proved in order to seek reliefs under Order XXXVIII Rule 5 of the CPC which are as under:

(i) Firstly, the petitioner has to establish that it has a strong prima facie case in its favour;

(ii) Secondly, it has to establish that respondent No.1 is attempting to remove or dispose of its assets with the intention of defeating the decree which may be passed in favour of the petitioner;

N. The petitioner has failed to establish that respondent No.1 is disposing or alienating its assets and as such any allegations which have been made qua this, are merely speculative in nature;

O. Unless these twin conditions as aforesaid are satisfied, the relief for securing the amount cannot be granted by this Court. Moreover, the petitioner has failed to establish that it has a *prima facie* case in its favour and it has also not been established on an affidavit or otherwise that the respondent No.1 is seeking to dispose / alienate its assets from the local limits of jurisdiction of this Court and more so with the intention of defeating any award or decree that may be passed in favour of the petitioner. So for the reasons thereof, the

petitioner is not entitled to any of the reliefs as provided under Order XXXVIII Rule 5 CPC;

P. The granting of such reliefs as sought by the petitioner would completely disrupt the business of the respondent No.1 and the same will also be in violation of TRAI Act and the regulations framed thereunder;

Q. The payments made by the respondent No.1 to the respondent No.2 are only against the subscription dues towards the subscription of the channels of the respondent No.2 in terms of the Interconnection Agreement entered between them in compliance with the Interconnection Regulations issued by the Telecom Regulatory Authority of India;

241. On the basis of the aforesaid, respondent No.1 has sought dismissal of the present petition.

242. Similarly, Mr. Chidambaram and Mr. Sethi have contested the prayers sought against respondent No.2 on the grounds which have already been referred above.

243. Having said that, this Court while considering this petition, had passed various Orders time to time. The relevant Orders in that regard are, Orders dated December 23, 2021, March 28, 2022 and April 29, 2022, which are reproduced as under:-

"Order dated December 23, 2021

xxxx xxxx xxxx

O.M.P.(I)(COMM) 414/2021

3. Issue notice to respondent no. 1, returnable on 04.01.2022.

4. No notice is being issued to respondent nos. 2 and 3 in this case as, prima facie, they are not parties to the arbitral proceedings and the petitioner's claim against respondent nos. 2 and 3 appears to be a substantive claim and although linked, an independent cause of action exists against the said respondents.

5. Let the reply be filed within a period of one week from today.

6. There is no dispute that respondent no.l had entered into the Facility Agreement dated 23.02.2017. Therefore, it is directed that in the meanwhile, respondent no.l shall not make any payments to any related party in terms of Clause 16.20(iii) of the Facility Agreement dated 23.02.2017, without the express consent of the petitioner.

7. List on 04.01.2022.

Order dated March 28, 2022

IA. No. 1630/2022

1. For the reasons stated in the application, the same is allowed. The delay in filing the rejoinder is condoned.

IA No. 4739/2022

2. This is an application filed by respondent no.2 seeking Modification / clarification of the order dated 23.12.2021 passed by this Court.

3. Mr Chidambaram, learned Senior Counsel appearing for the applicant (respondent no.2), submits that by the order dated 23.12.2021, this Court had interdicted respondent No.1 from making any payments to any related party in terms of Clause 16.20(iii) of the Facility Agreement dated 23.02.2017 without the express consent of the petitioner. He submits that in view of the said order, respondent no.1 has withheld amounts, which are due and payable to the applicant even though the applicant is not a

related party. He submits that respondent no.2 had declared respondent no.1 as a related party in the context of regulations made by the SEBI. However, the same are not relevant for the purposes of Clause 16.20(iii) of the Facility Agreement. He submits that the expression 'Related party' as used in Clause 16.20(iii) of the Facility Agreement refers to a related party under the Companies Act, 2013. He has drawn the attention of this Court to Section 2(76) of the Companies Act, 2013 and submits that on the anvil of this definition, respondent nos.1 and 2 are not related parties.

4. Issue notice. The learned counsel appearing for the petitioner accepts notice and seeks time to file a reply. Let the same be filed within a period of one week. Rejoinder, if any, be filed before the next date of hearing.

5. List on 22.04.2022.

6. In the meanwhile, respondent no.1 cannot retain the funds owed to respondent no.2. Mr Nayar, learned Senior Counsel appearing for respondent no.1, states that respondent no.1 has no difficulty in depositing the amounts owed to respondent no.2 with the Registry of this Court. It is so directed. All amounts owed by respondent no.1 to respondent no.2 be deposited with the Registry of this Court within a period of two weeks from today.

7. Interim order to continue.

Order dated April 29, 2022

1. The learned counsel appearing for the respondents requests for further two weeks' time to file his written submissions. It is stated that the counsel is infected with Covid-19. The request for adjournment is not opposed.

> *2. It is pointed out that on 22.04.2022, this Court had also directed that no payments would be made by respondent no.1 to respondent no.2 till the next date of hearing. However, the said line has not been typed in the said order. It is clarified that till the next date of hearing, respondent no.1 shall not make any payments to respondent no.2.*
>
> *3. List on 20.05.2022."*

244. Suffice to state, with regard to maintainability of the petition / prayers on the ground that the respondent No.2 is not a signatory to the CAL / Facility Agreement is concerned, the said issue has been decided by me while considering Arb. P. No.474/2022.

245. It is a matter of record that in terms of order dated March 28, 2022, the respondent No.1 has been depositing the amounts in the Registry of this Court. I find that the respondent No.2 has filed an application seeking modification/clarification of the Order dated December 23, 2021. At the same time, the petitioner has also filed an application seeking withdrawal of the amount deposited by the respondent No.1.

246. This Court is of the view that in view of the fact that this Court has appointed a learned Arbitrator, appropriate shall be that this petition under Section 9 of the Act of 1996 is treated as an application under Section 17 of the Act of 1996 on behalf of the petitioner, to be decided by the learned Arbitrator along with two applications (being IA No.10296/2022 filed by the petitioner seeking withdrawal of the amount deposited by the respondent No.1 and IA No. 4739/2022 filed

by respondent No.2 seeking modification / clarification of the order dated December 23, 2021) after hearing the counsel for the parties.

247. Till such time the applications are decided by the learned Arbitrator, the orders passed by this Court in this petition from time to time, as noted above, shall continue. It is made clear, the amount deposited by the respondent No.1 in this Court shall continue to be deposited, till the decision of the learned Arbitrator in terms of paragraph 246 above.

248. A copy of this order shall be sent to Justice L. Nageswara Rao (Retd.) through email after ascertaining the email ID from his office.

249. Liberty is also granted to the counsel for the parties to send a copy of this order to Justice L. Nageswara Rao (Retd.).

250. Petitions are accordingly disposed of. No costs.

V. KAMESWAR RAO, J

MARCH 03, 2023*/aky*