IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: November 23, 2020

\+ O.M.P.(I) (COMM.) 459/2019

KKR INDIA PRIVATE FINANCIAL SERVICES LIMITED & ANR. ..... Petitioners

Through: Mr. Neeraj Kishan Kaul, Mr. Akhil Sibal, Sr. Advs. with Mr. Yashvardhan, Mr. Murtaza Somjee, Ms. Smita Kant, Ms. Vatsala Khandelwal, Ms. Anwesha Dasgupta and Mr. Shantanu Parashar, Advs.

versus

WILLIAMSON MAGOR & CO. LIMITED & ORS. ..... Respondents

Through: Mr. Padam Khaitan, Mr. Jeevan Ballav Panda, Ms. Shalini Sati Prasad, Mr. Satish Padhi, Ms. Meher Tandon & Mr. Gaurav Sharma, Advs. for R-1 to R-4 & R-8.

Mr. Jayant Mehta, Mr. Jeevan Ballav Panda, Ms. Shalini Sati Prasad, Mr. Satish Padhi, Ms. Meher Tandon & Mr. Gaurav Sharma, Advs. for R5.

Mr. Sandeep Sethi, Sr. Adv. with Mr. Jeevan Ballav Panda, Ms. Shalini Sati Prasad, Mr. Satish Padhi, Mr. Mehra Tandon & Mr. Gaurav Sharma, Advs. for R-6

Mr. Sandeep Sethi and Mr. Sudhir Makkar, Sr. Advs. with Mr. Jeevan Ballav Panda, Ms. Shalini Sati Prasad, Mr. Satish Padhi, Mr. Mehra Tandon & Mr. Gaurav Sharma, Advs. for R-7

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

J U D G M E N T

V. KAMESWAR RAO, J

I.A.6877/2020 (filed by the petitioner for bringing on record additional documents)

1. This application has been filed by the petitioners with the following prayers:

> *"The Applicants/Petitioners respectfully pray that this Hon'ble Court may be graciously pleased to:*
>
> > *A. Allow the present application and take on record the e-mails annexed with the present application;*
> >
> > *B. Pass any other or further order as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."*

2. In substance, vide this application, petitioners seek to bring on record certain e-mails exchanged between the parties herein, more particularly with respondent Nos. 5, 6 & 7 in respect of certain transactions.

3. The case of the petitioners in this application is primarily to meet the case of respondent Nos. 5, 6 & 7, that they have no role to play in the transaction with the petitioners as they neither made any correspondence nor negotiation with the petitioners nor played any active role.

4. Reply to this application has been filed by respondent Nos. 5, 6 & 7 and in their submissions, it is stated that the said application has been filed after inordinate delay without any explanation after having access to the pleadings / arguments and

the stand of the respondents, in order to improve their case which is in gross violation of principles of natural justice. Vide the said application, the petitioners seek to put forth a new case. If the said application is allowed same would amount to amending the petition. That apart, it is stated that the documents which are sought to be brought on record are unrelated documents and cannot be brought in at this point of time. Further, it is not the case of the petitioners that these documents were not in their possession at the time of filing of the petition. It is also stated that the documents are irrelevant and in no manner demonstrate that the loan facility granted to the Williamson Magor Group is a single economic unit. Even the documents on which reliance is sought to be placed pertain to a period subsequent to the execution of the Facility Agreement and as such have no relation to the transaction in question.

5. Having perused the application / replies, and heard arguments on behalf of the parties, this Court is of the view, the present petition having been filed under Section 9 of the Arbitration and Conciliation Act, 1996 ('Act', for short) and not a Civil Suit, where the rigours of filing the documents have to be strictly followed, there being no impediment in law and to consider all the relevant material for proper adjudication, it is necessary that such documents are looked into.

6. Even though the petitioner filed this application subsequent to filing of the three applications by the respondent Nos. 5, 6 & 7, sufficient opportunity having been given to the said respondents to meet the case of the petitioners on these

documents by hearing the counsels on the objections on the application, which is in compliance of the principles of the natural justice, the plea of learned Sr. Counsels for the respondents 5, 6 and 7 that a new case is being set up is without any merit. The application is allowed and the documents are taken on record. The application is disposed of.

I.A. 18200/2019 (filed by respondent no. 5 for vacation of order dated December 13, 2019)

I.A. 18202/2019 (filed by respondent no. 6 for vacation of order dated December 13, 2019)

I.A.762/2020 (filed by respondent no. 5 for vacation of order dated December 13, 2019)

1. With this common order I shall decide the three applications filed by respondent No.5, 6 and 7 seeking vacation of the *ex-parte ad-interim* order passed by this Court on December 13, 2019.

2. Before dealing with these applications, I find it necessary to narrate in brief the facts and chronology of events that led to the filing of the present applications by the applicants / respondent Nos. 5, 6 and 7.

3. The petitioner No.1 is registered with the Reserve Bank of India as a non-deposit taking, systemically important Non-Banking Financial Company ('NBFC') as defined in 'Systemically Important Non-Banking Financial (Non-Deposit Accepting or Holding) Companies Prudential Norms (Reserve Bank) Directions, 2015, issued by the Reserve Bank of India and involved in the business of providing loans and advances to companies, and in this case has advanced an aggregate sum of INR 100 crores to respondent No. 1 and an aggregate sum of INR

100 crores to respondent No. 2.

4. Petitioner No.2 is a company registered under the Companies Act, 1956 which is also registered as a debenture trustee with Securities Exchange Board of India and acts as a security trustee on behalf of the Petitioner No. 1.

5. It is a conceded position of all the parties herein that petitioners entered into a Facility Agreement dated September 27, 2017 ('Facility Agreement', for short) with the respondent Nos. 1, 2, 3 and 4 whereby respondent Nos. 1 and 2 were granted credit facility of INR 100 Crores each.

6. The respondent No.1 is a company incorporated under the provisions of Companies Act, 1956 engaged in the business of manufacturing tea, jute, engineering and reprographic items. the Respondent No. 2, on the other hand, is an Investments Company, an NBFC registered with the Reserve Bank of India under the Reserve Bank of India Act, 1934, with respondent No. 3 and 4 being the Promoters/Directors of the respondents No. 1 and 2.

7. Pursuant to clause 5.1 of the Facility Agreement, the credit facilities were guaranteed by an irrevocable and unconditional personal guarantee entered by way of a Deed of Personal Guarantee dated September 26, 2017 ('Deed of Personal Guarantee', for short), executed by respondent Nos. 3 & 4 in favour of petitioner No. 2, whereby it was undertaken to pay the outstanding amounts and discharge all liabilities of respondent Nos. 1 & 2 under the Facility Agreement. In addition, respondent Nos. 3 & 4 had provided indemnity to the petitioners against all

loses and claims etc.

8. A Security Trust Facility Agreement was also executed between the petitioners and respondent Nos. 1 & 2 on September 27, 2017 ('Trust Facility Agreement', for short).

9. Pursuant to clause 5.1 of the Facility Agreement, an Unattested Share Pledge Agreement dated September 27, 2017 ('Share Pledge Agreement', for short) was entered into by and between the petitioners and the respondent Nos. 1, 2, 3, 4 and 5 along with respondent No. 8 whereby 4,16,66,666 compulsory convertible preference shares of respondent No.5 were pledged in favour of the Petitioner No.2.

10. It is stated by the petitioners/non-applicants in the petition filed under Section 9 of the Arbitration and Conciliation Act, 1996 ('Act', for short) that the credit facility under the Facility Agreement was advanced to respondent No. 1 and 2 after due verification of the credit worthiness of the group companies, as a whole and the underlying companies like respondent Nos. 5 to 7, the applicants herein. Respondent No. 5 is engaged in the business of providing turnkey solutions in the areas of power, steel etc. and respondent Nos. 1 & 2 hold some percentage of equity shares in the share capital of respondent No. 5. Respondent No. 6 is in the business of manufacturing tea and respondent Nos. 1 & 2 hold equity shares in the share capital of respondent No. 6. Likewise, respondent Nos. 1 and 2 hold equity shares in the share capital of respondent No. 7.

11. Pursuant to clause 5.8 of the Facility Agreement, within a period of 18 (eighteen) months, from the date of disbursement i.e.

September 30, 2017, the respondent Nos. 1 and 2 were required to issue a security by way of pledge over the equity shares of either respondent No.6 and/or respondent No.7 and/or create security by way of mortgage over properties acceptable by the petitioner No.1 so as to ensure that the collateral cover is atleast 1.5x of the loan outstanding amount. Similarly, as per clause 5.9 of the Facility Agreement, on or before the expiry of 24 (twenty-four) months from the date of disbursement i.e. September 30, 2017, the respondent Nos. 1 and 2 were required to ensure that the collateral cover is increased to 2.0X in respect of the loan outstanding amounts. However, it is stated by the petitioners in the petition under Section 9 that the respondents have failed to fulfil the aforesaid obligations.

12. It is the case of the petitioner in the main petition under Section 9 of the Act that as per clause 7.2.3 (c) of the Facility Agreement, the Guarantors and the Promoter Group were barred from selling, transferring or disposing off any shares of Respondents Nos. 5, 6 and 7 held by the Promoter Group without the prior consent of the petitioners. In this respect, it is averred that since the entry of parties into the Facility Agreement, the aggregating shareholding of the Promoter Group in (i) Respondent No.6 has reduced from 49.9% to 27% and in (ii) Respondent No 7 has reduced from 44% to 31.1% (of the entire share capital). It is also stated that as on September 30, 2019, the aggregate value of unencumbered shares of the respondent Nos. 6 and 7 is INR 16,00,00,000 as opposed to INR 750,00,00,000, which was the required value as per Clause 7.2.4 of the Facility

Agreement.

13. Similarly, Clause 7.2.6 mandated that the Guarantor and Promoter Group shall not encumber any share held by Guarantor and Promoter Group in the Reference Entities.

14. Subsequently, respondent No. 1 executed an Unattested Deed of Hypothecation ('Deed of Hypothecation', for short) in favour of petitioner No. 2 whereby respondent No. 1 hypothecated '*all of the present and future rights, title and interest and benefits of Respondent No. 1 in, to and under the Rupee denominated bank account in the name of the Respondent No. 1 bearing account number 019081400002674 with Yes Bank Ltd'*.

15. The petitioner has, in the main petition pointed out the following defaults on behalf of the respondents:

a. On March 31, 2019, the respondent Nos. 1 and 2 defaulted in creating the security and also failed to ensure that the collateral cover for the loan outstanding amounts is at least 1.5x of the loan outstanding amount pursuant to clauses 5.8 and 5.9 of the Facility Agreement.

b. On April 30, 2019, the respondent No.2 defaulted in making payments towards interest as stipulated under the Facility Agreement.

c. Further, on May 31, 2019 and June 30, 2019, the respondent Nos. 1 and 2 defaulted in making payments in respect of interest as stipulated under the Facility Agreement and till date the abovementioned defaults have not been rectified.

d. That, on September 30, 2019, the respondent Nos. 1 and 2 also failed to ensure that the collateral cover over the security created pursuant to clause 5.8 of the Facility Agreement, is increased to 2.0X of the loan outstanding amount as per the terms of the Facility Agreement.

16. With regard to the defaults, the petitioner has stated to have issued the following notices/demands:

a. Notice of breach of covenants and remainder to create security on or before March 31, 2019 dated March 15, 2019 was issued by the Petitioner No.1 to the Respondents Nos. 1, 2, 3, 4 and 8.

b. Notice of breach of covenants and failure to create security on or before March 31, 2019 dated April 25, 2019 was issued by the Petition No.1 to the Respondents Nos. 1, 2, 3, 4 and 8.

c. Letter of Reservation of Rights dated October 17, 2019 was issued by the Petitioner No.1 to the respondent Nos. 1, 2, 3 and 4.

d. On December 9, 2019, the Petitioner No. 1 issued an Acceleration Notice in favour of the Respondent No. 1 demanding payments aggregating up to INR 131,37,51,607.

e. On December 9, 2019, the Petitioner No. 1 issued an Acceleration Notice in favour of the Respondent No. 2 demanding payments aggregating up to INR 131,94,83,013.

f. On December 9, 2019, the Petitioner No. 2 has

issued a Demand Notice in favour of the Respondents demanding payments aggregating up to INR 263,32,34,620.

17. It is alleged that the petitioner filed the main petition under Section 9 on the failure of the respondents to discharge the liability towards the petitioner under the various agreements, and a co-ordinate Bench of this Court granted an *ex parte ad-interim stay* vide order dated December 13, 2019. The relevant portion of the order reads as under:

> *"……*
> *23. Accordingly respondent Nos. 1 to 8 are restrained from selling, transferring, alienating, disposing, assigning, dealing or encumbering or creating third party rights on their assets, till the next date of hearing.*
> *24. Respondent Nos. 1, 2, 3 and 4 are further restrained from diluting their shareholding in any of the Respondent Companies, directly or indirectly, by way of sale or otherwise, as also respondent Nos. 5, 6, and 7 from carrying out any change in its capital structure, or any Corporate or debt restructuring, till the next date of hearing.*
> *25. Respondent Nos. 1, 2, 3, 4 and 8 are restrained from alienating, creating third party rights and interest or creating any third-party encumbrance of whatsoever nature in 4,16,66,666 compulsory convertible preference shares of Respondent No.5, now converted into equity shares. Respondent Nos. 1, 2, 3 4 and 8 shall deposit the aforesaid equity shares in dematerialized form before this Court and the same will be retained by this Court.*
> *26. It is directed that the Rupee denominated bank account in the name of respondent No. 1 bearing*

account number 019081400002674 with Yes Bank Ltd. be attached.

27. The respondent Nos. 1 to 7 will file an affidavit providing the details of their tangible or intangible assets held by them as on 31.03.2019 as well as on 30.09.2019, before the next date of hearing."

18. It is to vacate the *ex parte* ad interim stay granted by the impugned order that respondent Nos. 5, 6 and 7 have filed these applications respectively.

19. It is the case of the respondent No.6 and respondent No. 7 and as contended by Mr. Sandeep Sethi, learned Senior Counsel that respondent No. 6 and respondent No. 7 are not signatories to the Facility Agreement on which the present Petition is founded and similarly also not parties to the transaction or the arbitration agreement and the connected agreements being the Security Trustee Agreement, Personal Guarantee, Share Pledge Agreement and the Deed of Hypothecation, being collectively herein after referred as Other Agreements. It is submitted by him that the subject transaction is between the petitioner No. 1 and Respondent Nos 1 & 2 for a sum of INR 100 crores advanced to each respondent. The repayment of the same is guaranteed by respondent Nos.3 and 4 in their personal capacity. It is further stated by him that the various agreements are signed by the petitioners and respondent Nos. 1 to 4 only and that shares held by the individual guarantors in respondent Nos. 6 and 7 were pledged as security for repayment of the loan taken by respondent Nos. 1 & 2, which was why respondent Nos. 6 and 7 were mentioned as 'Reference Entities', with no obligations cast over

them. In support of his submission, Mr. Sethi has relied upon the Apex Court judgment in ***Indowind Energy v. Wescare (India), (2010) 5 SCC 306,*** wherein it is held that common shareholding or common directors is not enough to bind the non-signatory company through the acts of the signatory.

20. It is submitted by Mr. Sethi that none of the foundational facts that are *sine qua non* for the invocation of the principle of group companies has been pleaded or even referred to in the petition. He stated that it is an undisputable position of law that the invocation of the group-companies doctrine requires a finding of unmistakable intent of non-signatory parties to be bound by the agreement. The question of such intention is clearly a question of fact which requires specific pleading. It is submitted by Mr. Sethi that in the present case, the documents placed on record show clearly that respondent No.6 and respondent No.7 were not parties to the agreements. There is no document or pleading alleging that respondent No.6 and respondent No.7 in any manner participated in the negotiations of the agreements or made any statement to be bound by such agreements. The contractual correspondence as well as the demand notices between the parties alleging default are also addressed only to respondent Nos. 1 to 4 and not to respondent No.6 or Respondent No.7. Therefore, *ex-facie* no such case has been pleaded by the Petitioners in the present case. Interim measures under Section 9 of the Act is an equitable and discretionary remedy, the petitioners' conduct on this count disentitles it to any indulgence from this Court.

21. Further, it is submitted by Mr. Sethi that the petitioner being a large player in the financial sector across over 20 countries, it is clear that it exercises reasonable prudence when entering into the Facility Agreement after ample negotiations and the same is self-contained, which in clear terms lays down the intent of the parities. It has been recorded in Clause 13.3 of the Facility Agreement as well.

22. It is submitted by Mr. Sethi that Clause 5.1 records specifically that the Borrowers, Guarantors and the Obligors shall secure the said loan and as per the Facility Agreement, Borrowers are respondent Nos. 1 & 2, while guarantors are respondent Nos. 3 & 4 and obligors defined as Borrowers and the Security Providers which include the borrowers or any other person creating security in favour of the petitioners. Clause 5.10 fastens the liability on the 'Promoter Group' to replenish the security cover in case of any deficiency in terms of the Facility Agreement. Respondent Nos. 6 & 7, as per the Facility Agreement are neither borrowers nor guarantors, which is clearly indicative of the fact that no obligation was intended to cast upon them despite being aware of their existence, rather they are enlisted only as reference entities and Clauses 5.8 and 5.12 unambiguously state that it is the equity shares in respondent Nos.6 and 7 owned by respondent Nos.1 and 2 that are to serve as security. In other words, it is his submission that the company and its shareholders are entirely distinct and independent in the eyes of law and the provision of the shares of a company as security by a shareholder for a loan availed by such shareholder

cannot possibly bind the said company in any manner whatsoever to such loan.

23. Mr. Sethi also submitted that the reliance placed by the petitioners on Clause 7.2.3 (a) which mandates the Borrowers, Guarantors and the Promoter Group not to issue fresh shares in any of the Reference Entities is misplaced for the reason that there is no obligation on respondent Nos.6 and 7 as they are neither Borrowers, Guarantors nor Promoter Group. The said obligations are cast upon the respondents No. 1-4 to protect the value of the security provided i.e. their shareholding in respondent Nos. 6 and 7. He further submitted that the intent of Clause 7.4.1 which requires respondent Nos.1 and 2 to ensure compliance with certain benchmarks of the financial health of respondent Nos. 6 and 7 is only limited to securing the value of the security i.e. the shares in respondent No.6 and respondent No.7. These terms do not in any manner oblige respondent No. 6 and respondent No.7 to do or refrain from doing any act. This is confirmed by the fact that Clause 5.8 requires provision of additional security in case of any deficiency only by R-1 to R-4. Accordingly, there was no obligation or charge cast on R-6 and R-7.

24. It is averred by Mr. Sethi, respondent Nos. 3 & 4 have signed the Facility Agreement in their personal capacity, as guarantors and the stand of petitioner that respondent No.6 & 7 are liable as per the doctrine of ostensible authority and estoppel is also misplaced.

25. Further, it is stated by Mr. Sethi that the fraud has not

been pleaded by the petitioners' for lifting of corporate veil. The petitioners' claim that proceeds of the loan received by respondent No.6 qualifies it as a case fraud has not been pleaded in the petition and that in the absence of any pleading the Court should be duty bound to disregard such a plea. In this regard, he has relied upon a Division Bench judgment of this Court in Division Bench of this Court in ***Elof Hansson v. Shree Acids & Chemicals, 2012 SCCOnLine Del 572.*** Without prejudice, it is stated by Mr. Sethi that the aforesaid contention, Clause 2.3 of the Facility Agreement clearly spelt out the purpose of the loan i.e. the discharge of R-6 's debts. It is therefore clear that the parties intended R-6 to be the recipient of the proceeds of the loan as per the clear understanding between the parties.

26. Moreover, Mr. Sethi stated that no case for invocation of the Group Companies Doctrine has been made out as claimed by the petitioners and that the reliance placed by the petitioners' on ***Mahanagar Telephone Nigam v. Canara Bank 2019 SCC OnLine SC 995, Chloro Controls India v. Severn Trent Water Purification (2013) 1 SCC 641***) and ***Cheran Properties v. Kasturi and Sons (2018) 16 SCC 413*** is misplaced, as the said judgments are distinguishable in the facts of the present case.

27. It is also vehemently stated by Mr. Sethi that no case had been made out by the petitioners to secure restraint against third parties under Section 9 of the Act. In support of his submission that restraint can't be imposed against a non-signatory/third party, Mr. Sethi has relied on the following judgments:

1. Kanta Vashist vs. Ashwani Khurana, CDJ 2008 DHC 2265;

2. Ajay Makhija v. Dollarmine Exports, 2009 SCCOnLine Del2486;

3. Mukesh Hans v. Uma Bhasin, 2010 SCC OnLine Del 2776;

4. Mcleod Russel India Limited v. IL and FS Financial Services Limited, APO 143 of 2019.

28. Mr. Sudhir Makkar, learned Sr. Counsel also appearing for respondent No. 7 has adopted the arguments advanced by Mr. Sethi.

29. Mr. Jayant Mehta, learned Counsel appearing for the respondent No. 5 has made identical submissions as made by Mr. Sethi insofar the maintainability of the petition qua respondent No.5, owing to no subsisting valid agreement between petitioners and respondent No.5 and respondent No.5 being a non-signatory to the Facility Agreement.

30. Additionally, Mr. Mehta has drawn the attention of this Court to the negative covenants viz. Clause 5.1, Clause 6.1, Clause 6.1.6, Clause 7.1.3, Clause 7.1.7, Clause 7.2, Clause 7.3, Clause 7.4, Clause 9.6 envisaged under the Facility Agreement to contend that no liability/obligation has been cast upon respondent No.5 as per the Facility Agreement. It is submitted by Mr. Mehta that only interface of the Respondent No. 5 with the subject transaction was that by way of the Unattested Pledge Agreement dated 27.09.2017 ("Pledge Agreement"), 4,16,66,666 number of Compulsorily Convertible Preference Shares ("CCPS") of the respondent No. 5 held by the respondent Nos. 1, 2 and 8 were

provided as security to the Petitioner No. 1 for the sums advanced to the Respondent Nos. 1 and 2 under the Facility Agreement. Subsequently, the said CCPS were converted into equity shares, which is recorded in the Supplemental and Amendment Agreement dated 10.07.2019. It is also stated that the Pledge Agreement and Amendment Agreement were the only documents executed by the Respondent No. 5, in its capacity as the 'Target', i.e., the entity whose shares were being provided as security by shareholders without any exposure to liability or guarantee.

31. It is also submitted by Mr. Mehta that endeavor of commercial courts should not be to look into implied terms of contract. In other words, it is his submission that if the purpose of the transaction was not to lend to the borrowers, nothing prevented the parties to obligate the respondent No. 5 and that in the present case, petitioners have consciously not done so. In support of his contention, Mr. Mehta has relied upon ***Nabha Power Ltd. v. Punjab State Power Corporation, (2018) 11 SCC 508*** and ***BALCO v. Kaiser Aluminium Technical Services (2016) 4 SCC 126.***

32. It is also submitted by Mr. Mehta that the 'group Company' doctrine is inapplicable in the present case as no such specific averment has been raised in the petition, except to the vague extent of purported reliance by the Petitioners on the financial strength of the "Williamson Magor Group", while advancing such loan facility to the Borrowers on the basis of security which included the shares held by the Borrowers/ Guarantors, *inter-alia*, in Respondent No. 5 and also that said

argument is manifestly contrary to the Facility Agreement, which admittedly does not obligate the Respondent No. 5 in any manner towards the alleged outstanding dues. In other words, it is his submission that (a) A written contract is to be read by its plain terms and so read, there is no contractual or legal obligation on the Respondent No. 5; (b) The Facility Agreement is a very detailed, formal and entire agreement. Its terms are clear and unambiguous. The Petitioners cannot read in to it terms that it does not contain. To do so would allow the Petitioners to rewrite the agreement, a right it does not and cannot legally possess; (c) There is no scope for any rights or obligations existing beyond and over the specific terms of the Facility Agreement. Mr. Mehta has placed reliance on ***Mahanagar Telephone Nigam v. Canara Bank, 2019 SCC OnLine SC 995***, wherein the principle enunciated was that non-signatory group companies are bound by the arbitration agreement only when there is a clear and unmistakable intention to that effect, contrary to the facts of the present case. He also distinguished the judgments in ***Chloro Controls (supra)*** and ***Cheran Propertities (supra)*** by stating that the said judgments were concerned with a web of agreements wherein different group entities were parties as against the present case which concerns only one agreement.

33. It is further submitted by Mr. Mehta that a conjoint reading of relevant decisions of the Supreme Court highlighted earlier, validates the position that the overarching principle under ***Indowind (supra)*** continues to be applicable subject only to limited well defined exceptions. Notably, the facts in ***Indowind***

(supra) are *pari materia* to the present case. The Court in ***Indowind (supra)*** held that common shareholding or directors is not enough to bind the non-signatory company through the acts of the signatory company.

34. Mr. Mehta also submitted that the respondent Nos. 3 and 4 signed the Facility Agreement only in their capacity as personal guarantors of the loan and that the piercing of the corporate veil is impermissible in the present proceedings qua respondent No.5 in the absence of its ingredients having been established, more so in the absence of any specific pleading to that effect. Reliance has been placed by him on the judgments of this High Court in ***Ajay Makhija v. Dollarmine Exports Pvt. Ltd. 2009 SCC Online Del 2486; Balmer Lawrie & Co. Ltd. v. Saraswathi Chemicals Proprietors Saraswathi Leather Chemicals(P) Ltd., 239 (2017) DLT 217; Gatx India v. Arshiya Rail 2014 SCC Online Del, Elof Hanson v. Shree Acid & Chemicals 2012 SCC OnLine Del 572*** as well as an Apex Court judgment in ***Bacha F. Guzder v. CIT, 1955 1 SCR 876.***

35. On the other hand it is the case of the plaintiff and as contented by Mr. Neeraj Kishan Kaul and Mr. Akhil Sibal, learned Senior Counsels appearing for the plaintiff that all the respondents are a part of same group of companies namely Williamson Magor Group and that Respondent No. 1 and 2 are pure holding investments companies and a major group shareholding company in the Williamson Magor Group, which exists merely to raise funds on behalf of its group companies, including respondent No .5, 6 and 7, as is evident from their own

website. Respondent No.1 &2 have no assets except shareholding in Respondent No. 5-7.

36. It is submitted by the Counsels that the Facility Agreement was extended to Williamson Magor Group as a whole after due verification of the credit worthiness of the group company, as a whole and the underlying companies like respondent Nos. 5 to 7. The Respondent Nos. 1 – 4 as part of being the Promoter /Promoter Group and directors of respondent Nos. 5 to 7 represented to the petitioners that additional security in the form of shares of respondent Nos. 6 and 7 would be provided to secure the obligations owed to the Petitioners. Further, it is on the basis of the fact that the facility was advanced taking into consideration the creditworthiness of the group as a whole, that the financial covenants in Clause 7.4 of the Facility Agreement applied to Respondent Nos. 6 and 7. In this regard reliance has been placed on the Table which is reproduced as under:

S.No.	Clause No.	Reference	Pages	Implication
I. FACILITY WAS FOR BENEFIT OF RESPONDENT NO. 6				
1.	2.3 read with C.A. Certificate @ Pg. No. 269	**2.3 END USE** (a) The Borrowers shall apply the amounts borrowed by it under the Facility in accordance with Applicable Law for the purpose of meeting the following costs: (i) Repayment of the existing loans/ advances extended by **MRIL** to the Borrowers or infusion of proceeds into **MRIL** solely for the purpose of reduction of debt	59	One of the uses of the facility was repayment of existing loans / advances extended by R-6 to R-1 and R-2 and infusion of funds into R-6 thus, making it a beneficiary of loan.
2.	2.1	**FACILITY** Subject to the terms of this Agreement, the Lenders make available to Borrower 1 an INR term loan facility in an aggregate being Rs. 100,00,00,000 (Rupees One Hundred Crores only) and Borrower 2 an INR term loan facility in an aggregate being Rs. 100,00,00,000 (Rupees One Hundred Crores only) (collectively referred to as "**Facility**") for the Tenor. The Facility may be drawn down by the Borrowers within the relevant Availability Period in accordance with the terms and conditions of this Agreement in one or more tranches.	59	

3.	7.1.11	End-Use The proceeds of the Facility shall at all times be utilised for the purposes as mentioned in clause 2.3 of this Agreement.	76	
II. RESPONDENTS NO. 5-7 ARE PROMOTER GROUP COMPANIES				
4.	1.1.1.(p)	**"Control"** (including, with correlative meaning, the terms "controlled by" and "under common control with") of a Person means (a) ownership of more than 50% (Fifty per cent) of the equity shares, voting rights or other ownership interests of such Person; or (b) the power to appoint more than half of the members of the board of directors; or (c) **the power to direct the management or policies of a Person, whether through the ownership of voting rights, power to appoint directors or similar governing body of such Person, or through contractual or other arrangements**.	47	• A combined reading of these clauses makes it is clear that Respondent No. 5-7 are part of Promoter Group as these are entities controlled by the Guarantors. • Respondent No. 3 and 4 are Managing Director of and Director of R-6 respectively and vice-a versa in case of Respondent No.7 and therefore, have power to direct management or policies of these companies through the ownership of voting rights, power to appoint directors or similar governing body or through contractual or other arrangements. • Further R-1 to R-4 are promoter group of Respondent No. 5-7 and therefore, in a position to exercise control over the policies of management. • Shareholding pattern of the Respondent No. 5 [**@117-121, Vol. 1 of P's Docs.**] shows that Respondents No. 4, 1, 2, 6 & 8 are part of "Promoter Group" • Shareholding pattern of the Respondent No. 7 [**@ 122-127, Vol. 1 of P's Docs.**] shows that Respondents No. 3, 4, 1, 2, 6 & 8 are part of "Promoter Group" • Shareholding pattern of the Respondent No. 2 [**@ 128-131, Vol-1 of P's Docs.**] shows that Respondents No. 4, 6, & 1 are part of "Promoter Group"
5.	1.1.1(q)	"**Controlled Entity**" in relation to any Person(s), is any other Person on whom such first Person exercises Control.	47	
6.	1.1.1.(ooo)	"**Promoter Group**" shall mean: Each of the Guarantors (i) Kilburn Engineering Limited; (ii) Babcock Borsig Limited; (iii) Bishnauth Investments Limited; (iv) Woodside Park Limited; (v) Ichamati Investments Limited; (vi) United Machine Co. Limited; (vii) Zen Industrial Services Limited; (viii) Nitya Holdings & Properties Limited; (ix) Dufflaghur Investments Limited; and **(x) Any other Controlled Entity of the Guarantor(s)**	53	

				• Shareholding pattern of the Respondent No. 6 [**@ 136-139, Vol-1 of P's Docs.**] shows that Respondents No. 3, 4, 1, 2, 8, & 7 are part of "Promoter Group"
III. RESPONDENTS NO. 5 TO 7 ARE "REFERENCE ENTITIES"				
7.	1.1.1.(sss)	"**Reference Entity**" shall mean (i) **McNally Bharat Engineering Company Limited**, a public listed company incorporated in India and validly existing as a company for the purposes of Companies Act 2013 with its registered office at Four Mangoe Lane, Surendra Mohan Ghosh Sarani, Kolkata- 700001 and corporate identification number L45202WB1961PLC025181 ("**MBECL**"); (ii) **McLeod Russel India Limited**, a company incorporated in India and validly existing as a company for the purposes of Companies Act 2013 with its registered office at Four Mangoe Lane, Surendra Mohan Ghosh Sarani, Kolkata-700001 and corporate identification number L51109WB1998PLC087076 ("**MRIL**"); and (iii) **Eveready Industries India Limited**, a company incorporated in India and validly existing as a company for the purposes of Companies Act 2013 with its registered office at 1, Middleton Street, Kolkata-700071 and corporate identification number L31402WB1934PLC007993 ("**EIIL**").	54	Respondents No. 5 to 7 are Reference Entities, which also form part of Promoter Group and have undertaken various obligations under the Facility Agreement
8.	1.1.1(rrr)	"**Reference Controlled Entities**" shall mean the Controlled Entities of the Reference Entity, the Borrowers, the Guarantors and/or the Obligors.	54	
IV. RESPONDENTS NO. 5 TO 7 ARE "OBLIGORS"				
9.	1.1.1(ccc)	"**Obligors**" shall mean the Borrowers, the **Security Providers** and the Guarantors	53	A combined reading of these clauses establishes that the Respondents 5 to 7 are Obligors as they are Security Providers, who had to create Security on the various assets and properties as noted in Clause 5 of the Facility Agreement.
10.	1.1.1(bbbb)	"**Security Provider**" shall mean (i) the Pledgors; and (ii) any other person creating Security under the Security Documents	56	
11.	1.1.1(aaaa)	"**Security**" shall mean the security interests created on the various assets and properties as noted in **clause 5 hereof**.	56	
12.	1.1.1(xxx)	"**Security Documents**" shall mean each of the agreement or deed or document (each as amended from time to time) executed by any of the Borrowers, the Guarantors and the Obligors for the benefit of the Lenders and/or the Identified Lenders or any of them for creation and perfection of Security or guarantee as required in terms of clause 5 hereof, including but not limited to the following: (i) this Agreement; (ii) Security Trustee Agreement dated September 27, 2017 between Williamson Magor & Co. Limited as Borrower 1, Williamson Financial Services Limited, as Borrower 2 and Lenders. (iii) Hypothecation Deed to be executed between the Parties; (iv) Pledge Agreement dated September 27, 2017 between Williamson Magor & Co. Limited, Williamson Financial Services Limited, Babcock Borsig Limited and KKR India Financial	55	

		Services Private Limited; (v) Personal Guarantees dated September 26, 2017.issued by Mr. Aditya Khaitan and Mr. Amritanshu Khaitan in favour of; (vi) Demand Promissory Note dated September 27, 2017issued by Borrower 1 and Borrower 2 in favour of the Security Trustee; (vii) Letter of Continuity of Demand Promissory Note dated September 24th, 2017.issued by Borrower 1 and Borrower 2 in favour of the Security Trustee; and (viii) **Security document to be executed pursuant to the provisions of Clause 5 of this Agreement**. (ix) any declarations, certificates, powers of attorney and/or other document designated as such by the Security Trustee or the Lenders in terms of Financing Documents or executed by the Borrowers, the Guarantors and/or the Obligors with the Lenders and/or the Security Trustee;		
13.	1.1.1(ee)	"**Financing Documents**" means this Agreement, any inter creditor agreement, each of the Security Documents, the Security Trustee Agreement, and any other agreement or deed or document executed by any of the **Borrowers, the Guarantors and the Obligors for the benefit of the Identified Lenders or any of them**.	49	
V. GUARANTORS				
14.	1.1.1(mm) read with Schedule 1	Guarantor	51 & 98	Respondent no. 3 and 4 are guarantors and therefore, Respondent No. 5-7 are part of promoter group for them being controlled by the Respondent No.3 and 4 in terms of Cl. 1.1.1(ooo)(x)
VI. SECURITY TO BE CREATED BY RESPONDENT NO. 5 TO 7				
15.	5.1 (e)	The Loans and all Loan Outstanding Amounts, including all Cash Interest, Default Interest, Redemption Interest all and any other costs, charges, expenses, fees or amounts payable to any of the Lenders and/or the Security Trustee under the Financing Documents and all other obligations and undertakings of the Borrowers, the Guarantors and the Obligors under the Financing Documents shall be secured by: (a) to (d) XXXX (e) **A letter of comfort to be issued by MRIL in a form acceptable to the Lenders.**	64-65	A Letter of comfort was to be issued by R-6 as part of Security.
16.	5.8	The Borrower shall ensure that within a period of 18 months from the first Disbursement Date, Security is created by way of pledge over equity shares of MRIL and/or EIIL and/or mortgage by way of a mortgage over properties acceptable by Lenders ("**New Security**"). The New Security shall be created to ensure that the Collateral Cover for the Loan Outstanding Amounts shall be at least 1.5x	65	Security was to be created by R-6 & R-7 in terms of these clauses in order to keep the Petitioners secured. Therefore, it was on their strength that the loan was extended by Petitioners to R-1 & R-2. **Notes**: 1. As on 31.03.2019, the
17.	5.9	On or before expiry of 24 months from the first Disbursement Date, the Borrower shall ensure that Collateral Cover over the New Security is increased to 2.0X of the Loan Outstanding Amount	65	

18.	5.10	Upon the breach of Collateral Cover as provided in Clause 5.8 or 5.9 above, the Borrower and/or Promoter Group shall provide incremental shares as pledge ("Top-up Shares"), within 5 Business Days, so that the Collateral Cover is maintained as per Clause 5.8 or 5.9 above.	65	Respondents failed to create the "New Security" and failed to ensure that the collateral cover over the new security is at least 1.5 times of the loan outstanding amount as stipulated in Clause 5.8. 2. As on 30.09.2019, the Respondents failed to ensure that the collateral cover over the new security is increased to 2.0 times of the loan outstanding amount as stipulated in Clause 5.9.
19.	5.11	Borrower and/or Promoter Group shall have the option of providing cash collateral in lieu of Top-up Shares, in which case, the cash collateral provided shall be adjusted against the Loan Outstanding Amount	65	
20.	5.12	Collateral Cover to be in the form of mortgage over real estate properties acceptable to the Lender and/or equity shares of MRIL / EIIL	65	
21.	1.1.1(eee)	"**Overall Rate**" shall mean an IRR of 16 % per annum. At the time the minimum Collateral Cover of the Security Interest created by the Promoter Group and Reference Entity/ Borrowers reaches 1.5x, an IRR of 14.5%per annum; or if the minimum Collateral Cover of the Security Interest created by the Promoter Group and Reference Entity/ Borrowers reaches 2.0x, an IRR of 12.5% per annum	53	
VII. REPRESENTATIONS & WARRANTIES MADE QUA CORPORATE STRUCTURE OF RESPONDENTS 5 TO 7 AS REFERENCE ENTITIES				
22.	6.1.2 (d) and (e)	6.1.2 Corporate (a) XXX (b) XXX (c) XXX (d) As on the date of execution of this Agreement and the first Disbursement Date, the shareholding of the **Reference Entity**, Borrowers and the Obligors is as provided in Schedule 6.1.2(d) (Shareholding Pattern) hereof. (e) The **Reference Entity**, Promoter Group, Borrowers and/or the Obligors or any of their directors do not appear on the RBI's list of defaulters and ECGC's caution list.	66- 67	Since the facility availed by R-1 & R-2 was granted on the strength of R-5 to 7, it was imperative that certain corporate structure is maintained by R-5 to R-7. Hence, these representations and warranties qua the corporate structure of R-5 to R-7 were provided by the Respondents.
VIII. REPRESENTATIONS & WARRANTIES MADE QUA ENFORCEABLE OBLIGATIONS OF RESPONDENTS 5 TO 7 AS REFERENCE ENTITIES				
23.	6.1.3	**6.1.3** Enforceable Obligations (a) XXX (b) XXX. (c) XXX (d) No event or occurrence which could be said to have a Material Adverse Effect on the **Reference Entity**, the Borrowers, the Guarantors or the Obligors or on their respective businesses or assets exists or is reasonably likely to exist. (e) to (f) XXX (g) The operations of the **Reference Entity**, Borrowers, the Guarantors and the Obligors are conducted in compliance with all Applicable Laws and the Borrowers, the Guarantors and/or the Obligors have not received any notice or other communication from any court, tribunal, arbitrator, governmental agency or regulatory body with respect to an alleged, actual or potential violation and/or failure to comply with any Applicable Laws.	67-68	Since the facility availed by R-1 & R-2 was granted on the strength of R-5 to 7, it was imperative that these representations and warranties qua enforceable obligations qua R-5 to R-7 were provided by the Respondents.
IX. REPRESENTATIONS & WARRANTIES MADE QUA LEAGL PROCEEDINGS AGAINST OBLIGATIONS OF RESPONDENTS 5 TO 7 AS REFERENCE ENTITIES				
24.	6.1.4	6.1.4 Legal Proceedings There are no Legal Proceedings pending or threatened, or any written notices received by the **Reference Entity**, the Borrowers, the Guarantors and/or the Obligors which would result into any Legal Proceedings, in India or any other jurisdiction (a) against the Reference Entity, the Borrowers,	68	Since the facility availed by R-1 & R-2 was granted on the strength of R-5 to 7, it was imperative that the R-5 to R-7 were not faced with legal proceedings

		the Guarantors and/or the Obligors, (b) any properties or rights of the Borrowers, the Guarantors and/or the Obligors, (c) relating to businesses or operations of the Borrowers, the Guarantors and/or the Obligors, or (d) regarding the legality or enforceability or effectiveness or validity or performance of any of the Financing Documents and/or any of the Clearances that have been obtained, and (e) that would prevent the exercise and the enforcement by each of the Lenders and the Security Trustee of their respective rights under the Financing Documents to which they are a party or the remedies in respect of thereof.		either pending or threatened. Any such pendency of legal proceedings would have material impact on loan provided by the Petitioners. Hence, the Respondents provided the representations & warranties in these terms.
X. REPRESENTATIONS & WARRANTIES MADE QUA ACCOUNTS OF RESPONDENTS 5 TO 7 AS REFERENCE ENTITIES				
25.	6.1.5	6.1.5 Accounts (a) The books of accounts of the **Reference Entity**, Borrowers and Obligors have been properly maintained in accordance with Applicable Law. (b) The accounts of the **Reference Entity**, Borrowers and Obligors have been prepared using GAAP, applied on a consistent basis; and are true and fair and disclose all liabilities (whether actual or contingent). (c) There are no known unaccounted liabilities of the **Reference Entity**, Borrowers and the Obligors except to the extent disclosed in the latest financial statements of the Reference Entity, Borrowers and the Obligors. The Reference Entity, Borrowers and/or the Obligors do not have any (i) material claims against them, (ii) material liabilities or (iii) Indebtedness, whether direct, indirect, contingent, absolute, accrued or otherwise, nor is there any condition, fact or circumstance that will create such claim, obligation, liability or Indebtedness, except as required to reflect the transactions contemplated by this Agreement. (d) There have been no change in the financial or operational position of the **Reference Entity**, Borrowers and/or the Obligors which has caused or could reasonably be expected to cause any Material Adverse Effect. (e) The **Reference Entity**, Borrowers and the Obligors which are companies maintain systems of internal accounting controls sufficient to provide reasonable assurance that (i) transactions are executed in accordance with management's general or specific authorisations, (ii) transactions are recorded as necessary to permit preparation of financial statements in conformity with GAAP, (iii) access to assets is permitted only in accordance with management's general or specific Clearance, and (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences. (f) The **Reference Entity**, Borrowers and the Obligors have made and kept books, records and accounts which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of assets of such entity and provide a sufficient basis for the preparation of its	68-69	Since the facility availed by R-1 & R-2 was granted on the strength of R-5 to 7, it was imperative that the R-5 to R-7 maintained their Accounts in the manner provided herein. Hence, the Respondents provided the representations & warranties in these terms.

		respective financial statements in accordance with applicable GAAP.		
XI. REPRESENTATIONS & WARRANTIES MADE QUA INSOLVENCY OF RESPONDENTS 5 TO 7 AS REFERENCE ENTITIES				
26.	6.1.8	6.1.8 Insolvency (a) The **Reference Entity**, Borrowers, the Guarantors and/or the Obligors are not insolvent or unable to pay their debts, and none of their creditors has presented any petition, application or other proceedings for any administration order, creditors' voluntary arrangement or similar relief by which their affairs, business or business assets are managed by a Person appointed for the purpose by a court, governmental agency or similar body, or by any creditor or by the entity itself nor has any such order or relief been granted or appointment made. (b) No order has been made, no petition or application presented, no resolution passed and no meeting convened for the purpose of winding-up/insolvency of the Reference Entity, Borrowers, the Guarantors and/or the Obligors or whereby their assets are to be distributed to creditors or shareholders or other contributories nor have they received written notice of any receiver (including an administrative receiver), liquidator, trustee, administrator, supervisor, nominee, custodian or similar official having been appointed in respect of the whole or any part of their businesses or assets.	70	Since the facility availed by R-1 & R-2 was granted on the strength of R-5 to 7, it was imperative that the R-5 to R-7 were not faced with any event of insolvency. Any such event of insolvency would have material impact on loan provided by the Petitioners. Hence, the Respondents provided the representations & warranties in these terms.
XII. REPRESENTATIONS & WARRANTIES MADE QUA INSURANCE POLICIES TO BE MAINTAINED BY RESPONDENTS 5 TO 7 AS REFERENCE ENTITIES				
27.	6.1.10	6.1.10 Insurance All insurance contracts/policies required or advisable in relation to the businesses and operations of the **Reference Entity**, Borrowers, the Guarantors and the Obligors and/or in terms of the Financing Documents have been put in place at the times and in the manner required herein and are, as contemplated herein, in full force and effect, and the Borrowers, the Guarantors and the Obligors have complied with all their obligations under the insurance contracts/policies and no event or circumstances has occurred nor has there been any omission to disclose a fact which in any such case would entitle any insurer to avoid or otherwise reduce its liability thereunder to less than the amount provided in the relevant policy and insurance coverage provided by such insurance. The Borrowers, the Guarantors and the Obligors have not defaulted in payment of any premium in relation to any insurance contract/policy procured by them. The Borrowers, the Guarantors and the Obligors shall provide the Security Trustee copies of cover notes of the insurance contracts procured by them.	71	Since the facility availed by R-1 & R-2 was granted on the strength of R-5 to 7, it was imperative that the R-5 to R-7 maintained the insurance policies in the manner provided herein. Hence, the Respondents provided the representations & warranties in these terms.
XIII. OTHER REPRESENTATIONS & WARRANTIES MADE QUA RESPONDENTS 5 TO 7 AS REFERENCE ENTITIES				
28.	6.1.12	6.1.12 Others (a) No event has occurred that has caused or is capable of causing, a Material Adverse Effect. (b) None of, the directors and/or the promoters of, the **Reference Entity**, Borrowers, the Guarantors and/or Obligors, have been barred from accessing the capital markets by the Securities and Exchange Board of India nor are the shares	71-72	Since the facility availed by R-1 & R-2 was granted on the strength of R-5 to 7, it was imperative that the R-5 to R-7 did not cause any Material Adverse Effect in the manner provided herein. Hence,

		of any of the Reference Entity, Borrowers, the Guarantors and / or Obligors (if they are listed) been suspended from trading.		the Respondents provided the representations & warranties in these terms.
29.	1.1.1 (bbb)	"**Material Adverse Effect**" shall mean the effect or consequence of an event, circumstance, occurrence or condition which, in the sole opinion of the Lenders, has caused, as of any date of determination, or could be expected to cause, a material and adverse effect on: (i) the financial condition, carrying of business, operations, assets or prospects of any of the Borrowers, the Guarantors and/or the Obligors and/or the Reference Entity; (ii) the ability of the Borrowers, the Guarantors or any Obligor to perform or comply with its obligations under any of the Financing Documents or in relation to the Identified Debt; (iii) the legality, validity, binding nature or enforceability of any of the Financing Documents (including the ability of any Finance Parties to enforce any of its remedies under the Financing Documents); or (iv) the validity, legality or enforceability of any Security expressed to be created pursuant to any Financing Documents or on the priority and ranking of any of that Security.	52	A bare perusal of terms in Clause 6 such as: ➢ non-inclusion in the RBI's defaulter's list; ➢ no events constituting Material Adverse Effect on R-5 to R-7; ➢ no pendency of legal proceedings against R-5 to R-7; ➢ maintenance of books of accounts of R-5 to R-7 in a particular manner; ➢ no insolvency proceedings against R-5 to R-7 shows that R-5 to R-7 were part of this transaction and are duly bound by these clauses. The fact that R-3 and R-4 had the power and authority to control the shareholding of R-5 to R-7 shows that these companies are controlled by R-3 and R-4. Lastly, a combined reading of all these clauses clearly indicate that R-5 to R-7 have important and crucial role in this loan transaction. All critical clauses relate to them. The purpose of these clauses is to secure the Petitioners. Therefore, if the order dated 13.12.2019 is vacated then the Petitioners will be left empty handed despite admitted dues of Rs. 293 Crores (Approx.) as R-1 to R-4 have no assets of its own to secure the Petitioners.
XIV. AFFIRMATIVE COVENANTS OF RESPONDENTS NO. 5 TO 7 AS REFERENCE ENTITIES				
30.	7.1	7.1.1 Inspection and Compliance (a) xxx (b) The Borrowers and Guarantors shall ensure that the **Reference Entity** does not at any time become a private limited company, except with the consent of the Majority Lenders and subject to any changes to the Security Documents required by the Lenders and/or the Security	72-76	Since the facility availed by R-1 & R-2 was granted on the strength of R-5 to 7, it was imperative that the R-5 to R-7 do not change their corporate structure by becoming a private limited company. Further, R-5 to

		Trustee having been made to their satisfaction. 7.1.2 Books of accounts The Borrowers and the Guarantors undertake in respect of the **Reference Entity**, the Borrowers, the Guarantors and the Obligors: (a) to keep such adequate accounting and control systems, management information systems, books of account, and other records as are required to be maintained under Applicable Law and such accounts as are adequate to reflect truly and fairly the financial condition and results of operations in conformity with GAAP consistently applied and all requirements of Applicable Law. (b) to ensure that its financial statements for each financial year give a true and fair view of the state of affairs of the Person in respect of whom such statement has been prepared in each case in accordance with GAAP consistently applied. (c) to ensure its audited financial statements for each financial year are prepared promptly and in any case within 45 (forty five) days of the end of each such financial year and in preparation of such financial statements apply all accounting policies in a consistent manner in accordance with GAAP. (d) to file all relevant tax returns within the time permitted by the authorities.		R-7 were required to present the true state of affairs by maintaining their and filing etc. of their books of accounts in the manner provided herein.
XV. NEGATIVE COVENANTS OF RESPONDENTS				
31.	7.2	7.2.3 The Borrowers, the Guarantors and the Promoter Group shall not: (a) issue any fresh equity or preference shares or any other instruments convertible into equity or preference shares by the Reference Entity; (b) sell, transfer or dispose off or allow any of the entities listed in Schedule 6.1.2(d) (Shareholding Pattern) hereof to sell, transfer or dispose off the shareholding in Borrowers which are companies, save and except as maybe permitted under this Agreement.; (c) sell, transfer or dispose off shares any of the Reference Entities held by the Promoter Group without prior consent of the Lenders.	76-77	At the time of filing of this petition, the aggregate shareholding of the Promoter Group (i) in Respondent No. 6 has reduced from 49% to 27% (of the entire share capital) and (ii) in Respondent No. 7 has reduced from 44% to 31.1% (of the entire share capital).
32.	7.2.4	The Guarantors and the Promoter Group shall at all times hold shares aggregating to a value of INR 750,00,00,000 of Eveready & McLeod Russell free and clear from Encumbrance.	77	As of 30.09.2019, the aggregate value of unencumbered shares of Respondent No. 6 & 7 is INR 16 crores as opposed to INR 750 crores. This is primarily because of the fact that the aggregate number of shares unencumbered since the entry into the Facility Agreement has drastically reduced (i) in respect of R-6 from 3.9 crores unencumbered shares to mere 10 lakh unencumbered shares; (ii) in respect of R-7 from 2.02 crores unencumbered

<table>
<tr><td></td><td></td><td></td><td></td><td>shares to mere 35 lakh unencumbered shares. This has further been affected by a sharp drop in the share prices</td></tr>
<tr><td>33.</td><td>7.2.6</td><td>7.2.6 The Guarantors and the Promoter Group shall not Encumber any shares held by the Guarantors and the Promoter Group in the Reference Entities save and except as disclosed by the Promoter Group as on the date of this Agreement or as provided under this Agreement or as required to be Encumbered as “top-up” shares in accordance with the provisions of existing security creation arrangements.</td><td>78</td><td>The aggregate number of shares encumbered since the entry into the Facility Agreement significantly increased from (i) in respect of R-6, 14.3% to 26.5%; and (ii) in respect of R-7, 16.3% to 26.3% (in each case of the entire share capital). Therefore, the entire shareholding of the Promoter Group is now pledged (almost 98% in Respondent No. 6 and 85% in respondent No. 7, as percentage of the shareholding held by them).</td></tr>
<tr><td colspan="5">XVI. INFORMATION COVENANTS OF RESPONDENTS</td></tr>
<tr><td>34.</td><td>7.3.3</td><td>The Borrowers shall provide ‘MIS reports’ in respect of the Reference Entity, Borrowers, the Guarantors and the Obligors containing details and in a form as required by the Lenders, to the Lenders within 15 (fifteen) calendar days of the end of every Fiscal Quarter.</td><td>80</td><td rowspan="3">Obligation to provide MIS reports, unaudited and audited financial statements at the end of every quarter and compliance certificate showing compliances by R-5 to R-7 was only due to the fact that the Facility Agreement was extended basis their financial strength.

Further, the Petitioners have produced emails showing compliance of these terms by R-6 & R-7, thus establishing that these respondents fulfilled their obligations under the Facility Agreement by undertaking to be bound by the terms of the Facility Agreement.</td></tr>
<tr><td>35.</td><td>7.3.4</td><td>The Borrowers shall deliver unaudited financial statements (standalone and consolidated) in respect of the Reference Entity, Borrowers, the Guarantors and the Obligors for each financial quarter to the Lenders within 15 (fifteen) calendar days of the end of each financial quarter and the audited financial statements (standalone and consolidated) and signed annual reports in respect of the Reference Entity, Borrowers, the Guarantors and the Obligors to the Lenders within 45 (forty five) calendar days of the end of each financial year.</td><td>80</td></tr>
<tr><td>36.</td><td>7.3.5 read with Schedule 1.1.1 (n) [Point 4]</td><td>The Borrowers shall provide Compliance Certificate (based such to be provided by an Authorized Officer who is a Director in respect of the Reference Entity, Borrowers, the Guarantors and the Obligors within: (a) 15 (fifteen) calendar days of the end of every Fiscal Quarter based on the unaudited financial statements, and (b) 45 (forty five) calendar days of the end of each financial year.</td><td>80 & 100</td></tr>
<tr><td colspan="5">XVII. FINANCIAL COVENANTS OF RESPONDENTS</td></tr>
<tr><td>37.</td><td>7.4</td><td>7.4.1 Each of the Borrower shall at all times comply with the following on a consolidated basis:
(a) Gross Primary Debt to LTM EBITDA Ratio: In respect of MRIL, Gross Primary Debt to LTM EBITDA Ratio shall be less than or equal to the ratio set out in respect of the periods below
<table>
<tr><th>Covenant</th><th>From September 30, 2017 till December 31,</th><th>From January 1, 2018 till March 31, 2018</th><th>From April 1, 2019 till repayment</th></tr>
</table>
</td><td>80</td><td>Obligation to maintain a certain percentage of EBITDA ratio of R-6 and R-7 shows that their financial strength was crucial for securing the dues of the Petitioners.

Further, the Petitioners have produced emails showing compliance of these terms by R-6 & R-7, thus establishing that these</td></tr>
</table>

			2017		
		Gross Primary Debt to LTM EBITDA Ratio for preceding 12 months(1)	8.75	3.5	3.0

(b) Gross Primary Debt to LTM EBITDA Ratio: In respect of EIIL, Gross Primary Debt to LTM EBITDA Ratio shall be shall be less than or equal to the ratio set out in respect of the periods below

Covenant	**From September 30, 2017 till repayment**
Gross Primary Debt to LTM EBITDA Ratio for preceding 12 months(1)	2.25

(1) Note: LTM EBITDA for preceding 12 months shall be based on (i) the audited financial statements of the Issuer, in case of the evaluation being for the end of the Financial Year, and (ii) the limited reviewed financial statements, in any other case. Such Gross Primary Debt to LTM EBIDTA Ratio to be tested at the end of every Fiscal Quarter

respondents fulfilled their obligations under the Facility Agreement by undertaking to be bound by the terms of the Facility Agreement.

XVIII. EVENTS OF DEFAULT				
38.	8 read with Schedule 1.1.1(z)	Events of Default and Consequences 8.1 Each of the events or circumstances set out in Schedule 1.1.1(z) (Events of Default) is an event of default ("**Event of Default**").	81	Clause 3 of Schedule 1.1.1(z) provides various situations qua R-5 to R-7, which would amount to events of default. Further, certain actions of R-5 to R-7 can also trigger events of default. The aforesaid unequivocally and unambiguously establishes that R-5 to R-7 were intrinsically connected with the performance of the Facility Agreement on part of the Respondents and failure in performance of these obligations by R-5 to R-7 would entail event of default.
39.	8.4.1(d) read with Schedule 1.1.1(z)	Acceleration and other consequence of default	81	
40.	Schedule 1.1.1(z)	**Schedule 1.1.1(z)** **Events of Default** 3. Cross Default (a) Any of the **Reference Entity**, Borrowers, the Guarantors and/or the Obligors failing to pay its debts or Indebtedness to any Person as they fall due or suspends or threatens to suspend making payments (whether principal or interest) with respect to any of its debts or any notice received by the **Reference Entity**, Borrowers, the Guarantors and/or Obligors regarding, or commencement by any lender or creditor of, any enforcement action on any security made available/guarantee provided by the **Reference Entity**, Borrowers, the Guarantors and/or the Obligors. (b) Any of the Reference Controlled Entities failing to pay its debts or Indebtedness to any Person as they fall due or suspends or threatens to suspend making payments (whether principal or interest) with respect to any of its debts or any notice received by any of the Reference Controlled Entities regarding, or commencement by any lender or creditor of, any enforcement action on any security made available/guarantee provided by any of the Reference Controlled Entities. (c) Any of the **Reference Entity**, Borrowers, the	108-111	

		Guarantors and/or the Obligors fail to comply with or breach the terms of any document (other than Financing Documents, the default in respect of which is provided in paragraphs 1 and 2 above) relating to any Indebtedness of such **Reference Entity**, Borrowers, the Guarantors and/or the Obligors and such non-compliance or breach entitles the counterparties/creditors of the **Reference Entity**, Borrowers, the Guarantors and/or Obligors to accelerate the outstanding amounts due to them or to take any enforcement action against the **Reference Entity**, Borrowers, the Guarantors and/or the Obligors and/or their assets or commence any liquidation, bankruptcy or winding up proceedings. (d) Any of the Reference Controlled Entities fail to comply with or breach the terms of any document (other than Financing Documents, the default in respect of which is provided in paragraphs 1 and 2 above) relating to any Indebtedness of such Reference Controlled Entity and such non-compliance or breach entitles the counterparties/creditors of any of the Reference Controlled Entities to accelerate the outstanding amounts due to them or to take any enforcement action against any of the Reference Controlled Entities and/or their assets or commence any liquidation, bankruptcy or winding up proceedings. (e) Any Person exercises a lien or set-off against any of the Borrowers, the Guarantors and/or the Obligors or any of their assets. (f) Failure by the **Reference Entity**, Borrowers, the Guarantors and/or the Obligors to pay one or more amounts due under any judgments or decrees which shall have been entered against the **Reference Entity**, the Borrowers, the Guarantors or any Obligors. 4. Winding Up, Nationalization, Receiver (a) Any of the **Reference Entity**, Borrowers, the Guarantors or the Obligors commencing/taking steps to initiate a voluntary winding up or restructuring or insolvency process under any applicable bankruptcy, insolvency, winding up or other similar Applicable Laws now or hereafter in effect; or (b) a petition is presented, or a meeting is convened for the purpose of considering a resolution, or any steps are taken, for making an administration order against or for the **Reference Entity**'s, Borrowers', the Guarantors' and/or the Obligors' winding up; or (c) Any of the **Reference Entity**, Borrowers, the Guarantors and/or the Obligors consents to the entry of an order for relief in an involuntary proceeding under any such Applicable Law, or consents to the appointment or taking possession of itself or its assets by a receiver, liquidator, assignee (or similar official). (b) If an involuntary proceeding against the **Reference Entity**, Borrower, the Guarantors and/or the Obligors has been admitted under any applicable bankruptcy, insolvency, winding up or		

		other similar Applicable Law now or hereafter in effect, or any notice from any Person is received by the **Reference Entity**, Borrowers, the Guarantors and/or the Obligors in relation to the institution/proposed institution of proceedings of winding-up, liquidation, dissolution, condemnation etc. against the **Reference Entity**, Borrowers, the Guarantors or any Obligor. (c) Any death, insolvency or any other incapacity of the Guarantors and/or Obligors who are individuals. (d) Any order is made for the dissolution, liquidation, winding-up or termination of the **Reference Entity**, Borrowers, the Guarantors or any of the Obligors or for the winding up or liquidation of their affairs. (e) Any notice is received by the **Reference Entity**, Borrowers, the Guarantors or any of the Obligors from any Governmental Authority in relation to the institution/proposed institution of proceedings of nationalisation, condemnation etc. against the **Reference Entity**, Borrowers, the Guarantors or any Obligor. (f) Any Governmental Authority having condemned, nationalized, seized, or otherwise expropriated all or any part of the assets of any of the **Reference Entity**, Borrowers, the Guarantors or Obligors or having assumed custody or control of its business or operations or having taken any action that would prevent it or its officers from carrying on its business or operations or a substantial part thereof. (g) Any proceeding or other action is ordered or admitted by any Governmental Authority/courts/tribunals for the appointment of a receiver, liquidator, assignee (or similar official) for any part of property or assets of the **Reference Entity**, Borrowers, the Guarantors or Obligors or an execution, attachment or restraint has been levied by a court/tribunal or any Governmental Authority on all or any part of the assets of any of the **Reference Entity**, Borrowers, the Guarantors or Obligors. (h) Any of the **Reference Entity**, Borrowers, the Guarantors and/or the Obligors is declared as sick under the Applicable Law or is, in the reasonable apprehension of the Lenders and/or the Security Trustee, likely to be declared as sick under Applicable Law. 5. Security (a) Failure by the Borrowers, the Guarantors and/or the Obligors, as applicable, in creation of Security Interest to the satisfaction of the Lenders within the period stipulated in the Financing Documents. (b) Notwithstanding anything contained in the Financing Documents, any of the Financing Documents once executed and delivered fail to provide the Security Interests, rights, title, remedies, powers or privileges intended to be created thereby (including the priority intended to be created thereby), or such Security Interest		

		failing to have the priority contemplated under the Financing Documents, or the Security Interest purported to be created thereby being jeopardized or endangered in any manner whatsoever, or any other obligations purported to be secured thereby or any part thereof being disaffirmed by or on behalf of any of the Borrowers, the Guarantors or the Obligors or any other party thereto. (c) The occurrence of any event affecting the Security or in the event of the title of any Borrowers, the Guarantors and/or Obligor to any portion of the Security being challenged or in the event any Security or part thereof or any Security Document fails to constitute a valid and perfected first ranking charge or ceases to be in full force and effect or Borrowers, the Guarantors and/or Obligor under any Security Document has repudiated or revoked or is likely to repudiate or revoke such Security. (d) If the whole or any part of the Security is sold, Encumbered or Transferred or otherwise disposed off without the consent of the Lenders. 6. Other Default (a) Failure by the entities listed in Schedule 6.1.2(d) (Shareholding Pattern) hereof to maintain and retain management control over the **Reference Entity**, the Borrowers, the Guarantors and/or the Obligors and/or failure to maintain their respective shareholding in the Borrowers, the Guarantors and the Obligors. (b) The **Reference Entity**, Borrowers, the Guarantors and/or any of the Obligors ceasing or makes a declaration/announcement/notification to cease to carry on its business. (c) Any license, clearance, approval or authorisation material in relation to the business of any of the **Reference Entity**, Borrowers, the Guarantors and/or any of the Obligors is revoked, withdrawn, terminated or suspended. (d) Any Material Adverse Effect. (e) Any insurance contracted or taken by the Borrowers is not, or ceases to be, in full force and effect at any time when it is required to be in effect or any insurance is avoided; or (b) any insurer or re-insurer avoids or suspends or becomes entitled to avoid or suspend, any insurance or any claim under it or otherwise reduce its liability under any insurance; or (c) any insurer of any insurance is not bound, or ceases to be bound, to meet its obligations in full or in part under any insurance. (f) Any Legal Proceeding shall have been instituted against the **Reference Entity**, Borrowers, the Guarantors or any of the Obligors which is of a value of more than INR 10,00,000. (g) Any material assets of the **Reference Entity**, Borrowers, the Guarantors and/or Obligor are destroyed in any substantial manner, whether due to a force majeure event or otherwise. (h) The liabilities of the **Reference Entity**, Borrowers, the Guarantors and/or the Obligors		

		are more than their respective assets or the networth of the **Reference Entity**, Borrowers, the Guarantors and/or the Obligors is eroded or becomes negative or zero. (i) The Borrowers using the Facility or any part thereof for any purpose other than for which the Facility was sanctioned. (j) The **Reference Entity**, Borrowers, the Guarantors and/or the Obligors or any of their directors appearing on the RBI's list of defaulters and ECGC's caution list. (k) Any of the directors and/or the promoters of the **Reference Entity**, Borrowers, the Guarantors and/or Obligors, being barred from accessing the capital markets by the Securities and Exchange Board of India or the shares of any of the **Reference Entity**, Borrowers, the Guarantors and / or Obligors (if they are listed) been suspended from trading. (l) The Guarantors ceasing to be a directors of the Borrowers.		
41.	11.10 (a)	11.10 Remedies and Waivers (a) No failure to exercise, nor any delay in exercising, on the part of any Lender and/or Security Trustee, any right or remedy under the Financing Documents shall operate as a waiver, nor shall any single or partial exercise of any right or remedy prevent any further or other exercise or the exercise of any other right or remedy. The rights and remedies provided in this Agreement are cumulative and not exclusive of any rights or remedies provided by Applicable Law.	92 read with page no. 310, 313,316 and 318	• Clause 11.10 clearly states that non exercise of any right under the facility agreement by the Petitioners would not amount to waiver. • The notices [Point 5 @ Pg. No. 310 and 313 and point 4 @ Pg. No. 316 and 318] expressly states that it is without prejudice to the rights and remedies available under the agreement.

37. In addition to relying upon the table reproduced above, the submissions of Mr. Kaul and Mr. Sibal are as follows:

1. The primary purpose of the Facility Agreement as per Clause 2.3 and the Chartered Accountant Certificate is to finance respondent No. 6. Respondent Nos.1 & 2 exist merely for the purpose of raising funds for its group companies.

2. Respondent No. 3 and 4 are the Managing Director and Director in respondent No.6 respectively and vice-versa in respondent No. 7. Moreover, respondent Nos. 1-4 being the promoter group of respondent No. 5-7, are in a

position to exercise control over the policies of the management. Shareholding pattern of the respondent No. 5 shows that respondent No. 4,1,2,6 & 8 are part of its 'Promoter Group'. Shareholding pattern of the respondent No. 7 shows that respondent No. 3,4,1,2,6 & 8 are part of its 'Promoter Group'. Further, shareholding pattern of the respondent No. 2 shows that respondent No. 4,6 & 1 are part of its 'Promoter Group'. Shareholding pattern of the respondent No. 6 shows that respondent No. 3, 4, 1,2 ,8 & 7 are part of its 'Promoter Group'.

3. As per Clause 7.1.1 (b) obligation is cast on respondent No. 1-4 to ensure that the respondent No. 5-7 does not become private companies. Therefore, respondent No 1-4 have power to direct management or policies of respondent No. 5-7 through ownership of voting rights, power to appoint directors or similar governing body through contractual or other arrangements and hence respondent No, 5-7 are part of the 'promoter group' being an entity controlled by Guarantors, respondent No. 3 & 4.

4. Respondent No. 5-7 cannot be absolved from their liability merely by reason of not being issued notices of default or acceleration notices, as Clause 11.10(a) of the Facility Agreement categorically states that failure to exercise, or any delay in exercising, on the part of any Lender and/or Security Trustee, any right or remedy under the Financing Documents shall not operate as a

waiver, nor shall any single or partial exercise of any right or remedy prevent any further or other exercise or the exercise of any other right or remedy. Further, the said Clause also provides that the rights and remedies provided in the Facility Agreement are cumulative and not exclusive of any rights and remedies provided by Applicable Law. On the acceleration notices and default notice it is also stated that the said notices are without prejudice to the rights and remedies available to the Lender/ Security Trustee under the Financing Documents and/or applicable law, all of which rights and remedies are specifically reserved and the Borrower's, Guarantor's and Obligor's continuing obligations under the Financing Documents.

5. Share Pledge Agreement was entered into by and between the petitioners and the respondent Nos. 1, 2, 3, 4 and 5 along with respondent No. 8, as per Clause 5.1 of the Facility Agreement, whereby 4,16,66,666 compulsory convertible preference shares of respondent No. 5 were pledged in favour of the petitioner No. 2. And as per Clause 5.3 thereof the Share Pledge Agreement respondent No. 5 provides various undertaking on its part.

6. Placing reliance on Clause 1.1.1 (aaa), (bbb), (ccc), (mmm), (ooo), (sss), (xxx) and Clause 1.1.1 (ee), it is stated that deinitions of 'Promoter', 'Promoter Group', 'Obligors', Guarantors' and 'Reference Entity', it is stated that a combined reading of these Clauses along

with the various communications exchanged between petitioners and respondents clearly reveals that the loan was extended to the Williamson Magor Group as a whole and they all constitute one single economic entity and further the mutual intention of the parties to bind non-signatories, respondent No. 5-7.

38. It is further submitted by the Counsels that the foundation to invoke 'Group Companies Doctrine' has been laid down in the pleadings, as the petitioners have very categorically revealed in the petition that although respondent No. 1-4 are signatory parties to the Facility Agreement, the facility was extended to the Williamson Magor Group as a whole on the basis of the credit worthiness of respondent No. 5-7.

39. It is vehemently contended by the Counsels that the orders under Section 9 of the Act can be passed against non-signatories on the following basis such as a) where there is an intention to bind the non-signatories, which can be inferred from agreement itself and/or the manner in which the agreement is implemented/performed by the parties i.e. conduct of parties; b) Group of Companies Doctrine, and; c) attempt to use a corporate façade to deprive the creditors of their money. Reliance has been placed on the following judgments in support of this plea:

1. ***Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. & Ors., 2013 (1) SCC 641;***

2. Cheran Properties Ltd. v. Kasturi Sons Ltd. & Ors., 2018 16 SCC 413;

3. Mahanagar Telephone Nigam Ltd. v. Canara Bank & Ors., 2019 SCC Online SC 995;

4. Sterling and Wilson International FZE and Ors. V. Sunshakti Solar Power Projects Private Limited AND Ors., MANU/DE/1303/2020;

5. VLS Finance Ltd. v. BMS IT Institute Private Limited & Ors., 220 (2015) DLT 113;

6. Goyal MG Gases Pvt. Ltd. v. Air Liquide Deutschland GmBH and Ors., MANU/DE/0098/2005;

7. Dorling Kindersley (India) Pvt. Ltd. v. Sanguine Technical Publishers & Ors., 2013 2 Arb.LR52 (Del);

8. Gatx India Pvt. Ltd. v. Arshiya Rail Infrastructure Ltd., 216 (2015) DLT 20;

40. Counsels have also submitted that even the website of respondent No.1 states that the group of entities and individuals include respondent Nos. 6 & 7. It is also stated that respondent Nos. 1 & 2 have acted as agents of respondent Nos. 5 to 7 in procuring the loans from petitioner No. 1 and have used the loan proceeds as part of their general business operations of funding group companies by transferring monies to respondent No. 6.

41. It is also submitted by the Counsels refuting the stand taken by the applicants/respondent Nos. 5-7, they don't form part of the Williamson Magor Group, that the Court must lift the corporate veil of the respondents in order to ascertain whether respondents actually form part of the Williamson Magor Group and that after availing the loan of Rs. 200 crores by representing themselves as part of group companies attempt is now made to

use a corporate façade to fraudulently deprive the petitioners of their money. In support of this, the Counsels have placed their anchorage on the following judgments:

1. Life Insurance Corporation Ltd. v. Escorts ltd. and Ors., 1986 1 SCC 264;

2. State of U.P. and Ors. v. Renusagar Power Co. and Ors., 1988 4 SCC 59;

3. Arcelomittal India (P) Ltd. v. Satish Kumar Gupta., 2019 2 SCC 1;

4. Vodafone International Holdings BV. Union of India and Anr., 2012 6 SCC 613;

5. DDA v. Skipper Construction Company (P) Ltd. & Anr., 1996 4 SCC 622.

42. Having heard the Ld. counsels appearing for the parties, at the outset I shall broadly encapsulate their submissions. Mr. Sethi, Mr. Makkar Learned Senior Counsels and Mr. Jayant Mehta, learned counsel appearing for respondent Nos. 6, 7 & 5 respectively ('Counsels for respondents' for short) have submitted as follows:

1. Respondent 5, 6 and 7 are not signatories to the Facility Agreement, Personal Guarantee, Share Pledge Agreement and the Deed of Hypothecation. No disclosure to that extent has been made in the petition.

2. Being non-signatories, respondent No.5, 6 and 7 are not parties to the transaction or arbitration agreements therein and Section 9 does not lie against them. (Reference: on ***Indowind (Supra)***; ***Ameet Lalchand Shah***

(supra); ***Kanta Vashist (supra), Ajay Makhija, Mukesh Hans (supra), Mcleod Russel India Ltd. (supra)***).

3. Moreover, the invocation of group companies' doctrine requires a finding of unmistakeable intent of non-signatory parties to be bound by agreement.

4. Respondent Nos. 5, 6 and 7 are intentionally kept from being enveloped within the definition of being a 'Borrower', 'Guarantor', 'Obligor', or 'Promoter Group'.

5. The Facility Agreement is a self-contained agreement as per Clause 13.3 and as per Clause 4.1 the obligation to repay loan is that of respondent Nos. 1 and 2 (Borrowers) and also respondent No. 3 and 4 (Guarantors).

6. Clause 5.1 casts specific obligation on 'Borrower', 'Guarantor', 'Obligor' to secure the loan and Clause 5.10 requires 'Promoter-Group' to replenish security in case of deficiency.

7. 'Promoter Group' does not include respondent Nos. 5, 6 & & 7 under the Facility Agreement and are not controlled entities of Guarantors.

8. 'Reference Entities' are being specifically defined and introduced only to state that the equity shares in respondent No. 6 & 7 are owned by the Borrowers, which serves as the security to the transaction under the Facility Agreement. (Reference to Clause 5.8 and 5.12). The company and its shareholders are independent and distinct entities in the eye of law.

9. Clause 7.2.3 (a) requires 'Borrower', 'Guarantor', or 'Promoter Group' not to issue fresh shares in any 'Reference Entity' and no obligation is cast upon respondent No. 6 and 7. The obligation is of respondent Nos. 1-4 to protect the value of the security provided i.e. their shareholding in respondent Nos. 6 and 7.

10. Clause 7.4.1 requires respondent No. 1 & 2 to ensure compliance of certain benchmarks of the financial health of the respondent No.5, 6 & 7. These terms do not in any manner oblige respondent Nos.5, 6 & 7 to do or refrain doing any act. A conjoint reading with Clause 5.8 makes it clear that the obligation for providing additional security in case of deficiency is on respondent Nos. 1-4.

11. Notices of breach are all addressed to respondent Nos. 1-4.

12. Respondent Nos. 3 & 4 have signed the Facility Agreement in their personal capacity as Guarantors as defined under Schedule 1 and there being no instance wherein respondent Nos. 3 and 4 have purported to act on behalf of respondent Nos. 5, 6 & 7, the doctrine of ostensible authority and estoppel is misplaced.

13. No case of Fraud has been pleaded by the petitioner, for lifting of the corporate veil. Reliance is placed on ***Eloff Hansson (supra),*** to contend that in the absence of such pleading, Court is bound to disregard the same.

14. The plea of fraud being committed as the proceeds

where received by respondent No. 6 is any way misplaced as Clause 2.3 of the Facility Agreement lays the purpose of the loan to discharge respondent No. 6.

15. No *prima facie* case is made out, as to restrain a third party under Section 9. Reliance placed by petitioner on Dorling Kindersley (supra) is misplaced as no derivative rights/title exists with the third party.

16. Reliance placed by petitioner on ***Mahanagar Telephone Nigam (supra),*** in support of the contention that Section 9 lie against a non-signatory to an arbitration agreement is misplaced, as no intention to bind the non-signatories is made out as per the Facility Agreement. Similarly, the judgments, ***Chloro Controls India (supra), Mayavati Trading (supra), Gareware Wall Ropes (supra)*** and ***Cheran Properties (supra)*** are distinguishable in the facts of this case.

43. On the other hand, the submissions made by Mr. Neeraj Kishan Kaul and Mr. Akhil Sibal are as follows.

1. All respondents are part of the Williamson Magor Group. Respondent No. 1 and 2 are pure holding and investment companies and a major shareholding company in the Williamson Magor Group. In this regard, reliance was placed upon Clauses 1.1.1(aaa), (bbb), (ccc), (mmm), (ooo), (sss), (xxx) and 1.1.1(eee).

2. Respondent Nos. 1 & 2 exists merely to raise funds on behalf of its group companies including respondent Nos. 5-7.

3. Clause 2.3 of the Facility Agreement records its primary purpose as to finance respondent No.6.

4. Credit facility granted after taking into consideration the credit worthiness of Williamson Magor Group as a whole and clause 7.4 of the Facility Agreement is applicable to respondent Nos. 6 and 7.

5. Shareholding pattern of respondent Nos. 5, 6 & 7 indicate that they form part of the 'Promoter Group' as defined under the Facility Agreement, being entities controlled by the Guarantors.

6. As per Clause 5.1(e), a letter is to be issued by respondent No. 6 to the Lenders and Clause 5.11 grants both the Borrower and/or Promoter Group the option of providing cash collateral in lieu of Top-up Shares.

7. Clause 7.1.1 (b), obligation is cast on respondent No. 1-4 to ensure, respondent No. 5-7 does not become private entities.

8. The shareholding of Reference Entity as on disbursement date was provided in Schedule 6.1.2(d) of the Facility Agreement, which has changed as on date.

9. As per Clause 6.1.5(a), books of accounts to be prepared using GAAP on a consistent basis of Reference Entity, borrowers, obligors in accordance with applicable law is indicative of the fact that the Facility Agreement was granted on the strength respondent Nos. 5 to 7.

10. As relied upon Clause 1.1.1 (bbb) read with Clause 6 to contend that "material adverse effect" envisages

change in the financial condition, carrying out business, assets or prospects of Reference Entity as expressly represented and warranted in Clause 6.

11. Shareholding pattern of respondent Nos. 5 to 7 clearly indicates that respondent Nos. 1 to 4 form part of its Promoter Group.

12. Group Companies Doctrine can be invoked as in the petition it has been categorically stated that although respondent Nos. 1 to 4 are signatories, the facility was extended to the Williamson Magor Group as a whole.

13. Orders Under Section 9 of the Act can be passed against non-signatories (i) where there is an intention to bind non-signatories which can be inferred from agreement itself and / or the manner in which the agreement is performed by parties,(ii) Group of Companies Doctrine and (iii) attempt to use corporate façade to deprive creditors of their money (Ref: ***Chloro Controls India Pvt. Ltd. (supra); Cheran Properties Ltd. (supra); Mahanagar Telephone Nigam Ltd. (supra); Sterling and Wilson International FZE and Ors. (supra); VLS Finance Ltd. (supra); Goyal MG Gases Pvt. Ltd. (supra); Dorling Kindersley (India) Pvt. Ltd. (supra); Gatx India Pvt. Ltd. (supra).***

44. Having broadly noted the submissions, the preliminary issue that falls for consideration under these applications is the maintainability of the petition in so far as respondent No. 5, 6

and 7 are concerned, being non-signatories to the Facility Agreement and to that extent the applicability of *ex-parte* order passed by this Court on December 13, 2019.

45**.** It is trite law that even though the scope of an arbitration agreement is entered into by a Company within a group of corporate entities, as per *'Group of Companies Doctrine'*, the same can in certain circumstances bind non-signatory affiliates as well. This doctrine was propounded through the case of ***Dow Chemical v. Isover-Saint-Gobain, 1984 Rev Arb 137*** and first invoked by the Supreme Court in ***Chloro Controls (supra).*** A combined reading of the judgments of the Apex Court and this Court, as relied upon by the Mr. Kaul and Mr. Sibal, in ***Chloro Controls (supra), Cheran Properties Limited (supra), Mahanagar Telephone Nigam Ltd. (supra), Sterling and Wilson International Fze and Ors. (supra), VLS Finance Ltd. (supra), Gatx India Pvt. Ltd. (supra), Goyal MG Gases Pvt. Ltd. (supra)*** *and* ***Dorling Kindersley (supra)*** reveals the following position:

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

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

3. 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;

4. 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;

5. 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;

6. 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

7. 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.

46. Having noted the position of law, I shall now refer to the terms of the Facility Agreement. The position that emerges from the Facility Agreement is as follows:

1. Respondent Nos.1 and 2 (Borrowers as defined

under Part-E of Schedule – I to the agreement) have availed credit facility to the tune of Rs.100 Crores each from the petitioner No.1.

2. Respondent Nos. 3 and 4 are guarantors to the Facility Agreement as per Part-A of Schedule – I.

3. Clause 2.3 of the Facility Agreement records that the facility was availed for repayment of existing loans / advances extended by respondent No.6 to borrowers or infusion of proceeds into respondent No.6 solely for the purpose of reduction of debt.

4. Clause 1.1.1 (p) defines 'Control'. It also includes the power to direct the management or policies of a person, whether through the ownership of voting rights, power to appoint Directors or similar governing body of such person or through contractual or other arrangement.

5. Clause 1.1.1 (bbb) defined 'Material Adverse Effect' to include *an event, circumstance, occurrence or condition which, in the sole opinion of the lenders, has caused, as of any date of determination, or could be expected to cause, a material and adverse effect on: (i) the financial condition, carrying of business, operations, assets or prospects of any of the Borrowers, the Guarantors and/or the Obligors and/or the Reference Entity;*

6. Clause 1.1.1(ooo) defines 'promoter group' and includes *any other controlled entity of the guarantors*.

7. Clause 1.1.1 (aaa) defines security to mean the

security interest created on various assets and properties as noted in Clause 5.

8. The Facility Agreement also defines security document in Clause 1.1.1 (xxx) to include all documents executed pursuant to Clause 5 which deals with 'Security'.

9. 'Security Provider' shall mean (i) the Pledgors; and (ii) any other person creating Security under the Security Documents.

10. Clause 1.1.1 (ccc) defines 'Obligors' as Borrowers, 'Security Provider' and Guarantors.

11. In pursuance of Clause 5.1(a) a first ranking and exclusive pledge on pledged shares created pursuant to pledge agreement for securing loan, outstanding amount and any monies payable in respect of the facility.

12. A. Clause 5.1.(e) includes *A letter of comfort to be issued by MRIL in a form acceptable to lenders* to secure the loans and all outstanding amounts.

13. Even though the obligation to ensure adequate collateral cover ('New Security'), by way of pledge over equity shares of respondent No.6 and/or respondent No.7 and/or mortgage over properties at the end of 18 and 24 months (1.5x and 2.0 x respectively), was on the borrowers as per Clauses 5.8 and 5.9; Clause 5.10 envisaged that *the Borrower and / or Promoter Group shall provide incremental shares as pledged "top-up shares''* on the breach co-lateral cover as per Clause 5.8

and 5.9.

14. An option to even provide cash collateral in lieu of "Top-up Shares" was also provided to the Borrower and Promoter Group as per Clause 5.11. The cash collateral provided was to be adjusted against the loan outstanding amount.

15. Respondents 5 to 7 are named as 'Reference Entities' under Clause 1.1.1 (sss).

16. Clause 6 of the Facility Agreement dealt with Representation and warranties which the borrower and guarantors jointly and severally made to the lenders as on date of the Agreement to be continued till the date of final settlement.

16.1 As per Clause 6.1.2 (d) an express representation and warranty was made that *As on date of the execution of this agreement and the first disbursement date, the shareholding of Reference Entity, borrowers and the obligors is as provided in Schedule – 6.1.2 (d)* and the same shall be maintained till the date of final settlement.

16.2 Clause 6.1.2 (e) stipulated the Reference Entity, Promoter Group, borrowers and / or the obligors or any of their Directors shall not appear on the RBI list of defaulters and ECGC's caution list.

16.3 Clause 6.1.4 expressly stated no legal proceedings pending or threatened, or any written

notices received by the Reference Entity, the borrowers, the guarantors and / or the obligors.

16.4 As per Clause 6.1.5(a), books of accounts to be prepared using GAAP on a consistent basis of Reference Entity, borrowers, obligors in accordance with applicable law.

16.5 Clause 6.1.8(a) also envisaged that the Reference Entity, borrowers, the guarantors and / or obligors are not insolvent or unable to pay their debts.

17. Clause 7.1.1 (b), obligation is cast on respondent No. 1-4 to ensure, respondent No. 5-7 does not become private entities.

18. Clause 7.2.3 (a) mandates that the Borrowers, Guarantors and the Promoter Group shall not issue any fresh equity or preference share or any other instruments convertible into equity or preference shares by the Reference Entity.

19. Clause 7.2.3 (b) also mandates the Borrowers, Guarantors and the Promoter Group not to sell, transfer or dispose off or allow any of the entities listed in Schedule 6.1.2(d) (entities includes respondent No.5-7) of the Facility Agreement to sell, transfer or dispose off shareholding in Borrowers except as permitted under the Facility.

20. Obligation is cast on the Borrowers, Guarantors and the Promoter Group to not sell, transfer or dispose off

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

21. Guarantors and Promoter Group to hold shares aggregating to a value of 7,50,00,00,000 of respondent Nos. 6 and 7 as per Clause 7.2.4.

22. As per Clause 7.3.4 obligation was cast upon the Borrowers to deliver unaudited and audited financial statements in respect of the Reference Entity, Borrowers, the Guarantors and the Obligors for each financial quarter to the Lenders within 15 (fifteen) calendar and 45 (forty-five) calendar days of the end of each financial year respectively.

23. Schedule 1.1.1(z) which deals with events of defaults such as cross-default (Clause 3 thereto), winding up nationalization, receiver (Clause 4 thereto), other default (Clause 6 thereto), all envisage these events applicable to Reference Entities as well.

24. In particular Clause 6(a) of Schedule 1.1.1(z) contemplates an event of default, as *failure by the entities listed in Schedule 6.1.2(d) (Shareholding Pattern) hereof to maintain and retain management control over the Reference Entity, the Borrowers, the Guarantors and/or the Obligors and/or failure to maintain their respective shareholding in the Borrowers, the Guarantors and the Obligor*s."

22. Clause 7.4 of the Facility Agreement is upon respondent Nos.1and 2 to maintain Gross Primary Debt to LTM EBITDA Ratio in respect of respondent Nos.6 and

7 at certain levels at given points of time.

47. A perusal of the documents which are placed on record reveals the following:

1. An email exchanged from an official (Manager of the respondent No. 1) under the official mail-id of respondent No. 6 to the petitioner's representative (e-mail dated June 28, 2018 annexed at page No. 18 to I.A. 6877/2020) with regard to the quarterly compliance to be followed as per the Facility Agreement, depicts the files on behalf of respondent No. 7 being attached by the Manager of respondent No. 1.

2. An email sent by an official of the petitioner to respondent No. 3 & 4 (e-mail dated January 24, 2019 annexed at page No. 33 to I.A. 6877/2020), whereby it is indicated that the loan under Facility Agreement was given in favour of '*your promoter hold cos. in Sep'17 with PG's and in good faith'*. The email further reads as, '*It has been brought to my notice that this is facility has multiple covenant breaches (primarily on account of excess leverage in McLeod Russel & Eveready and non-maintenance of min. unencumbered shareholding of Rs.750 crores) which were informed to us only on post facto basis which is completely unacceptable. Further, I understand that the aforesaid credit facility needs to be secured by 1.5x cover (Principal + Accreted Interest) in the form of pledge of shares of Eveready & McLeod Russel not later than 31st*

March'19 and thereafter at 2.0x level by 30th Sep'19. Please give us a plan to rectify the aforesaid breaches at the earliest and ensure to provide us the security within the agreed time line'.

3. The respondent Nos. 3 & 4 has in fact replied to the aforesaid mail vide email on the same day (annexed at page No. 33 to I.A. 6877/2020), acknowledging the mail and has not disputed them being not part of the promoter/promoter group of the holding companies. Moreover, in pursuance of rectifying the breaches and other statutory requirements, the official of petitioner No. 1 communicated to the respondent No. 3 & 4 that *'..We've since then discussed your requirement for incremental funding at the holdco. level to take care of certain short-term maturities at the operating co. level and we are unable to progress at this juncture. Incrementally, we have an RBI inspection coming up, and we would need to comply with the security creation requirement in the existing facility first, and <u>would appreciate if you could prioritize creating the requisite security (1.5x cover in the form of pledge over Eveready & McLeod Russel shares) against our facility of Rs.200 crores + accreted interest latest by 31st March'19. Request if you could accordingly organize to create security within the aforesaid timeline.'</u>*

4. An e-mail dated January 07, 2019, exchanged between an official of the petitioner No. 1 to an official of

respondent No. 6, whereby in a table reproduced therein, respondent No. 3 & 4 are named as the Promoters of respondent No. 7 and the Promoter Group therein is defined as *Promoter & his immediate family members & any entity owned and controlled by such individuals which constitutes Promoter Group.*

48. 'Security provider' as envisaged under Clause 1.1.1(bbb) means to include any person who creates 'Security' under the 'Security Documents' and therefore, respondent Nos. 5 and 7 are 'Security Providers' which also qualifies them as 'Obligors' as per Clause 1.1.1 (ccc). Thus, respondent Nos. 5 and 7 in addition to being 'Reference Entities' are also 'Security Providers' as well as 'Obligors' as per the Facility Agreement.

49. The shareholding pattern as laid down in Schedule 6.1.2(d) of the Facility Agreement clearly depicts that respondent Nos. 1, 2, 4 and 6 form the Promoter Group of respondent No.5; respondent Nos. 1,2,3,4 and 6 form part of the Promoter Group of respondent No.7; respondent Nos. 1,2,3,4 and 7 form part of Promoter Group of respondent No. 6 and; respondent Nos. 1, 3 and 6 form part of Promoter Group of respondent No. 2, 5 to 7.

50. The Borrowers and Guarantors, being respondent Nos.1-4, had expressly jointly and severally warranted and represented under Clause 6.1.2(d) to the petitioner No.1 and Security Trustee that the shareholding of the Reference Entity, Borrowers and Obligors as provided in Schedule 6.1.2(d) as on date of disbursement shall remain the same all throughout till

the date of final settlement.

51. In fact, Schedule 1.1.1(z) which contemplates various Events of Default, under Clause 6(a) reads as under:

> *"(a) Failure by the entities listed in Schedule 6.1.2(d) (Shareholding Pattern) hereof to maintain and retain management control over the Reference Entity, the Borrowers, the Guarantors and/or the Obligors and/or failure to maintain their respective shareholding in the Borrowers, the Guarantors and the Obligors."*

52. The entities listed in Schedule 6.1.2(d) are Babcock Borsig Limited/respondent No. 8, respondent Nos.1 and 2, as well as respondent Nos.5 to 7. A conjoint reading of Clause 6.1.2(d), Clause 6 (a) to Schedule 1.1.1.(z) *prima facie* indicates that the Borrowers and Guarantors exercised management control over the Reference Entities and that the obligation was jointly and severally on respondent Nos. 1-4, accordingly, to maintain the shareholding of the Reference Entities intact. Clause 7.1.1(b) viewed from this prism, which casts an obligation on respondent Nos.1 to 4 to ensure the respondent Nos.5 to 7 does not become private entities, makes it clear that Reference Entities function at the behest of respondent Nos.1 to 4 herein accordingly.

53. Similarly, as per Clause 7.3.4 obligation is cast upon the Borrowers to deliver unaudited and audited financial statements in respect of the Reference Entity, Borrowers, the Guarantors and the Obligors for each financial quarter to the Lenders within 15 (fifteen) calendar and 45 (forty-five) calendar days of the end of each financial year respectively. An obligation as per Clause

7.4 of the Facility Agreement is upon respondent Nos.1and 2 to maintain Gross Primary Debt to LTM EBITDA Ratio in respect of respondent Nos.6 and 7 at certain levels at given points of time.

54. Moreover, it is also pertinent to note that the Facility Agreement categorically records at Clause 2.3 (a) (i) that the Borrowers shall apply the amounts borrowed towards repayment of existing loans/advances extended by respondent No. 6/MRIL to the Borrowers or infusion of proceeds into respondent No.6/MRIL solely for the purpose of reduction of debt.

55. The communications as reproduced above at paragraph 47 along with a reading of Clause 2.3 of the Facility Agreement, which states one of the reasons for availing the Facility as '*Repayment of the existing loans/ advances extended by MRIL to the Borrowers or infusion of proceeds into MRIL solely for the purpose of reduction of debt',* is clearly indicative of the fact that respondent No. 1 and 2 along with the group-companies functioned as a single economic entity.

56. The above-discussed Clauses of the Facility Agreement and communication between various respondents, viewed from the touchstone of settled-law, the position that clearly emerges is, respondent Nos. 1, 2 and 5-8 form part of a tight group structure with strong organizational and financial links, with respondent No. 3 and 4 being part of the Promoter Group of the various respondents, and in fact functions as a single economic entity. The organizational structure with various respondents

herein being part of promoter group *inter-se* the respondents, none of the companies are stranger to the Facility Agreement. That apart, the communications bring to light the various negotiations being initiated by non-signatories, as well as the mutual intention to bind the non-signatories to the Facility Agreement. Therefore, I am of the opinion that the matter is an apt case for invoking the 'Group Companies Doctrine' and bind the respondent Nos. 5, 6 and 7/applicants herein who are non-signatories to the Facility Agreement.

57. In so far as the pleas taken by the Counsels for respondents by relying upon the various Clauses of the Facility Agreement are concerned, those cannot be read in isolation overlooking other Clauses, referred above. They had relied on the judgment of the Supreme Court in ***Indowind (supra),*** wherein while considering an appeal arising out of an application filed under Section 11 of the Act, the Court held that against the anvil of Section 7, in the absence of an arbitration agreement between the parties, no claim against any party or no dispute thereon can be the subject-matter of reference to an Arbitrator. Similarly, Reliance was also placed on judgments restricting the applicability of Section 9 to non-signatories and third parties viz. ***1. Kanta Vashist (supra) 2. Ajay Makhija (supra) 3. Mukesh Hans (supra)*** **and** ***4. Mcleod Russel India Limited (supra)***. Suffice it to state that owing to the invocation of 'Group Company Doctrine', these judgments including ***Indowind (supra)*** find no applicability in the facts of this case.

58. It is an undisputed fact that the respondent Nos.5 to 7 are

referred to in the Facility Agreement as 'Reference Entity' as per Clause 1.1.1(sss). As per Clause 4.1 the obligation to repay is cast upon the Borrowers. However, what needs to be considered at this stage is whether *prima facie* any obligation / liability accrues upon respondent Nos. 5 to 7 being the 'Reference Entities' to the Facility Agreement.

59. Clause 5 of the Facility Agreement lays down the various security arrangement / documents to secure the various obligations and undertakings of the Borrowers, Guarantors and Obligors. It is an admitted position of the parties that it is pursuant to Clause 5.1 (a) that the Share Pledge Agreement was entered into by and between respondent Nos. 1, 2, 8, and Security Trustee whereby 4,16,66,666 compulsory convertible preference shares in the share capital of respondent No. 5 (Target) were pledged. Similarly, as per Clause 5.1(e), a letter of comfort is to be issued by MRIL / respondent No.6 in a form acceptable to the Lenders / petitioners. Clause 1.1.1 (xxx)(viii) of the Facility Agreement brings within the ambit of 'Security Documents', any Security Document to be executed pursuant to provisions of Clause 5 of the Agreement. A conjoint reading Clause 5.1(a), Clause 5.1(e) and Clause 1.1.1 (xxx)(viii) *prima facie* mandates respondent Nos. 5 and 6 to create Security Document (Share Pledge Agreement and letter of comfort respectively) for securing the credit facility under the Facility Agreement.

60. Having said that the provisions of the Facility Agreement as noted above and the e-mail on behalf of the petitioner No.1

as referred to in Para 47(2) & (3) above also indicates that respondent Nos. 3 and 4 as guarantors exercised control over the respondent Nos. 6 & 7. Interestingly, in response to the e-mail referred to in Para 47 (2), respondent No. 3 / Aditya Khaitan in his e-mail, with a copy to respondent No. 4, stated as under:

> *"Thank you for your mail and I have noted the concerns you have put out. Our intention has been to ensure that the entire amount is repaid and we have already put some actions in play which your team is fully aware of.*
> *I would like to come across to meet you and explain the plan and request if you could give me a time early next week.*
> *Kind regards."*

61. A reading of the e-mail does indicate that respondent Nos. 3 & 4 had not denied their control over the entities being respondent Nos. 6 & 7. They being the guarantors to the Facility Agreement, Clause 1.1.1 (ooo) which defines the Promoter Group to include '*any other controlled entities of the guarantor'*, shall trigger. Schedule 6.1.2 (d) to the Facility Agreement clearly reveals that respondent Nos.1, 2, 4 & 7, form part of Promoter Group of respondent No.5; respondent Nos. 1, 2, 3, 4 and 6 form part of Promoter Group of respondent No. 7; and respondent Nos. 1, 2, 3, 4 and 7 form part of Promoter Group of respondent No. 6. Moreover, respondent Nos. 3 and 4 are the Managing Director and Director in respondent No. 6 and *vice-versa* in respondent No. 7. The Facility Agreement clearly stipulates the obligation of the Promoter Group under Clauses

5.10 and 5.11 to include that they shall provide *'Top-up shares'* upon breach of collateral cover in terms of Clauses 5.8 and 5.9. Even clause 5.11 obligates the Promoter Group to provide cash collateral in view of *'Top-up shares'*. That apart Clauses 7.2.4 and 7.2.6 of the Facility Agreement also obligates the following: -

> *"7.2.4 The Guarantors and the Promoter Group shall at all times hold shares aggregating to a value of INR 750,00,00,000 of Eveready & Mcleod Russell free and clear from Encumbrance.*
>
> *7.2.6 The Guarantors and the Promoter Group shall not Encumber any shares held by the Guarantors and the Promoter Group in the Reference Entities save and except as disclosed by the Promoter Group as on the date of this Agreement or as provided under this Agreement or as required to be Encumbered as "top-up" shares in accordance with the provisions of existing security creation arrangements."*

62. Similarly, obligations have been listed on the Promoter Group under Clause 7.2.3.

63. The plea of the Counsels for the respondents was that respondent Nos. 5, 6 & 7 are not controlled entities of the guarantors. This plea is belied by their own e-mails on behalf of the guarantors, i.e., respondent Nos. 3 & 4, which have been referred above. It is also necessary to state, reading of the Facility Agreement *prima facie* reveals that every Reference Entity is part of Promoter Group but every entity which forms part of the Promoter Group is not a Reference Entity. It appears, for this primary reason, a mention to a Reference Entity has not been expressly made in the definition of

Promoter Group under Clause 1.1.1 (ooo), but the stipulation thereunder that *'any controlled entity of the guarantors'* would be construed as a part of the Promoter Group, surely suggest that Reference Entities being 5, 6 & 7 must be construed to mean Promoter Group. Thus, the plea of Counsels for respondents that no obligation has been cast upon respondent Nos. 5, 6 & 7 is therefore *prima facie* unsustainable in view of my conclusion above. I am conscious that a provision imposing any liability / obligation has to be strictly construed but this being a Section 9 Petition, the final adjudication in that regard has to be by the arbitral tribunal.

64. The Judgments referred by the Counsels for the respondents viz. ***Elof Hansson (supra); Ajay Makhija (supra); Balmer Lawrie & Co. (supra); Bacha F. Guzder (supra),*** in support of their plea that lifting of corporate veil has to be specifically pleaded and proved would have no relevance in view of my conclusion above, which is based on the interpretation of the Facility Agreement and on facts.

65. In so far as the judgment of the Calcutta High Court in the case of ***Mcleod Russel (supra),*** relied upon by Mr. Sethi and Mr. Makkar, is concerned, the same arises from an appeal filed against an order passed in application under Order XXXIX Rule 1 & 2 therein, unlike the case in hand, which is a petition under Section 9 of the Act. The doctrine of 'Group of Companies', was first invoked by the Supreme Court in ***Chloro Controls (supra)*** to bind non-signatory companies to an arbitration clause under an application filed under Section 11. The said Doctrine

has been made applicable by me in the facts of the case, especially on a reading of the terms of the Facility Agreement along with various communications exchanged between the parties.

66. That apart, in the said judgment, the terms of the Facility Agreement were not considered by the Court in the manner, I have done in this case to come to a conclusion on the *prima facie* liabilities of respondent Nos. 5 to 7 herein. So, it follows the judgment is clearly distinguishable.

67. At this stage, I may state that in the interim order dated December 13, 2019 this Court has restrained the respondents including 5, 6 & 7 in the following manner:

1. carrying out any change in its capital structure or,

2. any corporate or debt restructuring and;

3. restraint from selling, transferring, alienating, disposing, assigning, dealing or encumbering or creating third party rights on their assets.

68. These three directions according to me are justified in view of the obligations which have been cast upon respondent Nos. 5, 6 & 7 in the Facility Agreement and the same cannot be interfered with.

The applications are dismissed.

V. KAMESWAR RAO, J

NOVEMBER 23, 2020*/aky/ak/jg*