# Neelkanth Mansions And Infrastructure ... vs Urban Infrastructure Ventures Capital ... on 7 December, 2018

## Author: R.D. Dhanuka

## Bench: R.D. Dhanuka

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vai

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISIONAL

COMMERCIAL ARBITRATION PETITION NO.13 OF 2017
WITH
COMMERCIAL ARBITRATION PETITION NO.38 OF 2017
WITH
COMMERCIAL ARBITRATION PETITION NO.39 OF 2017
WITH
COMMERCIAL ARBITRATION PETITION NO.40 OF 2017
WITH
COMMERCIAL ARBITRATION PETITION NO.42 OF 2017
WITH
COMMERCIAL ARBITRATION PETITION NO.43 OF 2017
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WITH
COMMERCIAL ARBITRATION PETITION NO.60 OF 2017
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COMMERCIAL ARBITRATION PETITION NO.62 OF 2017
WITH
COMMERCIAL ARBITRATION PETITION NO.65 OF 2017
WITH
COMMERCIAL ARBITRATION PETITION NO.66 OF 2017
WITH
COMMERCIAL ARBITRATION PETITION NO.67 OF 2017
AND
COMMERCIAL ARBITRATION PETITION NO.68 OF 2017

1. Neelkanth Mansions and Infrastructures )
Private Limited (formerly known as Neelkanth )
Mansions Ltd.) A company incorporated under )
the Companies Act, 1956 and having their )
address at 5th Floor, Fine House, Anandji Lane, )
Ghatkopar (East), Mumbai - 400 077. )
)
2. Neelkanth Devansh Developers Private Limited )
A company incorporated under the Companies )
Act, 1956 and having its office at 5th floor, )
Fine House, Anandji Lane,Off. M.G. Road, )
Ghatkopar (East), Mumbai - 400 077. )
)
3. Neelkanth Soham Developers Private Limited )
A company incorporated under the Companies )
Act, 1956 and having its office at 5th floor, )
Fine House, Anandji Lane,Off.M.G.Road, )
Ghatkopar (East), Mumbai - 400 077. )
)
4. Neelkanth Kalindi Realtors Private Limited )
A company incorporated under the Companies )
Act, 1956 and having its office at 5th floor, )
Fine House, Anandji Lane,Off.M.G.Road, )
Ghatkopar (East), Mumbai - 400 077. ) ...Petitioners

....Versus....

1. Urban Infrastructure Ventures Capital Limited )

A company incorporated under the Companies )
Act, 1956 and having its office at 121-123, )



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Free Press House, Free Press Journal Marg, )
Nariman Point, Mumbai - 400 021. )
)

2. Urban Infrastructure Real Estate Fund )
a public limited company with limited liability )
incorporated in Mauritius and having its office )
at IFS Court, Twenty Eight, Cybercity, )
Ebene, Mauritius. )
)

3. Urban Infrastructure Venture Capital Fund )
st
a fund incorporated by Trust Deed of 31 January )
2006 and having its office at Free Press House, )
12th Floor, Nariman Point, Mumbai - 400 021. )
)

4. Urban Infrastructure Trustees Limited )
a company incorporated under the Companies )
Act, 1956 having its office at Free Press House, )
12th Floor, Nariman Point, Mumbai - 400 021. )
)

5. Jai Corp. Ltd. ("Jai Corp") )
a company incorporated under the Companies )
Act, 1956 and having its Registered Office )
at A-3 MIDC, Industrial Area, Nanded - 431 903 )
)
Jai Corp. Limited, 12B, Mittal Tower, B-Wing, )
1st Floor, Free Press Journal Marg, )
Nariman Point, Mumbai - 400 021. )
)

6. Sharanya Trading Private Limited )
Now known as Shinano Retail Private Limited )
a company incorporated under the Companies )
Act, 1956 and having its Office at 4th Floor, )
Court House, Lokmanya Tilak Marg, Dhobi )
Talao, Mumbai - 400 002. )
)

7. Neelkanth Somnath Realtors Private Limited )
A company incorporated under the Companies )
Act, 1956 and having its office at 5th floor, )
Fine House, Anandji Lane,Off.M.G.Road, )
Ghatkopar (East), Mumbai - 400 077. )
)

8. Neelkanth Ricelands Private Limited )
A company incorporated under the Companies )
Act, 1956 and having its office at 5th floor, )



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Fine House, Anandji Lane,Off.M.G.Road, )
Ghatkopar (East), Mumbai - 400 077. )
)
9. Nilayami Realtors Private Limited )
A company incorporated under the Companies )
Act, 1956 and having its office at 5th floor, )
Fine House, Anandji Lane,Off.M.G.Road, )
Ghatkopar (East), Mumbai - 400 077. )
)
10. Neelkanth Urban Developers Private Limited )
(earlier known as "Asim Realty Private Limited )
A company incorporated under the Companies )
Act, 1956 and having its office at Neelkanth )
Corporate IT Park, Plot No.240/240-1-8, )
Kirol Road, Vidyavihar (W), Mumbai -400086 )..Respondents

Mr.Gaurav Joshi, Senior Advocate, with Mr.Parimal K. Shroff, Mr.D.V. Deokar, Mr.Pinakin Modi, Mr.D. Parikh, Ms.J. Upadhyay and Ms.Ankita Roy, i/b Parimal K.Shroff & Co. for the Petitioners (Original Claimants) in Commercial Arbitration Petition No.13 of 2017.

Mr.Janak Dwarkadas, Senior Advocate, with Mr.Parimal K. Shroff, Mr.D.V. Deokar, Mr.Pinakin Modi, Mr.D.Parikh, Ms.J. Upadhyay and Ms.Ankita Roy, i/b Parimal K.Shroff & Co. for the Petitioners (Original Claimants) in Commercial Arbitration Petition No.52 of 2017.

Mr.Parimal K. Shroff, Mr.D.V. Deokar, Mr.Pinakin Modi, Mr.D.Parikh, Ms.J. Upadhyay and Ms.Ankita Roy, i/b Parimal K.Shroff & Co. for the Petitioners (Original Claimants) in in all other Commercial Arbitration Petitions.

Mr.Shyam Mehta, Senior Advocate, with Mr.Aditya Bapat, Mr.Sandeep Junnarkar and Mr.Yash Joglekar i/b Junnarkar & Associates for the Respondent No.1 (Original Respondent No.4).

Mr.Zal Andhyarujina, with Ms.Shruti Sardesai, Ms.Hetal Thakore, Ms.Jyoti Ghag and Mr.Kunal Parekh i/b Dua Associates for the Respondent No.2 (Original Respondent No.2).

Mr.Navroz Seervai, Senior Advocate, with Mr.Firdosh Pooniwala,

Mr.Arif Doctor, Mr.Sandeep Junnarkar and Mr.Yash Joglekar i/b Junnarkar & Associates for the Respondent Nos.3 and 4 (Original Respondent Nos.1 and 3).



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Mr.Cyrus Ardeshir, with Mr.Murari Madekar and Mr.Sachin Kudalkar i/b Madekar & Co. for the Respondent No.5 in Comm. Arbitration Petition Nos.13/2017, 45/2017, 46/2017, 39/2017, 58/2017, 44/2017 and 47/2017 (Original Respondent No.5).

Dr.Birendra Saraf with Mr.Rajeev Carvalho with Mr.Amey Nabar and Mr.Gaurav Thakur I/b M/s.Dayal & Associates for the Respondent No.6.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 11TH SEPTEMBER, 2018
PRONOUNCED ON : 7TH DECEMBER, 2018

JUDGMENT :

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1. By petition filed under section 37 of the Arbitration and Conciliation Act, 1996 the petitioners who were the original claimants before the learned arbitrator, the petitioners have impugned the order dated 5th December, 2016 passed by the learned arbitrator accepting the plea of the jurisdiction raised by the respondent nos.1 to 6 in Case Nos.6 to 10 of 2015 before the learned arbitrator and holding that the learned arbitrator did not have jurisdiction to adjudicate the disputes raised by the petitioners relating to the parties other than the parties to respective 6 Subscription cum Shareholders Agreements dated 18th October, 2008.

2. The learned arbitrator has ordered the deletion of the claimant nos.1, 2, 3, 4 and respondent nos.2, 4, 5, 6, 7, 9 and 10 from the array of parties and further directing the claimants to either file an amended statement of claim within four weeks from December 2016 by deleting those parties and confine their claims disputes carbp13-17g.doc arising from Subscription cum Shareholders Agreements dated 18 th October,2008 or to file a fresh statement of claim within the said period. The respondents to these petitions were the respondents in the arbitral proceedings. For the sake of convenience, the parties are referred to as arrayed in the statement of claim in the later part of this judgment.

3. Since all the parties have addressed this Court in Commercial Arbitration Petition No.13 of 2017 arising out of Case No.5 of 2015 and have agreed that the outcome of the said commercial petition would decide the remaining 24 petitions. The facts in the said Case No.5 of 2012 and the arguments

advanced by the learned counsel for the parties therein are summarized and are dealt with in the later part of this judgment.

Case of the Claimants is as under :-

4. There are two groups which had entered into the subject agreements and had formed Special Purpose Vehicles. The Neelkanth Group (NG) of which the claimants are a part and another group is Urban Group (UG / Urban Group) of which some of the respondents are part is owned and controlled by Mr.Anand Jain. Insofar as the Neelkanth Group is concerned, the same is owned and controlled by Patel family. The respondent no.1 is 100% subsidiary of the respondent no.5 i.e. Jai Corporation Limited and is carbp13-17g.doc also an Investment Manager to the respondent no.1 i.e. Urban Infrastructure Trustee Limited and the respondent no.3 i.e. Urban Infrastructure Venture Capital Fund and the Indian Investment Advisor to the respondent no.2 i.e. Urban Infrastructure Real Estate Fund.

5. The respondent no.2 is Overseas Private Equity Fund incorporated under the bye-laws prevailing in Republic of Mauritius having separate and independent investment activities. The respondent no.1 is its Indian Investment Advisor and represented it in all dealings with the Neelkanth Group. The respondent no.3 is a Domestic Fund established in the form of a trust and registered with the Securities and Exchange Board of India as a Venture Capital fund under the Securities and Exchange Board of India (Venture Capital Funds) Regulations, 1996 by the respondent as the Settlor. The respondent no.1 is its Indian Investment Advisor and represented it in all dealings with the Neelkanth Group.

6. The respondent no.1 is the trustee company of its domestic fund. The respondent no.5 is another lead company of the Urban Group holding the company of the respondent no.1. The respondent no.6 is another company of Urban Group. Dharti Investments and Holdings Private Limited and Vinamra Universal Traders Private Limited are other companies of the said Urban carbp13-17g.doc Group. Urban Group was in all the dealings with the Neelkanth Group was represented by Mr.Parag Parekh and/or Mr.Anand Jain and all decisions relating to the projects were taken by a Managing Committee formed by both groups. Till 2013, no board meetings of various Special Purpose Vehicles were formally held and the minutes of meeting were merely recorded based on these decisions.

7. Some time in the year 2006, Urban Group through Mr.Anand Jain approached Patel family i.e. Neelkanth Group and represented that Urban Group wanted to invest in real estate projects through their various Group companies. The Urban Group was allegedly aware of the Neelkanth Group's expertise and capabilities in execution of real estate projects and were desirous of investing in several projects which would thereafter be jointly developed.

8. Some time in the month of July / August, 2006, Mr.Anand Jain and Mr.Parag Parekh enquired with Neelkanth Group whether they were willing to jointly develop the Vidyavihar project. Initially, the Neelkanth Group informed Mr.Anand Jain and Mr.Parag Parekh that they were not willing to enter into any agreement to jointly develop only the Vidyavihar property. Mr.Anand Jain and Mr.Parag Parekh therefore informed the Neelkanth Group that the "Urban Group"

would jointly develop both Vidyavihar properties as well as Sterlite carbp13-17g.doc properties with the Neelkanth Group.

9. Some time in the month of August / September, 2006, an oral agreement was allegedly entered into between the Neelkanth Group and Urban Group wherein it was agreed that various projects would be developed through different Special Purpose Vehicles in and agreed ratio of shareholding. It was further allegedly agreed that the Urban Group would bring in funds into the Special Purpose Vehicles including any shortfall in investments required to be infused by the Neelkanth Group and that the excess funding brought in by the Urban Group over and above their pro-rata share would carry interest at an agreed rate.

10. It was also allegedly agreed that any such excess funding by the Urban Group could be repaid from share in the surplus of the Neelkanth Group or from the profits earned from the project. It was further agreed that the said understanding would form an integral part of the Shareholders Agreements between the Neelkanth Group and the Urban Group in respect of all Special Purpose Vehicles projects. It is the case of the petitioners that in or about September / October, 2007, the said oral alleged understanding was reduced to writing and physically exchanged between the parties but updated to record the subsequent developments / investments. Though it remained to be signed, it was allegedly acted upon by the parties.

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11. In the month of August / September, 2006 based on the above agreement, it was allegedly agreed and understood that the Neelkanth Group was to bring its know-how at no cost and existing properties without revaluation whilst the Urban Group would bring in the required capital.

12. In the year 2006-07, Mr.Parag S. Parekh, the Managing Director of Urban Infrastructure Venture Capital Limited i.e. the respondent no.4 was nominated to be the sole person in-charge of the Joint Venture with Mr.Mohan V. Patel and others and their group companies i.e. Neelkanth Group. In the month of August / September, 2006, the first project identified for the Joint Venture business was acquisition, development and marketing of Retail Mall- cum-Commercial Project known as "Neelkanth Palacia" at Vidyavihar (now known as "Neelkanth Business Park") i.e. the first project.

13. In the month of August / September, 2006, the parties identified the second project to be undertaken by the two groups in joint venture i.e. for the acquisition, development and marketing of an IT Park at Vidyavihar (West) belonging to one Sterlite Industries Limited (known as "Neelkanth Corporate Park"). In the year 2006 the Urban Group nominated one of its companies as a Special Purpose Vehicle for the Joint Venture business viz. Asim Realty Private Limited, a company incorporated by the respondent no.4 by their carbp13-17g.doc Directors Dinesh Kumar and Tushar Sarda. It is the case of the claimants that subsequent to the infusion of funds by the Urban Group and Neelkanth Group, the shares held by Dinesh Gupta and Tushar Sarda were transferred to the respondent no.4. The said company was subsequently renamed Neelkanth Urban Development Private Limited. The equity shares and/or shareholding in the said Neelkanth Urban Development

Private Limited between the Urban Group and Neelkanth Group were initially agreed to be in the ratio of 50:50. It was subsequently allegedly agreed between the Urban Group and Neelkanth Group that the equity shares and / or shareholding in the said Neelkanth Urban Development Private Limited would be between the Neelkanth Group and Urban Group in the ratio of 51% and 49% respectively.

14. On 19th October, 2006, the Inter Corporate Deposit of Rs.20.75 crores was given by one Dharti Investments, the company of Urban Group to the petitioners to partly finance its investment in the Special Purpose Vehicles / project. The Neelkanth Group infused the same amount in Asim Reality as share and debenture substantiate application money. The said Dharti Investment also directly gave another Inter Corporate Deposit of Rs.29.25 crores to Asim Realty Private Limited. The said Inter Corporate Deposit of Dharti Investments was allegedly repaid by the claimants i.e. carbp13-17g.doc Neelkanth Urban Development Private Limited within a period of 32 days i.e. before the due date.

15. On 19th October, 2006, at the request of the Urban Group, the Neelkanth Group executed another Inter Corporate Deposit Agreements between the claimant no.1 and Dharti Investment and Holding Limited for a sum of Rs.290.75 crores. On 19 th February, 2007 the said Dharti Investment gave Inter Corporate Deposit of Rs.60.00 crores to the claimant no.1 to partly finance its investment in the first project. The Neelkanth Group infused the said amount in Asim Reality Private Limited as share and debenture subscription amount. It is the case of the claimants that in the fund flow statements exchanged between the Neelkanth Group and Urban Group from time to time, these Inter Corporate Deposits had been shown as the excess investment / infusion by Urban Group in the joint ventures, which it was submitted in terms of the alleged oral understanding between the parties.

16. Between 2006 and 2007, the purpose of making payment by the Special Purpose Vehicles i.e. Asim Realty Private limited as security deposit for acquiring development rights in the Vidyavihar project, monies were required to be infused. Accordingly in accordance with the alleged oral agreement, the Urban Group through its companies i.e. including the respondent no.3 and the carbp13-17g.doc respondent no.1 and the said Dharti Investments and Holdings Private Limited infused the monies in the Special Purpose Vehicles in the form of share application money, debenture application money and the Inter Corporate Deposit.

17. In the month of February, 2007, for the purpose of joint development, various residential projects, including township development were identified in various locations such as redevelopment of Vartak Nagar at Thane, redevelopment of Garodia Nagar, at Ghatkopar, Panvel, Khalapur and Bhivandi areas. It was alleged to have been agreed that the shareholding and/or profit sharing ratio in those Special Purpose Vehicles for those projects would be 60:40 Neelkanth Group and Urban Group respectively.

18. In the month of March, 2007 based on the alleged oral understanding, it was decided that the development of the properties at Harigram, Kewale and Pale in Panvel taluka would be executed by the Special Purpose Vehicle, which was already incorporated by Neelkanth Group known as

Neelkanth Riceland Private Limited and the board meetings were recorded to be held to enter into the Memorandum Of Understandings for acquisition of lands. The Memorandum Of Understandings were also entered into for acquisition of lands. According to the claimants, those steps were taken without even Neelkanth Group and Urban Group even entering carbp13-17g.doc into any Shareholders Agreements.

19. In the month of July, 2007, Urban Group was allegedly aware that Neelkanth Group had previously acquired large pieces of lands in Khalapur village of Khalapur taluka. Mr.Parag Parekh suggested that the Neelkanth Group shall acquire further lands in Khalapur taluka aggregating to around 600 acres for the purposes of jointly developing of a township. The board meetings were recorded to be held to enter into the Memorandum Of Understandings for the acquisition of lands. The Memorandum Of Understandings were also entered into for acquisition of lands. Thus the steps were taken without the two groups even entering into any Shareholders Agreements. The acquisition of Khalapur lands was the third project.

20. It is the case of the claimants that subject to the said oral agreement, the Urban Group wanted projects to be Special Purpose Vehicle specific. The Urban Group accordingly informed the Neelkanth Group that the Khalapur project ought to be undertaken by any Special Purpose Vehicle. Accordingly, Nilayami Realtors Private Limited was introduced as a Special Purpose Vehicle for executing the Khalapur project.

21. On 24th August, 2007, a Subscription-cum-Shareholding Agreement was executed between the respondent no.1, the claimant no.1 and Asim Realty Private Limited ("First Shareholder carbp13-17g.doc Agreement") (Hereinafter referred to as "SHA"). On 20 th September, 2007, similarly another Subscription-cum-Shareholding Agreement was entered into between the respondent no.2, claimant no.1 and Neelkanth Riceland Private Limited which is the second Subscription- cum-Shareholding Agreement (Hereinafter referred to as "SSHA"). On 27th September, 2007, with a view to repay the amount of the Inter Corporate Deposit of Rs.50.00 crores given by Dharti Investments and Holdings Private Limited, another Inter Corporate Deposit of Rs.50.00 crores was given to the claimant no.1 by Vinamra Universal Traders Private Limited. The said amount was simultaneously utilized by Neelkanth Group to repay Inter Corporate Deposit of Rs.50.00 crores given by Dharti Investments and Holdings Private Limited.

22. On 23rd October, 2007, in accordance with the oral agreement, the said Vinamra Universal Traders Private limited, a company of Urban Group gave another Inter Corporate Deposit of Rs.8.00 crores to the claimant no.1 which amount was used by the claimant no.1 to infuse the moneys into three Special Purpose Vehicles / projects viz. Riceland / Nilayami and Somnath.

23. In the month of October, 2007, the claimant no.1 repaid a sum of Rs.24.56 crores from its own resource i.e. Rs.20.00 crores in the year 2007 and the balance amount in the year 2010 out of carbp13-17g.doc Rs.84.00 crores, which was to be paid to Vinamra Universal Traders Private Limited under two Inter Corporate Deposits paid by it to the claimant no.1. On 8th November, 2007 in accordance with the alleged oral agreement, a further Inter Corporate Deposit of Rs.6.00 crores was given to the claimant no.1 by Vinamra Universal Traders Private Limited which amount was

alleged to have been used by the petitioner no.1 to infuse the moneys in the first project i.e. known as Neelkanth Business Park.

24. On 20th November, 2007 in accordance with the alleged oral agreement, a further Inter Corporate Deposit of Rs.20.00 crores was given to the claimant no.1 by Vinamra Universal Traders Private Limited to infuse moneys in three Special Purpose Vehicles / projects viz. Riceland / Nilayami and Somnath. On 22 nd April, 2008, a document titled Memorandum Of Understanding (termed as "Supplemental Agreement") embodying the terms of the concluded oral contract arrived at in August / September, 2006 was prepared and was faxed to the respondent no.1. The said document was however, not signed by the parties.

25. On 26th June, 2008, a Shareholders Agreement was entered into between the claimant no.1, respondent no.2 and Nilayami Realtors Private Limited i.e. the third Shareholders Agreement. On 18th October, 2008, three further Shareholders carbp13-17g.doc Agreements were entered into between the respondent no.4 as trustee of the respondent no.3 of Urban Group, the claimant no.1 and various Special Purpose Vehicles i.e. 4 th to 6th Shareholders Agreements. (Hereinafter referred to as the said SHA).

26. It is the case of the claimants that initial shareholding pattern in all four Special Vehicle Purposes was the claimant no.1 51.10% and the respondent no.1 48.90% in the Special Purpose Vehicle and NUDPL i.e. Neelkanth Urban Development Private Limited. In case of Somnath, Neelkanth Devansh had 81.63% shareholding, whereas the respondent no.1 had 18.37%, in case of Riceland, Neelkanth Kalindi were 60% and the respondent no.2 had 18%, the respondent no.3 had 20%, respondent no.5 0.8% and Shinano 1.20%. In Nilayamo, Neelkanth Soham 60%, respondent no.2 23.85%, respondent no.3 13.5%, Jai Corp 1.06% and Shinano 1.59%.

27. It is the case of the claimants that during the period between 20th August, 2008 and 5th July, 2011, based on the Supplemental Agreement / Memorandum Of Understanding, various fund flow statements were exchanged between the parties which sets out the funding of Neelkanth Group and Urban Group showing that the Inter Corporate Deposits issued by the Urban Group companies as their excess investment.

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28. It is the case of the claimants that on 2 nd April, 2007, 25th January, 2008 and 5th May, 2008 various emails / minutes of meetings were exchanged between the parties thereby confirming that the respondent nos.1 to 6 are part of the Urban Group. According to the claimants, the understanding as recorded in the Supplemental Agreement was acted upon by the parties. In the month of September / October, 2008, due to global recession and the crash of financial markets, the Urban Group stopped infusing moneys into any of the Special Purpose Vehicles / projects despite continuous assurance given by Mr.Parag Parekh to the Urban Group

29. In the month of February, 2010, the respondent no.1 informed the Neelkanth Group that the Urban Group wanted to switch the excess investment /capital brought in by Urban Group in the

form of Inter Corporate Deposit from Vinamra Universal Traders Private Limited to the respondent no.1. On 23 rd February, 2010, in order to switch the excess investment / capital, the respondent no.1 issued the Inter Corporate Deposit to the claimant no.1 for Rs.36.00 crores which was used by the claimants to repay the said amount to Vinamra Universal Traders Private Limited on 25 th February, 2010. On 25th February, 2010 the claimant no.1 alleged to have paid Rs.20.00 crores to Vinamra Universal Traders Private Limited towards part repayment of the other Inter Corporate Deposits from its carbp13-17g.doc own resource.

30. It is the case of the claimants that on 29 th March, 2010, the respondent no.1 made the Inter Corporate Deposit of Rs.23.44 crores to the claimant no.1. According to the claimants, in the month of March, 2010, on the suggestion of the Urban Group, it was agreed to transfer the investment of Neelkanth Group in three Special Purpose Vehicles i.e. Neelkanth Somnath, Neelkanth Riceland and Nilayami to Neelkanth Soham, Neelkanth Kalindi and Neelkanth Devansh along with the excess investment of th Urban Group. It was alleged that the respondent no.1 would issue three Inter Corporate Deposits to (i) Neelkanth Soham in the sum of Rs.14.84 crores, (ii) Neelkanth Kalindi in the sum of Rs.24.80 crores and (iii) Neelkanth Devansh in the sum of Rs.19.80 crores which amounts were to be utilized to simultaneously repay the earlier Inter Corporate Deposits dated 23rd February, 2010 and 29th March, 2010 given by the respondent no.1.

31. It is the case of the claimants that on 31 st March, 2010, the respondent no.1 placed Inter Corporate Deposit of Rs.24.80 crores to Neelkanth Kalindi, Inter Corporate Deposit of Rs.19.80 crores with Neelkanth Devansh and Inter Corporate Deposit of Rs.14.84 crores with Neelkanth Soham.

32. It is the case of the claimants that on 31 st March, 2010, carbp13-17g.doc Neelkanth Devansh, Neelkanth Kalindi and Neelkanth Soham paid the amount received from the respondent no.1 as suggested by Urban Group as part consideration for purchase of 60% shareholding along with debentures in the three Special Purpose Vehicles to the claimant no.1. The claimant no.1 in turn repaid the said amount to the respondent no.1 against the amounts received under the earlier Inter Corporate Deposits.

33. It is the case of the claimants that since the Urban Group failed to sign the 'Supplemental Agreement' though the same was acted upon and since the Urban Group was not willing to either infuse further fund or to go back to on the personal or corporate guarantee given by the Neelkanth Group for raising finance for NUDPL, formerly known as Asim Realty Pvt. Ltd., both the groups decided to separate and distribute the assets of Special Public Vehicle except NUDPL. Several meetings were accordingly held between Urban Group and Neelkanth Group for arriving at for settlement and/or finding out a solution.

34. It is the case of the claimants that on 12 th October, 2010, the Neelkanth Group sent an e-mail to the Urban Group wherein the assets of three Special Purpose Vehicles excluding NUDPL were valued at Rs.463 crores. The valuation sheet attached to the said e- mail setout the terms of the distribution of the assets. During the carbp13-17g.doc process of arriving at settlement, Mr.Parag Parekh of Urban Group sent an e-mail dated 19th August, 2011 and insisted that Mr.Mohan Patel of

Neelkanth Group and Mr.Anand Jain of Urban Group shall meet to discuss settlement.

35. During the period between October 2011 and 11 th June, 2013, both the groups decided to approach Mr.Krishnamurthy for settlement of disputes between them including ICDAs issued by the respondent no.1. Several meeting were allegedly held between both the groups with the said Mr.Krishnamurthy to resolve the differences between the parties and to arrive at a settlement. According to the claimants, pursuant to the meetings between two groups with the said Mr.Krishnamurthy, a Memorandum of Understanding for distribution of assets and final settlement was sent by e-mail dated 9 th February, 2012 along with annexures from Mr.Mukesh Patel to Mr.Parag Parekh which included investments of all entities. According to the claimants, one of the annexures to the said Memorandum of Understanding was a copy of the 'Supplemental Agreement' faxed in the year 2008.

36. On 14th February, 2012, Mr.Parag Parekh sent a e-mail to Mr.Mukesh Patel in regard to basic principles of asset distribution which was allegedly finalized in the meeting with Mr.Krishnamurthy. It was suggested by Mr.Parag Parekh that the group shall execute carbp13-17g.doc final documents rather than entering into an Memorandum of Understanding.

37. On 24th February, 2012, Mr.Amit Gupta sent an e-mail to Mr.Mukesh Patel contending that if Kewale, Harigram along with Bhiwandi and Khalapur properties were to come to Urban Group, the Urban Group shall still to receive the amount around Rs.40 crores from the Neelkanth Group. It is the case of the claimants this was inline with the alleged agreed principle of asset distribution including excess investments by way of ICDA along with interest + 40% shares of Urban Group.

38. It is the case of the claimants that in breach of Supplemental Agreement / Memorandum of Understanding on 14 th March, 2012, the respondent no.1 issued a notice to the claimants calling upon them to repay the ICD amounts along with interest. According to the claimants, as per the Supplemental Agreement / Memorandum of Understanding, the excess funds were to be repaid only from the surplus of the projects undertaken by the Special Purpose Vehicles (SPVs).

39. During the period between 4th August, 2012 and 9th August, 2012, the claimants paid initial sum of Rs.5 crores to UIVCF, the respondent no.3 herein as the lead company of the Urban Group. According to the claimants, the said amount was paid by the carbp13-17g.doc respondent no.10 to NMIPL i.e. the claimant no.1 on 20 th August, 2012 and the said amount was paid on the same day by the respondent no.10 to UIVCF, the respondent no.3 herein.

40. It is the case of the claimants that in breach of the Supplemental Agreement / Memorandum of Understanding, the respondent no.1 issued a statutory notice under section 434 of the Companies Act, 1956 on 1st November, 2012 to the claimant no.3, claimant no.4 and claimant no.2 demanding a sum of Rs.22,42,63,736/-, Rs.37,47,80,368/- and Rs.29,92,19,811/- respectively. The respondent no.1 also demanded the amount from the claimant no.1 as guarantors for claimant no.2.

41. On 20th November, 2012, the Neelkanth Group through their advocates' letter replied to the statutory notice and denied all the alleged liabilities setout in the said statutory notice dated 1st

November, 2012. On 21st November, 2012, the claimant nos. 2, 3, and 4 also replied to the statutory notices issued by the respondent no.1 and denied the liability setout in the said statutory notice. On 18th December, 2012, the respondent no.1 filed three separate company petitions bearing nos. 31, 33 and 38 of 2013 against the claimant nos.3, 4 and 2 respectively in this Court.

42. On 22nd October, 2013, the Neelkanth Group and others issued five notices to some of the companies of the Urban Group carbp13-17g.doc and invoked the alleged arbitration agreement under the Shareholders Agreements read with the Supplemental Agreement excluding the first Shareholders Agreement. On 15 th November, 2013, the respondent no.2 i.e. Urban Infrastructure Real Estate Fund, (UIREF) denied the allegations made in those five notices. On 15 th November, 2013, the respondent nos. 1 and 3 sent reply to the notices invoking arbitration agreement and denied the allegations made therein. They also contended that they were not the parties to the Subscription cum Shareholders Agreements.

43. On 2nd April, 2014, the respondent no.1 filed a summary suit bearing nos.477 of 2014, 478 of 2014 and 398 of 2014 against the claimant nos.4, 3, 2 and others based on the same Inter Corporate Deposit Agreements dated 31st March, 2010 against the claimants and other two group companies of Neelkanth Group for recovery of amounts. On 9th May, 2014, by a common order in Company Petition Nos.31 of 2013, 38 of 2013 and 33 of 2013, this Court directed the claimant no.3, claimant no.2 and claimant no.4 respectively to pay a sum of Rs.30,74,86,986/- Rs.38,51,35,213/- and Rs.23,04,59,942/- respectively to the respondent no.1 within 14 weeks from the date of the said order and made it clear that in case of the default, those petitions would stand admitted. The claimant nos. 3, 4 and 2 filed a separate appeals against the common carbp13-17g.doc judgment and order dated 9th May, 2014 before the Division Bench of this Court.

44. On 8th September, 2014, the claimant no.1 and others once again invoked alleged arbitration agreement by one consolidated notice and served a copy of the notice to the respondent no.1 and others. On 9th December, 2014, the claimant nos. 1 to 6 filed an application under section 11(6) read with sections 11(9) and 11(12) of the Arbitration and Conciliation Act, 1996 being the Arbitration Petition No.12 of 2015 inter-alia praying for appointment of an arbitrator in regard to the disputes and differences between Neelkanth Group and Urban Group before the Hon'ble Supreme Court. In the month of August, 2015, the claimants filed an impleadment application in the said Arbitration Petition No.12 of 2015 before the Hon'ble Supreme Court inter-alia praying for impleadment of respondent nos.3 to 6.

45. It is the case of the claimants that the said Arbitration Petition No.12 of 2015 filed before the Hon'ble Supreme Court was allowed to be withdrawn in view of the statement made by the respondent no.2 and respondent no.4 that they were agreeable to appoint Shri Justice R.M. Lodha, former Chief Justice of India as the sole arbitrator in respect of all the agreements instead of the named arbitrator. It is the case of the claimants that in view of the said carbp13-17g.doc statement made by the respondent nos.2 and 4, the claimant no.1 withdrew the said Arbitration Petition No.12 of 2015 leaving all other questions to be decided by the sole arbitrator.

46. On 9th March, 2016, the Appellate Bench of this Court dismissed all the three appeals filed by the respondent nos. 3, 4 and 2 impugning the common order dated 9th March, 2016 passed by the Company Court in winding up proceedings.

47. The claimant nos.2, 3 and 4 thereafter filed a Special Leave Petition impugning the order dated 9th March, 2016 before the Hon'ble Supreme Court on 8th April, 2016. The Hon'ble Supreme Court disposed of the said Special Leave Petition and observed that since the learned arbitrator is in seisin of the dispute, the learned arbitrator shall proceed with the arbitration proceedings uninfluenced by any of the findings and observations made by this Court in the said order dated 9th March,2016 passed by the Division Bench of this Court in the appeals preferred by the claimant nos.2, 3 and 4.

48. The claimants thereafter filed a statement of claim before the learned arbitrator claiming various reliefs. On 8 th February, 2016, the respondent nos.1 to 6 filed an application under section 16 of the Arbitration Act before the learned arbitrator on various grounds. On 5th March, 2016, the claimants filed reply to the application filed by the respondent nos. 2 to 6 and on 14th March, 2016 filed reply to the carbp13-17g.doc application filed by the respondent no.1 under section 16 of the Arbitration Act.

49. By an order dated 5th December, 2016, the learned arbitrator allowed the applications of respondent nos.1 to 6 in each of the Arbitration Petition Nos.5 to 10 of 2015 filed under section 16 of the Arbitration Act and held that the learned arbitrator had no jurisdiction and the arbitration against the said respondents was not sustainable. On 7th December, 2016, the claimants withdrew the Commercial Appeal (L) Nos. 1 of 2016, 2 of 2016 and 3 of 2016 filed by the claimants against the order dated 25 th April, 2016 passed in Notice of Motion No.166 of 2015 in Summary Suit No.477 of 2014 filed by the respondent no.1 in view of the impugned order passed by the learned arbitrator.

50. Being aggrieved by the order passed by the learned arbitrator accepting the plea of jurisdiction raised by the respondent nos.1 to 6, the claimants had filed 30 appeals numbered as arbitration petitions under section 37 of the Arbitration Act in this Court. During the pendency of these petitions, the claimants have withdrawn 5 arbitration petitions in view of the settlement arrived at between them and the respondents in those five matters.

51. Mr.Joshi, learned senior counsel for the claimants invited my attention to various documents annexed to the commercial carbp13-17g.doc arbitration petitions, compilation of documents filed before this Court, applications and affidavits of the parties before the learned arbitrator, averments made in the statement of claim, the documents annexed thereto and the findings rendered by the learned arbitrator. He submits that the Urban Group is owned and controlled by Mr.Anand Jain whereas the Neelkanth Group is owned and controlled by the Patel family.

52. It is submitted by the learned senior counsel that during the period between 2006-07, Mr.Anand Jain and/or their group had desired to have association with Mr.Mohan Patel and their group companies and also to have Joint Ventures in real estate business for commercial, residential including townships development. The respondent no.3 a domestic fund established in the form of a trust and was registered under the provisions of Securities and Exchange Board of India by the

respondent no.1 as a settlor.

53. In the month of May, 2006, the fund had set up a scheme known as Urban Infrastructure Opportunities Fund in terms of which the scheme obtained contributions from the contributors. The moneys received were to be and have been deployed by the fund in various real estate projects. The respondent no.2 was a separate overseas private equity fund. Mr.Parag S. Parekh, the Managing Director of the respondent no.1 was nominated to be the sole person in-charge carbp13-17g.doc of the Joint Venture with Mr.Mohan V. Patel and others of the Neelkanth Group during the period between 2006-07. Various projects were identified for Joint Venture business i.e. for acquisition, development and marketing of retail mall-cum-commercial project known as 'Neelkanth Palacia', Vidyavihar (West), Mumbai - 400 086 now known as 'Neelkanth Business Park'. The second project was identified as 'Neelkanth Corporate Park' at Vidyavihar West.

54. It is submitted that the Urban Group nominated a company of Urban Group-Asim Realty Pvt. Ltd. having incorporated by the respondent no.1 through their directors Mr.Dinesh Kumar Gupta and Mr.Tushar Sarda. Subsequent to the infusion of fund by Urban Group and Neelkanth Group by the respondent no.4 as Special Purpose Vehicles which was renamed as Neelkanth Urban Development Pvt. Ltd. (NUDPL). He submits that the equity shares and/or shareholdings in the said NUDPL between the Urban Group and Neelkanth Group was agreed to be in the ratio of 50:50. It was separately agreed between the two groups that the equity shares and/or shareholding in the said NUDPL will be 51% Neelkanth Group and 49% Urban Group.

55. It is submitted that the Urban Group thereafter showed further interest in the other projects to be taken up with the Neelkanth Group in the Joint Ventures which were identified by the parties.

carbp13-17g.doc During the period between 2006-07, the Urban Group nominated the (1) Urban Infrastructure Opportunities Fund (UIOF) (domestic fund), (2) Urban Infrastructure Real Estate Fund (UIREF) (foreign fund), (3) Urban Infrastructure Venture Capital Ltd. (advisor to UIREF and Manager to UIOF), (4) Jai Corporation Ltd. And (5) Sharanya Trading Pvt. Ltd.

56. It is submitted by the learned senior counsel that during the period between 2006-2007, the Urban Group agreed to invest the funds in excess of their profit sharing ratio for Neelkanth Group also at the rate of 12% interest which was to be borne by the Neelkanth Group. He submits that the Urban Group accordingly brought investment on behalf of the Neelkanth Group through Dharti Investments to the tune of Rs.20.75 crores for Neelkanth Business Park Project. Dharti Investments also gave Inter Corporate Deposit of Rs.29.25 crores to Asim Realty Pvt. Ltd. The said Inter Corporate Deposit of Dharti Investments was repaid within a period of 32 days before the due date. Neelkanth Group also infused the said amount in then Asim Realty as shares and debenture subscription amount.

57. It is submitted by the learned senior counsel that on 19 th October, 2006, at the request of the Urban Group, Neelkanth Group had executed Inter Corporate Deposit Agreements between the claimant no.1 and Dharti Investments and Holding Ltd. And Urban carbp13-17g.doc Group company. On 19th February, 2007, the Urban Group brought investments on behalf of the

Neelkanth Group to the tune of Rs.50 crores for Neelkanth Corporate Park. Neelkanth Group infused the said amount in then Asim Realty as share and debenture subscription amount. He submits that on 19th February, 2007 the Neelkanth Group at the request of the Urban Group executed Inter Corporate Deposit Agreements between the claimant no.1 and Dharti Investments and Holding Ltd.

58. It is submitted by the learned senior counsel that further Inter Corporate Deposit Agreements were entered into between the claimant no.1 and Vinamra Universal Traders Pvt. Ltd. for Rs.50 Crores which amount was utilized by the Neelkanth Group to repay Rs.50 crores of first deposit agreement. The said agreement was entered into on 27th September, 2007. On 23rd October, 2007, the second Inter Corporate Deposit Agreement was entered into between the claimant no.1 and Vinamra Universal Traders Pvt. Ltd. for Rs.8 crores. The said amount was utilized by Neelkanth Group by Special Purpose Vehicles / Joint Ventures.

59. It is submitted by the learned senior counsel that in the month of October, 2007, the claimant no.1 repaid Rs.24.56 crores from its own source to Vinamra Universal Traders Pvt. Ltd. The second deposit agreement was entered into between the claimant carbp13-17g.doc no.1 and Vinamra Universal Traders Pvt. Ltd. for Rs.20 crores on 20 th November, 2007. The said amount was utilized by Neelkanth Group for the project undertaken by Special Purpose Vehicles / Joint Ventures. It is submitted by the learned senior counsel that various funds were introduced by Urban Group under various agreements and were utilized for various Special Purpose Vehicles / Joint Ventures by the Neelkanth Group.

60. Learned senior counsel invited my attention to various statement of accounts exchanged between the parties and e-mails in support of his submission that all the respondent nos.1 to 6 had represented to the claimant that they belong to Urban Group and thus could not be allowed to now contend that they were not the part of the Urban Group. He submits that all the SHA and SSHA including the arbitration agreement were binding on respondent nos.1 to 6. He submits that the draft Supplemental Agreement / Memorandum of Understanding between the Urban Group and Neelkanth Group had formed an integral part of each Shareholder Agreement and Share Subscription Agreement and was to be read with Shareholder Agreement and Share Subscription Agreement.

61. Learned senior counsel submits that the transactions between the parties were of a composite nature. The performance of the funding obligations under the SHA and SSHA with or without carbp13-17g.doc Supplemental Agreement incorporated therein may not be feasible without aid, execution and performance of the supplementary or ancillary agreements. All the Inter Corporate Deposit Agreements with the respondent no.1 were also executed in pursuance and performance of the funding obligation of the respondents under the Shareholders Agreements and Share Subscription Agreement and were not independent contracts. He submits that the learned arbitrator ought to have appreciated mutual intention of all parties which was to bind both the signatories as well as non signatory affiliates.

62. Learned senior counsel also invited my attention to the expression 'affiliates' mentioned in the Shareholders Agreements and submits that it was clearly stated in the said agreement while referring to Urban Infrastructure Trustees Pvt. Ltd. that the said party shall unless repugnant to the context or meaning thereof be deemed to mean and include the trustee or trustees for the time being of the said funds and the successors, affiliates of the UITPL and permitted assigns. He submits that it is thus clear that all the affiliates of the UITPL were expressly included in the definition of UITPL as a party. He submits that in the Shareholder Agreement, the expression 'affiliate' is defined under clause 1(b), means any person directly or indirectly controlling, controlled by or under common control with, that carbp13-17g.doc party or any person or entity forming part of such party. He submits that the said expression would clearly reveal the intention of the parties that several persons and entities are included when the expression 'party' is used in the contract, and such expression would not confine itself only to the one company in the Shareholders Agreement.

63. It is submitted that in any Shareholders Agreement, all the shareholders of the company are parties, otherwise it cannot be implemented. He submits that the respondent nos.1 to 5 are affiliates as defined in the Shareholders Agreement. In any event, the respondent no.4 is expressly referred to as an affiliates in the agreement dated 24th August,2007 and is referred to as investment manager / investment advisor in the three agreements dated 18 th October 2018, agreement dated 20th September, 2007 and 26 th June, 2008 respectively.

64. It is submitted by the learned senior counsel that in the Shareholders Agreement, whilst referring to 'Neelkanth', the same does not include its affiliate. He submits that the respondent no.6 also has to be an affiliate of the respondent no.1 and respondent no.3. The respondent no.6 was introduced and nominated by the Urban Group for holding shares.

65. Learned senior counsel invited my attention to the carbp13-17g.doc arbitration agreement recorded in clause (19) of the Shareholders Agreement and would submit that the said agreement applies to any dispute or differences between the parties. The parties referred to UITPL which includes its affiliates and the respondent nos.1 to 6 being affiliates are also thus parties to the arbitration agreement recorded in clause (19). The arbitration clause thus applies to any disputes or differences between the respondent nos.1 to 6 on one hand and Neelkanth Group on the other hand. He submits that in the definition of 'third party' in the Shareholder Agreement, an affiliate is not included. It is submitted that even without considering the provision of the Supplemental Agreement, there exist an arbitration agreement expressly recorded in clause (19) of the Shareholders Agreement to which all the respondent nos. 1 to 6 are parties and thus the learned arbitrator could not have directed the claimants to delete some of the respondents from the arena of the statement of claim filed by the claimants.

66. Learned senior counsel for the claimants placed reliance on the 'Deed of Adherence'. He also invited my attention to clause (j) of the Shareholders Agreement which defines 'control' and would submit that the said definition is very wide. He submits that though the definition of shareholder is restricted, definition of 'affiliates' and 'party' are much wider. He submits that it was not the case of the carbp13-17g.doc respondents that the reliefs claimed by the claimants were beyond the scope of arbitration agreement under clause 19.1. He submits that if the definition of 'affiliates' is given

narrow meaning and would include only parties, the said definition would be otiose. In support of this submission, learned senior counsel placed reliance on the judgment of this Court in case of Rakesh S. Kathotia vs. Milton Global Ltd., 2014 SCC OnLine Bom.1119 and in particular paragraphs 2, 5, 9 to 14, 17, 18 and 21.

67. Learned senior counsel placed reliance on the judgment of Supreme Court in case of Chowgule & Co. Pvt. Ltd. vs. Union of India and others, (1987) 1 SCC 730 in support of the submission that unless an agreement provides for repugnancy, entire definition cannot be made otiose. He placed reliance on the clause (k) of the SHA, clause 2.1, clause 4.1, clause 4.2 and would submit that even if the Deed of Adherence is not signed by an affiliate, atmost such affiliate may not be able to give voting right as shareholder but such affiliates are eligible to exercise other rights provided to shareholders. Subject to repugnancy all clauses of the SHA including arbitration agreement applies to the affiliates. He also placed reliance on clause 5.2.1, 5.2.2 and 5.2.3 of the SHA in support of his aforesaid submission.

68. Learned senior counsel invited my attention to the carbp13-17g.doc submissions of all the parties recorded by the learned arbitrator in the impugned order and the findings recorded thereon in paragraphs 178 to 211 of the impugned order rejecting the contention of the claimants that the respondent nos.4, 5 and 6 being affiliates UITL (respondent no.1) and being thus parties to the expressed terms of the Shareholders Agreements / Subscription cum Shareholders Agreements. The learned arbitrator rejected the submission of the claimants that under the expressed term of the agreement (s) all contesting respondents were the parties to the written contract.

69. It is submitted by the learned senior counsel that by virtue of the impugned order passed by the learned arbitrator, the recitals and the definition of the 'affiliates' in the agreement have been made otiose. The learned arbitrator has ignored the background in which the parties had entered into the Shareholders Agreements / Subscription cum Shareholders Agreements. The nominees and affiliates of the respondent no.4 had participated and had acted upon the Shareholders Agreements / Subscription cum Shareholders Agreements.

70. Learned senior counsel placed reliance on the minutes of the meeting of the representatives of both the parties recording various discussions about the ongoing projects. Various e-mails were also exchanged between the affiliates of the Urban Group with the carbp13-17g.doc Neelkanth Group. Learned senior counsel placed reliance on the judgment of Supreme Court in case of The Godhra Electricity Co.Ltd. & Another vs. The State of Gujarat & Another, (1975) 1 SCC 199 and in particular paragraphs 11 to 16 in support of his submission that while interpreting the terms of the contract, the learned arbitrator ought to have considered the intention of both the parties and also the subsequent conduct. He submits that all the parties to the arbitration proceedings including the affiliates had acted upon the Shareholders Agreements and Subscription cum Shareholders Agreements.

71. Learned senior counsel invited my attention to 18 reasons recorded by the learned arbitrator in paragraphs 181 to 198 of the impugned award while rejecting the contentions of the claimants on this issue and would submit that each and every finding of the learned arbitrator in those

paragraphs are contrary to law and the intention of parties. He submits that the learned arbitrator has totally failed to appreciate that all the parties including affiliates had already acted upon the SHA / SSHA. Several directors of the parent companies had been replaced by appointment of the affiliates. There were four Special Purpose Vehicles which fact was totally ignored by the learned arbitrator. The interpretation of the learned arbitrator is contrary to the plain reading of clause 5.2.3 of the agreement. He carbp13-17g.doc submits that clause (19) of the agreement which provides for arbitration agreement refers to the expression 'parties' which included affiliates.

72. Learned senior counsel submits that the term of the Supplemental Agreement stood incorporated in the SHA and SSHA. All the provisions of SHA and SSHA have to be read together. Learned senior counsel invited my attention to the submissions made by the learned counsel for the parties before the learned arbitrator reflected in paragraphs (273) to (284) of the impugned award including the findings rendered by the learned arbitrator on those submissions on the issue as to whether the Supplemental Agreement was a complete, conclusive and binding contract. He submits that the learned arbitrator has decided validity of the Supplemental Agreement while deciding the plea raised by the contesting respondents under section 16 of the Arbitration Act finally and thus if the impugned order is not set aside by this Court, the claimants would not be able to file a civil suit. He submits that it was not the case of the claimants that the Supplemental Agreement contained any arbitration clause.

73. In his alternate submissions, learned senior counsel for the claimants submits that the Neelkanth Group and Urban Group had entered into SHA and SSHA. Each group had several carbp13-17g.doc companies, Special Purpose Vehicles and their group companies were part of the SHA and SSHA. Since all the parties had acted upon all those agreements including their group companies and associates, the arbitration agreement recorded in the SHA and SSHA were binding all the parties including the members of the group. The Shareholder Agreement does not refer to any particular projects but also refers to the Special Purpose Vehicles. He submits that which project was to be implemented by whom was not referred in the SHA but was agreed by and between the parties and was referred in the Supplemental Agreement. Learned senior counsel vehemently placed reliance on the judgment of Supreme Court in case of Chloro Controls India Private Limited vs. Severn Trent Water Purification Inc. & Others, (2013) 1 SCC 641 and more particularly on paragraphs 72 to 76 and 105 to 107.

74. It is submitted by the learned senior counsel that the learned arbitrator ought to have accepted the case of the claimants that the transactions amongst the parties were of composite nature where the performance of the funding under the SHA and SSHA with or without Supplemental Agreement incorporated therein may not be feasible without aid, execution and performance of the supplementary or ancillary agreements such as Inter Corporate Deposit Agreements and share applications etc. All these carbp13-17g.doc agreements were inextricably inter-linked with the Inter corporate Deposit Agreements, SHA and SSHA and were not capable of being beneficiary performed without performance of the other agreements.

75. It is submitted that the reliance placed by the learned arbitrator on the judgment of the Hon'ble Supreme Court in case of Indowind Energy vs. Wescare (I) Ltd. & Another, (2010) 5 SCC 306 was

totally misplaced. He strongly placed reliance on the judgment of Supreme Court in case of Chloro Controls India (supra) and would submit that the Hon'ble Supreme Court in the said judgment which was a later judgment has laid down that in certain circumstances, even the parties who are not parties or the signatories to the arbitration agreement can be made parties to the arbitral proceedings. He submits that the Hon'ble Supreme Court has culled out exception out of the principles laid down in case of Indowind Energy (supra).

76. It is submitted that the judgment of the Hon'ble Supreme Court in case of Chloro Controls India (supra) was decided by a Bench larger than the Bench which decided the case of Indowind Energy (supra). He submits that the principles laid down by the Supreme Court in case of Chloro Controls India (supra) squarely applies to the facts of this case and thus all the parties who were forming part of the two groups i.e. Neelkanth Group and Urban Group carbp13-17g.doc were rightly made parties to the arbitration proceedings filed by the claimants irrespective of whether they were signatories to the SHA / SSHA or not.

77. It is submitted by the learned senior counsel that section 8 of the Arbitration Act has been now amended and is brought in line with section 45 of the Arbitration Act by virtue of Amendment Act of 2015 and thus both the provisions stand on the same footing and thus sections 8 and 45 as amended applies to the facts of this case. Learned senior counsel for the claimants placed reliance upon various documents on record including e-mails exchanged between the parties to the SHA / SSHA and also between the alleged affiliates of the Urban Group, exchange of the accounts, state of transfer of fund etc. and would submit that the learned arbitrator has totally overlooked these crucial and admitted facts.

78. The Urban Group had undertaken funding obligations not only by the contributing fund by way of shares and debentures but also by lending moneys to Neelkanth Group for its shares and debentures money which obligation was partly discharged by the Urban Group in various forms i.e. share debentures Inter Corporate Deposit by various entities i.e. the respondent nos.1 to 6 under various contracts. He submits that the performance of the finance obligation by the Urban Group could be achieved only if all the carbp13-17g.doc different entities perform, their different objections which were inextricably inter-linked and formed part of one composite deal. The learned arbitrator thus could not have segregated the affiliates and other members of the Urban Group from the contract and from the applicabilities of arbitration agreement.

79. Learned senior counsel for the claimants placed reliance on the judgment of Supreme Court in case of Cheran Properties vs. Kasturi & Sons Ltd., 2018 SCC OnLine SC 431 and in particular paragraphs 23 and 25 to 43. It is submitted that the Hon'ble Supreme Court in the said judgment has laid down the test for binding the non signatory to an arbitration agreement entered into by the company within the group and has held that such an arbitration agreement would be binding on its non-signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non- signatory affiliates. He submits that the Hon'ble Supreme Court in the said judgment has not accepted the contention of the contesting party that for binding the non signatories, there must be mother/parent agreement. The Court has to consider the common intention of the parties and to ascertain whether the

circumstances indicate that both the signatories as well as non signatories had intended to be bound by the arbitration agreement. It is submitted carbp13-17g.doc that the Hon'ble Supreme Court in case of Cheran Properties (supra) has not affirmed the judgment in case of Indowind Energy (supra) but has affirmed the judgment of Supreme Court in case of Chloro Controls India (supra).

80. The next submission of the learned senior counsel for the claimants is that the learned arbitrator ought to have allowed the claimants to lead oral evidence about the existence of the Supplemental Agreement and in support of their contention that the said Supplemental Agreement was acted upon by both the groups even while deciding the application under section 16 of the Arbitration Act. In support of this submission, learned senior counsel invited my attention to the submissions recorded by the learned arbitrator in the impugned order and the findings on the said issue in paragraphs 215 to 272 and submits that the bar under sections 91 and 92 of the Indian Evidence Act, 1872 would not apply to the third party. The proviso to section 92 applies to the facts of this case.

81. It is submitted that though the learned arbitrator had recorded the statement of the contesting respondents made during the course of the arguments that they were proceeding on the assumption that the Supplemental Agreement exist, the learned arbitrator erroneously recorded the findings that no such Supplemental Agreement exist and the same has not been proved carbp13-17g.doc without rendering any opportunity to the claimant to lead oral evidence. He submits that section 92 of the Indian Evidence Act, does not contemplate any agreement whether oral or in writing. He also placed reliance on section 99 of the Evidence Act. He submits that the findings rendered by the learned arbitrator that the Supplemental Agreement does not exist and the same is not proved by the claimants is final in all respect and no such findings could have been rendered by the learned arbitrator contrary to the statement made by the respondents that on demurer they had admitted the existence of the Supplemental Agreement.

82. Learned senior counsel placed reliance on section 24 of the Arbitration Act and would submit that the impugned order is ex- facie contrary to section 24 of the Arbitration Act read with sections 91, 92 and 99 of the Indian Evidence Act. He submits that the findings rendered by the learned arbitrator in paragraphs (350) to (360) could not have been rendered without giving any opportunity to the claimants to lead oral evidence.

83. It is submitted that the findings rendered by the learned arbitrator in paragraph (362) of the impugned order that each SHA / SSHA are separate, distinct and independent contract relating to particular project and similarly Inter Corporate Deposits are separate, distinct and independent of each other also could not have been carbp13-17g.doc rendered without affording opportunity to the claimants to lead oral evidence. He submits that the learned arbitrator has wrongly distinguished the judgment of Supreme Court in case of Demerara Distilleries Pvt. Ltd. & Ors. vs. Demerara Distillers Ltd., 2014 SCC OnLine Sc 953 which was clearly applicable to the facts of this case.

84. It is submitted that the concession made by the contesting respondents before the learned arbitrator was not limited to the existence of 'some documents' but to the existence of the 'Supplemental Agreement', its impact, effect or incorporation into the SHA / SSHA. The concession made by the contesting respondents is clearly understood and recorded by the learned arbitrator

while rejecting the request of the claimants for leading oral evidence.

85. The next submission of the learned senior counsel for the claimants is that the claimants had issued a composite notice dated 8th September, 2014 invoking arbitration agreement. Since the respondents did not agree for the appointment of the arbitrator, an application under section 11(9) was filed by the claimants before the Hon'ble Supreme Court. In the said application under section 11(9) of the Arbitration Act, UIVCL (respondent no.4), respondent no.5 and respondent no.6 were not the parties. He submits that in view of the parties having agreed to substitute the named arbitrator before the carbp13-17g.doc Hon'ble Supreme Court, the said arbitration application filed by the claimants was withdrawn keeping all the contentions of the parties open. He submits that there was only the change of arbitrator. The order passed by the Hon'ble Supreme Court only debarred the claimants from raising the other issues.

86. It is submitted that it is not disputed that there was an application for impleadment of the respondent nos.3, 4, 5 and 6 before the Hon'ble Supreme Court after filing of the arbitration application stating therein that the application was being filed to implead those companies to the arbitration application so that they were also referred to the arbitration. He submits that the respondents thus cannot be allowed to urge that the dispute between all the parties in the said application filed under section 11(9) and in the said application for impleadment were not referred to the arbitration of the learned arbitrator. He submits that the objections raised by the respondents before the learned arbitrator in this regard was hyper technical and contrary to the order passed by the Hon'ble Supreme Court.

87. Learned senior counsel also placed reliance on the following judgments in support of various submissions recorded aforesaid :-

1). Judgment of Gujarat High Court in case of

carbp13-17g.doc

Van Oord Acz India Pvt. Ltd. vs. Gujarat

Adani Port Pvt. Ltd., AIR 2005 Guj. 284

[ paragraph 14 ],

2). Judgment of this Court in Summons for

Judgment No.51 of 2014 dated 12th

February, 2018 in case of Urban

Infrastructure Venture Capital Ltd. vs. Neelkanth Soham Developers Pvt. Ltd. & Ors.,

3). Judgment of Supreme Court in case of Maharshi Dayanand University and another vs. Anand Co-op. L/C Society Ltd., (2007) 5 SCC 295 [ paragraphs 12, 13 ],

4). Judgment of Supreme Court in case of M.S. Commercial & Others vs. Calicut Engineering Works Ltd., (2004) 10 SCC 656 [ paragraphs 3 to 5 ],

5). Judgment of Supreme Court in case of SBP & Co. vs. Patel Engineering Ltd. & Another, (2005) 8 SCC 618,

6). Judgment of Supreme Court in case of



Ramesh B. Desai & Others vs. Bipin Vadilal Mehta & Others (2006) 5 SCC 638 [ paragraphs 14 to 19],

7). Judgment of Supreme Court in case of Oil & Natural Gas Corporation Ltd. vs. Saw Pipes Ltd. (2003) 5 SCC 705 [ paragraph

13],

8). Judgment of this Court in case of Meher Singh vs. Deepak Sawhny & another, 1991(1) Bom.C.R. 107 [ paragraphs 9, 10],

9). Judgment of this Court in case of Vinay Bubna vs. Yogesh Mehta & Others, 1998(4) Bom.C.R. 849,

10). Judgment of this Court in case of Mrs.Pushpa P.Mulchandani and Ors. vs. Admiral, Radhakrishin Tahiliani (Retd.) & Ors., in Appeal No.981 of 2001 dated 4th October, 2007 [ paragraphs 15 to 17] and

11). Judgment of Supreme Court in case of Ameet Lalchand Shah & Others vs. Rishabh Enterprises & Another, 2018 SCC OnLine SC 487 [ paragraphs 11, 12, 17, 18,



21, 24 to 28].

88. Mr.Dwarkadas, learned senior counsel for the claimants adopted the submissions made by Mr.Joshi, learned senior counsel for the claimants in Commercial Arbitration Petition No.13 of 2017 and made additional submissions in Commercial Arbitration Petition No.52 of 2017.

89. Learned senior counsel made the following submissions :-

a). All the parties in the arbitral proceedings had treated each other forming part of the two Groups i.e. Urban Group and Neelkanth Group. The profit sharing ratio of two Groups was 40:60 broadly. The Urban Group had agreed to invest as per the aforesaid ratio. The Urban Group had agreed to give back to back guarantee.

If there is any shortfall in making investment on the part of the Neelkanth Group, Urban Group had raised additional fund. The respondent no.1 was a parent company and was to bring money to pay the Intercorporate deposits. The respondent no.1 however stopped bringing the funds since 2010. The Supplemental Agreement agreed between the parties has been acted upon by all the parties to the SHA / SSHA and also by the affiliates of the Urban Group.

b). Reliance is placed on the letter dated 25th January, 2008 from the respondents to the claimants thereby forwarding a funding carbp13-17g.doc statements which would indicate that all the affiliates forming part of the Urban Group were also parties to the project and the said Supplemental Agreement was acted upon since last several years. There were large number of transfers of money from one entity to another. Reliance is placed on the letter dated 27 th March, 2010 from Mr.Trevor Machado of the Urban Group addressed to the Neelkanth Group in support of the submission that the parties had agreed to the mode and manner of the investment of money by the Urban Group and would be utilised by Neelkanth Group in the project at hand.

c). The emails sent by the respondents to the claimants have to be explained by the respondents. Various amounts paid by the respondents and received by the claimants were reflected in the said documents. Reliance is also placed on the documents at pages 159 to 161 of the compilation in support of the submission that the claimants had also sent a statement to the said Mr.Trevor Machado representing the respondents. Various Intercorporate deposits were reflected in the said statement. Learned arbitrator was thus bound to render an opportunity of leading oral evidence to the claimants before rendering a finding that the Supplemental Agreement/ MOU was not conclusive.

d). Reliance is placed on a document at pages 170 and 171 of the compilation i.e. a letter addressed by Neelkanth Group to the carbp13-17g.doc Urban Group. It is submitted that no objection of any nature was raised by the Urban Group regarding the said emails and the final statement forwarded by the Neelkanth Group to the Urban Group.

e). Reliance is placed on the letter dated 9 th February, 2012 from the Neelkanth Group to the Urban Group for referring the dispute to the mediation of Mr.K.G. Krishnamurthy. The said MOU was circulated by the Neelkanth Group for discussion. Reliance is also placed on a document at page 192 of the compilation, sent by the Managing Director of the Urban Group to the Neelkanth Group which allegedly recorded what transpired in the meeting held between the parties with the learned Mediator Mr.K.G. Krishnamurthy. He submits that before the learned Mediator, the respondents did not raise any issue that the Intercorporate deposits were to be treated as separate and independent and were not forming part of the Urban Group. Learned arbitrator was required to see business reality and the intention of both the parties and the conduct which clearly showed that all the parties before the learned arbitrator were forming part of the two groups having common

interest and carrying out same projects.

f). Reliance is placed on the judgment of the Supreme Court in the case of Cheran Properties vs. Kasturi and Sons (supra) and more particularly paragraphs 29 and 43 and would submit carbp13-17g.doc that the test laid down by the Hon'ble Supreme Court in the said judgment would clearly apply to the facts of this case. Learned arbitrator was required to consider the common intention and purpose for setting up various projects by the two groups having joined together including the affiliates and that the parties had all throughout treated each other as two groups and not individuals. All the provisions of the arbitration agreement thus forming part of the Shareholders Agreement and Subscription cum Shareholders Agreement were extended to all the parties including the affiliates for all the purposes.

g). Reliance is placed on the definition of the affiliates in the SHA and would submit that the control test applies. He placed reliance on the judgment of this Court delivered on 12 th February, 2018 in Summons for Judgment No.51 of 2014 in Summary Suit No.398 of 2014 and other connected matters in the case of Urban Infrastructure Venture Capital Ltd. vs. Neelkanth Soham Developers Pvt. Ltd. & Ors. and more particularly paragraph 6 thereof and would submit that this Court dealt with the issue of obligation of the parties of Intercorporate deposits. The Special Leave Petition against the order passed in appeal is still pending.

h). The parties in five Commercial Arbitration Petition bearing Nos.47 of 2017, 51 of 2017, 41 of 2017, 64 of 2017 and 57 of 2017 carbp13-17g.doc have already settled the matters with some of the respondents and have already withdrawn those commercial arbitration petitions on 11th June, 2018.

90. Mr.P.K. Shroff, learned counsel appearing for the claimants in the remaining commercial arbitration petitions adopts the submissions made by Mr.Joshi, learned senior counsel for the claimants in Commercial Arbitration Petition No.13 of 2017 and Mr.Dwarkadas, learned senior counsel for the claimants in Commercial Arbitration Petition No.52 of 2017.

91. Mr.Shyam Mehta, learned senior counsel for the respondent no.1, on the other hand, submits that the claimant no.1 is the flagship company of the Neelkanth Group. The claimant nos.2, 3 and 4 are the Group companies of the claimant no.1 and were not the parties to any SHA / SSHA. The respondent no.1 is the sole trustee of the respondent no.3. The respondent no.2 was incorporated as real estate fund in Mauritius. The respondent no.3 is a domestic venture capital fund registered with SEBI. The respondent no.4 is a wholly owned subsidiary of the respondent no.5. The respondent no.4 is also the investment manager to the respondent no.1 and the Indian investment advisor to the investment manager of the respondent no.2. The investment manager of the respondent no.2 is a company incorporated in carbp13-17g.doc Mauritius called Urban Infrastructure Capital Advisors which is not a party to the present proceedings. The respondent no.5 is a holding company of the respondent no.1 and the respondent no.4. The respondent no.6 is a private limited company that has no connection with the respondent nos.1 to 5. The respondent nos.7 to 10 are the special purpose vehicles/ JV companies in which the claimants and the respondent nos.1 and 2 made investments pursuant to various SSHA.

92. The shares of claimant no.1 in the respondent no.7 were sold to the claimant no.2, the shares of the claimant no.1 in the respondent no.8 were sold to the claimant no.4 and the shares of the claimant no.1 in the respondent no.9 were sold to the claimant no.3. The claimant no.1 retained its shareholding in the respondent no.10. It is submitted that the respondent no.1 had not agreed to refer its dispute with the claimants to the arbitration. No order is passed under Section 11(9) of the Arbitration Act appointing the learned arbitrator to adjudicate the dispute, if any, between the respondent no.1 and the claimants.

93. It is submitted that the learned arbitrator thus rightly held that he had no jurisdiction to decide the disputes between the claimants and the respondent no.1. In support of this submission, learned senior counsel invited my attention to the submissions of the carbp13-17g.doc parties recorded by the learned arbitrator and the findings rendered thereon in paragraphs 133 to 143 of the impugned order. He also placed reliance on the grounds raised by the respondent no.1 in the application filed under Section 16 of the Arbitration Act before the learned arbitrator and reply filed by the claimants to the said application filed by his clients.

94. Learned senior counsel placed reliance on the averments made by the claimants in the Arbitration Application No.12 of 2015 filed before the Hon'ble Supreme Court under Section 11(9) of the Arbitration Act and the order dated 25th August, 2015 passed by the Hon'ble Supreme Court in the said application referring certain disputes of the parties to the arbitration. He submits that the learned arbitrator had conferred the jurisdiction to pass an order dated 25 th August, 2015. It is submitted that the named arbitrator in all the agreements was substituted by appointment of the learned arbitrator. There was no reference to any alleged Supplemental Agreement or the said MOU in the said order. The claimants had accordingly withdrawn the said Arbitration Application No.12 of 2015.

95. It is submitted by the learned senior counsel that the respondent no.1 was not made a party to the arbitration application before the Hon'ble Supreme Court. The only respondent nos.2, 4, 7, 8, 9 and 10 were joined as the party-respondents to the said carbp13-17g.doc proceedings. The claimants sought the confirmation of the appointment of the arbitrator on behalf of the Neelkanth Group while seeking appointment of the learned arbitrator on behalf of the respondent nos.1 and 2 respectively in the arbitration application before the Hon'ble Supreme Court. The claimants did not seek appointment on the basis that the respondent no.4 and the respondent no.2 represented the so called Urban Group. The appointment of the arbitrator was sought only on behalf of the respondent nos.2 and 4.

96. It is submitted that the order passed by the Hon'ble Supreme Court on 25th August, 2015 was passed by consent of parties in Arbitration application No.12 of 2015. The Hon'ble Supreme Court did not issue any directions referring the parties to arbitration. In the said order, a statement made by the counsel for the respondent nos.1 and 2 in the Arbitration Application and the respondent nos.2 and 1 in the present proceedings respectively was recorded that they were agreeable to have the Arbitral Tribunal as a sole arbitrator in respect of the SHA instead of Mr.Manish S. Parekh, the named arbitrator in the arbitration agreement in the SHA.

97. It is submitted that it was thus clear that the respondent nos.2 and 4 had agreed to refer the disputes and differences between themselves and the claimants to the learned arbitrator carbp13-17g.doc appointed by the Hon'ble Supreme Court. He submits that though the respondent no.1 herein was appearing before the Hon'ble Supreme Court in the Impleadment Application and the counsel was present at the time of passing of the order dated 25 th August, 2015, the counsel for the respondent no.1 did not make any statement agreeing to refer its dispute with the claimants to arbitration. The counsel for the respondent no.1 was not even called upon to make any such statement. The respondent no.1 did not agree to refer its dispute with the claimants to arbitration of the learned arbitrator. After recording of such statement by the Hon'ble Supreme Court, the claimants did not press for any further reliefs and withdrew the said Arbitration Application No.12 of 2015.

98. It is submitted that though the claimants had applied for liberty to withdraw the Arbitration Application leaving all other questions to be decided by the learned arbitrator, the Hon'ble Supreme Court granted liberty to the claimants only to withdraw the arbitration application and not in respect of the prayer to leave all other questions to be decided by the learned arbitrator. He submits that in any event, the question of referring the dispute between the claimants and other respondents except respondent nos.2 and 4 who were neither the parties nor had agreed to refer their disputes to arbitration did not arise. The parties who were not the parties to the carbp13-17g.doc arbitration agreement could not be forced to refer their disputes to arbitration or their disputes could not have been unilaterally referred to arbitration.

99. Learned senior counsel submits that initially the claimants invoked the arbitration agreement against the respondent no.1 vide its six individual notices all dated 22 nd August, 2013 and thereafter vide composite notice date 8th September, 2014 calling upon the respondent no.1 to either agree to the sole arbitrator suggested by them or to appoint its own arbitrator. It was made clear in the said notices that if the respondent no.1 fail to either agree to suggest the name of the arbitrator or to appoint its own arbitrator within the stipulated period, the claimants would be considered to establish the proceedings under section 11 of the Arbitration Act.

100. Learned senior counsel placed reliance on the letters dated 15th November, 2013 and 6th October, 2014 in response to the notices dated 22nd August, 2013 and 8th September, 2013 disputing the existence of the arbitration agreement between the claimants and the respondent no.4 and refusing to agree to refer all their disputes to arbitration. He submits that admittedly the claimants did not implead the respondent no.1 as a party to the Arbitration Application No.12 of 2015 filed under section 11(9) of the Arbitration Act before the Hon'ble Supreme Court and subsequently filed the Impleadment carbp13-17g.doc Application No.2 of 2015 inter-alia praying for impleading the respondent no.1 in the said arbitration application. He submits that the claimants however, did not press such Impleadment Application No.2 of 2015. There was thus no arbitration application for appointment of another arbitrator insofar as the respondent no.1 is concerned. The respondent no.1 thus could not have been unilaterally impleaded as a party respondent in the statement of claim directly filed before the learned arbitrator.

101. Learned senior counsel invited my attention to paragraphs 7.30 and 7.34 of the reply filed by the claimants to the application filed by the respondent no.1 under section 16 of the Arbitration Act contending that the respondent no.1 was bound by the statement made by the respondent nos.1 and 2 before the Hon'ble Supreme Court. No such averment however is made by the claimants in the statement of claim while impleading the respondent no.1. The claimants were thus precluded from raising such contention in the reply filed to the application under section 16 of the Arbitration Act. The claimants did not establish that when the respondent nos.1 and 2 before the Hon'ble Supreme Court made a statement, they had made such statement not only on their behalf but also on behalf of other respondents and could not establish that the respondent nos.1 and 2 therein were representing respondent no.4 before the Hon'ble carbp13-17g.doc Supreme Court.

102. It is submitted that the said Impleadment Application was filed by the claimants after about two months of filing of the arbitration application. The claimants had applied for impleadment of respondent no.4 on the ground that the said respondent no.4 was allegedly an "affiliate" of the respondent nos.1 and 2 as defined under the Share Subscription Agreement. He submits that if according to the claimants respondent no.4 was bound by the acts of the respondent nos.1 and 2 before the Hon'ble Supreme Court, the claimants were not required to file any Impleadment Application. Learned senior counsel placed reliance on the averments made by the claimants in paragraphs 2, 4.7, 5.5, 5.9 and 13.6 and the reply filed by the claimants to the application under section 16 contending that it was respondent no.4 who was representing the respondent nos.1 and 2 in various dealings between the claimants and the respondent nos.1 and 2 and not vice-versa. He submits that the claimants have raised various inconsistent pleas in the pleadings.

103. It is submitted by the learned senior counsel that even if the contention of the claimants that respondent no.4 was an affiliate of the respondent nos.1 and 2 and the dispute between the claimants and respondent no.4 was required to be referred to arbitration, the respondent no.4 was required to be impleaded in the application filed carbp13-17g.doc under section 11(9) of the Arbitration Act by the claimants. Admittedly, the claimants had not impleaded respondent no.4 as a party respondent to the said Arbitration Application No.12 of 2015 before the Hon'ble Supreme Court. He submits that the claimants have not raised any plea in the statement of claim that respondent no.4 was not impleaded to the Arbitration Application No.12 of 2015 on the ground that an objection was raised by the Registry of the Hon'ble Supreme Court in the said Arbitration Application No.12 of 2015. He submits that the learned arbitrator has thus rightly allowed the application filed by some of the respondents under section 16 of the Arbitration Act raising a plea of jurisdiction and existence of the agreement between the claimants and those respondents.

104. The next submission of the learned senior counsel for respondent no.4 is that there was no signed arbitration agreement between any of the claimants and respondent no.4 as required under section 7 of the Arbitration Act. He strongly placed reliance on sections 7(3) and 7(4) in support of the submission that the arbitration agreement has to be in writing and such arbitration agreement is in writing if it is contained in (a) a document signed by the parties, (b) an exchange of letters etc. or (c) an exchange of settlement of claim alleging existing of the arbitration agreement and there being no denial of existence of the arbitration agreement in the carbp13-17g.doc written statement. He submits that the mandatory provisions of sections 7(3) and 7(4) are thus not complied with.

105. Learned senior counsel placed reliance on section 7(5) of the Arbitration Act and would submit that it was not the case of the claimants that its case was based on section 7(5). On the contrary, the claimants had expressly stated that their case was not based on section 7(5). Learned senior counsel strongly placed reliance on the judgment of the Hon'ble Supreme Court in case of Indowind Energy Limited (supra) in support of the submission that the arbitration agreement cannot be oral and must come into existence only in the manner contemplated under section 7 of the Arbitration Act.

106. Learned senior counsel placed reliance on the judgment of the Hon'ble Supreme Court in case of Duro Felguera S.A. Limited (supra) holding that when the parties entering into the separate agreements contending separate arbitration clause, there is no question of making any composite reference to arbitration. Learned senior counsel distinguished the judgment of the Hon'ble Supreme Court in case of Cheran Properties Limited (supra) relied upon by Mr.Joshi and Mr.Dwarkadas, learned senior counsel for the claimants on the ground that the Hon'ble Supreme Court in the said judgment has not over ruled the principles of law laid down in case of Indowind Energy Limited (supra).

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107. The Hon'ble Supreme Court considered the said decision in case of Indowind Energy Limited (supra) in the judgment in case of Cheran Properties Limited (supra) and observed that the factual situation in case of Indowind Energy Limited (supra) was different from the judgment before Hon'ble Supreme Court in case of Cheran Properties Limited (supra). He submits that the judgment in case of Cheran Properties Limited (supra) thus is clearly distinguishable in the facts of this case and would not assist the case of the claimants. Learned senior counsel placed reliance on the findings rendered by the learned arbitrator on the issue of existence of the arbitration agreement raised by the claimants in paragraphs 296 to 322 of the impugned order.

108. The next submission of the learned senior counsel for the respondent no.4 is that even assuming that the respondent no.4 was an "affiliate" in terms of the share purchase agreement, it was not bound by any terms of the SSHA until it would have acquired shares of Special Purpose Vehicles and would have executed a Deed of Adherence as provided in the Share Subscription Agreements.

109. Learned senior counsel placed reliance on the findings of the learned arbitrator on this issue in paragraphs 145 to 212 of the impugned order. He also placed reliance on the plea raised by his client in the application under section 16 and more particularly in carbp13-17g.doc paragraph 12 thereof and the reply of the claimants on such plea in paragraphs 7.64 to 7.71 and also placed reliance on the averments of the claimants in paragraphs 13.1 and 13.2 of the Statement of Claim. He submits that respondent no.4 had denied specifically in paragraph 12.5 of the application filed under section 16 that the said company was affiliated under the SSHA. However, the said application was argued without prejudice and on the assumption that his client was affiliated as defined in the SSHA his client was not bound by the terms of the said SSHA. He submits that since for the purpose of the said application under section 16, the respondent no.4 had proceeded on the assumption that it was an affiliate as defined in the Share Subscription Agreements, it was not necessary for the claimants

to prove the said statement and thus the learned arbitrator has rightly rejected the request of the claimants to lead evidence to prove that the respondent no.4 was an affiliate as defined in the SSHA.

110. The next submission of the learned senior counsel is that the SSHA was not binding on the respondent no.4 in any manner whatsoever. In support of this submission, learned senior counsel placed reliance on clause 1.1 sub-clause (gg) defining the term "third party", clauses 4.2 and 5.2, clause 1 of the draft of Deed of Adherence, clauses 5.2.1 and 5.2.3 of the Share Subscription carbp13-17g.doc Agreement, clauses 4.7.3 and 4.7.4, clauses 5.3.1, 5.4.1, 7.1,12.2 to 12.5, 15.4, 16.1 and 18.1. He submits that those provisions would clearly indicate that respondent no.4 being a third party was not at all concerned with the said SSHA and was not binding upon the party in any manner whatsoever.

111. It is submitted that the expression "investor", "Offshore Fund" and "party" will not include the affiliates of the respondent no.2 unless affiliate executes the Deed of Adherence and acquired the shares in the Special Purpose Vehicles. He submits that after execution of the SSHA, claimant no.1 had transferred its share in the joint venture company i.e. Nilayami to one of its affiliate i.e. Neelkanth Soham. At that time, Neelkanth Soham had executed a Deed of Adherence in accordance with the terms of the SSHA which would clearly indicate that even the parties understood the terms of the SSHA to mean that for an affiliate to be bound by the said SSHA was required to execute a Deed of Adherence. The Deeds of Adherence in accordance with the SSHA were also executed by the transferee of shares by the claimants i.e. Neelkanth Kalindi and Neelkanth Devansh respectively. No such Deed of Adherence was executed by any of the parties according to the claimants who were the affiliates of the respondent nos.1 and 2 or otherwise.

112. Learned senior counsel invited my attention to the carbp13-17g.doc judgment of the Hon'ble Supreme Court in case of Chloro Controls (supra) relied upon by the claimants and would submit that the said judgment has been dealt with by the learned arbitrator in great detail in paragraphs 327 to 352 in the impugned order passed by the learned arbitrator. He submits that the said judgment was under

> section 45 of the Arbitration Act. The claimants had contended during the course of their arguments before the learned arbitrator that six SSHA with the alleged Supplemental Agreement incorporated in each of them, together constitute one mother agreement and that there were six parts of one mother agreement. There was however, no such pleading either in the statement of claim or in the reply to the application filed by the claimants' application under section 16 of the Arbitration Act.

113. It is submitted by the learned senior counsel that the Hon'ble Supreme Court in case of Chloro Controls (supra) did not decide the issue as to whether the persons who were not the parties to any of the agreements could also be joined in the arbitration. He submits that the judgment of the Hon'ble Supreme Court in case of Chloro Controls (supra) would not apply to the facts of this case at all. The place of seat of the present arbitration proceedings is Mumbai under section 19.2.2 of the SSHA and thus the present arbitration is a domestic arbitration governed by Part - I of the carbp13-17g.doc Arbitration Act. Section 45 of the Arbitration Act falls in Part - II and has no

applicability to the present proceedings. Doctrine of "Group of Companies" laid down in the judgment in case of Chloro Controls (supra) is thus not applicable to the present proceedings. He submits that the respondent no.4 is not the signatory to the SSHA and has not been impleaded as party to the present proceedings unlike the respondent nos.3 and 4 in case of Chloro Controls (supra). The claimants failed to prove the mutual intention to join the non-signatory affiliates in their statement of claim.

114. Insofar as the judgment of the Hon'ble Supreme Court in case of Cheran Properties Limited (supra) relied upon by the claimants is concerned, it is submitted by the learned senior counsel that the said judgment does not alter the law as laid down in case of Chloro Controls (supra) and merely restates the same. The said judgment in case of Cheran Properties Limited (supra) also requires that intention to bind non-signatory parties to the agreement must be clearly manifest which intention has not been demonstrated by the claimants. In support of this submission, learned senior counsel placed reliance on clauses 21.9 and 21.6 of the SSHA which provides that the said SSHA constitutes the entire agreement between the parties and cancels and supersedes all the prior arrangements, agreements or understandings if any, whether oral or carbp13-17g.doc in writing.

115. Clause 21.6 provides that no variation or amendment to the said SSHA would be valid and binding unless it was recorded in a written document executed amongst the parties. Similar clauses are recorded in the other SSHA. Several SSHA has its own arbitration agreement. He submits that if according to the claimants, the intention of the parties was to bind even non-signatory to several SSHA, there was no reason to include a separate arbitration clause in each of the SSHA. He submits that the language of each arbitration clause also clearly indicates that it pertains to only the dispute connected with the agreement of which it formed a part.

116. It is submitted by the learned senior counsel that on 18 th October, 2008, three separate SSHA were entered into between UITL and the claimant no.1 pertaining to three different Special Purpose Vehicles. If all the SSHA entered into by and between the affiliates were intended to constitute a composite transaction which was to be adjudicated in a single arbitration, there was no need for parties to enter into separate SSHA for each investment, at such close proximity to each other. The separate SSHA were entered into even for the same project.

117. It is submitted by the learned senior counsel that the Inter Corporate Deposit Agreements did not have arbitration agreement carbp13-17g.doc and on the contrary each of this agreement had clause conferring exclusive jurisdiction on the Competent Authority in Mumbai. He submits that it is thus clear that the parties to the Inter Corporate Deposit Agreements did not agree to have their disputes resolved by arbitration under the SSHA. The respondent no.4 was consciously not made a party signatory to the SSHA of the said company was the investment management to respondent no.1 and the Indian investment advisor to the investment manager of the respondent no.2. He submits that the Hon'ble Supreme Court has held that in such a situation, it is necessary that there should be composite transaction to achieve the common object. There was neither any such pleading in the statement of claim filed by the claimants or in the reply filed by the claimants to the application under section 16 of the Arbitration Act filed by the respondent no.4.

118. Learned senior counsel placed reliance on clauses 21.9 and 21.6 of the SSHA and would submit that those two clauses would clearly establish that the transactions in questions were independent of each other and were not composite in nature.

119. It is submitted by the learned senior counsel that to attract doctrine of "Group of Companies" laid down in case of Chloro Controls (supra) decided by the Hon'ble Supreme Court, the performance of one of the agreements should be so intrinsically carbp13-17g.doc interlinked with the other agreements that they are incapable of being beneficially performed without performance of the others, or incapable of being severed from the rest. No such pleadings can be found in the statement of claim filed by the claimants. The claimants have belatedly raised a plea in the reply filed by them to the application under section 16 of the Arbitration Act for the first time that the Inter Corporate Deposit Agreements and the Share Subscription Agreements were interlinked. It is submitted that the terms of the Inter Corporate Deposit Agreements are inconsistent with or contrary to the terms of the Supplemental Agreement which would clearly indicate that they cannot be formed part of a composite transaction.

120. The next submission of the learned senior counsel for the respondent no.4 is that there is no final, binding and concluded written Supplemental Agreement between the respondent no.4 and the claimants nor does the alleged written Supplemental agreement made the respondent no.4 a party to the SSHA. In support of this submission, learned senior counsel invited my attention to paragraphs 4.6, 4.19, 4.20, 4.25, 4.29, 4.36, 4.46, 4.73, 4.74, 4,75, 4.76, 4.85, 4.86, 6 and 13 of the statement of claim and various paragraphs of reply filed by the claimants to the application under section 16 of the Arbitration Act. He submits that the respondent no.4 carbp13-17g.doc had denied the existence of the alleged Supplemental Agreement in its application filed under section 16 of the Arbitration Act. He placed reliance on the findings of the learned arbitrator rendered on this issue in paragraphs 269 to 326 of the impugned order.

121. It is submitted by the learned senior counsel that there is no pleading at all filed by the claimants as to when and between whom the draft Supplemental Agreement was finalized and the terms thereof agreed upon by the parties. The said Supplemental Agreement referred in paragraph 4.19 of the statement of claim was only a draft prepared, revised and exchanged between the two groups. The Urban Group has refused to sign or execute the same. The pleas of the claimants in this regard are conflicting. He submits that the claimants did not make out a case in any of the pleadings that there was final, binding and concluded contact in terms of the alleged Supplemental Agreement between the Urban Group and Neelkanth Group. No such alleged details have been pleaded by the claimants.

122. There is intrinsic evidence in the alleged Supplemental Agreement itself which shows that the alleged Supplemental Agreement was not a concluded contract. In support of this submission, learned senior counsel invited my attention to the various clauses of the alleged Supplemental Agreement. It is carbp13-17g.doc submitted that even if the Supplemental agreement was a contract entered into between the two groups some time in the month of October, 2006 or earlier, as per the express terms of SSHA and in particular clause 21.9 thereof, the said Supplemental Agreement has been cancelled and superseded and has no validity. He submits that assuming without admitting

that the terms of the Supplemental Agreement stood incorporated in the SSHA, it still does not follow that the parties to the Supplemental Agreement became parties to the SSHA and thus the respondent no.4 will not be a party to the SSHA.

123. In support of this submission, learned senior counsel placed reliance on the invocation notice dated 22nd October, 2013, composite notice dated 8th September, 2014, the averments made by the claimants in the Arbitration Application No.12 of 2014 filed before the Hon'ble Supreme Court, Impleadment Application No.2 of 2015 filed in the Arbitration Application No.12 of 2014, certain averments from the statement of claim and reply filed by the claimants to the applications filed under section 16 of the Arbitration Act. It is submitted that in view of the fact that the Supplemental Agreement did not constitute the final and concluded and/or binding contract and in any event was cancelled and superseded by the SSHA, there was no question of acting upon the same.

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124. Insofar as reliance placed by the claimants on Annexure "A" of the alleged Supplemental Agreement is concerned, it is submitted by the learned senior counsel that Annexure "A" had placed on record investment allegedly made between October, 2006 and March, 2008 i.e. prior to the date of Fax dated 22nd April, 2008. The said Annexure "A" would not indicate that the alleged Supplemental Agreement was acted upon. The alleged Supplemental Agreement faxed on 22nd April, 2008 could never be reduced form of the oral Supplemental Agreement allegedly arrived at in the month of August, 2006. There was no SHA between Neelkanth Group and Urban Group prior to August / September, 2006. The alleged written Supplemental Agreement refers to the alleged SHA entered into between Neelkanth Group and Urban Group even in the past.

125. It is submitted by the learned senior counsel that the terms of the Inter Corporate Deposit Agreements are inconsistent with the terms of the Supplemental Agreement which would indicate that the alleged Supplemental Agreement was never acted upon or agreed upon by the parties. The rate of interest payable on the deposits given by the respondent no.4 as per the terms of the Inter Corporate Deposit Agreements was 15% p.a. quarterly, whereas as per the alleged Supplemental Agreement, the interest payable on "excess funding' brought in by the respondent no.4 was 12% p.a. He pointed carbp13-17g.doc out various other inconsistencies in clause 2(e) of the Supplemental Agreement and Inter Corporate Deposit Agreements.

126. Insofar as the submission of the learned senior counsel for the claimants that the learned arbitrator ought to have given an opportunity to the claimants to lead oral evidence to show that the alleged Supplemental Agreement was acted upon is concerned, it is submitted by the learned senior counsel that the claimants have not been able to prove the terms of the so called Supplemental Agreement that was allegedly arrived at between the parties nor that any such Supplemental Agreement was concluded. The question of the learned arbitrator thus permitting the claimants to lead any oral evidence to show that some alleged Supplemental Agreement was acted upon by the parties did not arise.

127. It is submitted by the learned senior counsel that the stand taken by the claimants in response to the query from the learned arbitrator regarding the Supplemental Agreement that "fax dated 22nd April, 2008 embodied the terms of the concluded oral contract arrived at in August - September, 2006, only updated so as to take into account the subsequent events / investments" was not pleaded by the claimants in any of the pleadings filed before the learned arbitrator and the same was in any event contrary and/or in consistent with the stand of the claimants taken in the statement of carbp13-17g.doc claim contending that the said fax dated 22 nd April, 2008 was a mere draft. He submits that the claimants thus cannot be allowed to urge that the said Supplemental Agreement was a concluded contract.

128. It is submitted by the learned senior counsel that the Inter Corporate Deposit Agreements cannot be the subject matter of the arbitration. None of those agreements contained any arbitration agreement. Those agreements are complete in all respects regarding all the terms and conditions agreed upon by and between the parties to those agreements. None of those agreements are referred in the other agreements between the parties and were self-contained and separate agreements in themselves. Article VIII of those agreements clearly provides that those agreements were subject to exclusive jurisdiction of the Competent Courts in Mumbai. The disputes relating to Inter Corporate Deposit Agreements thus could not be brought within the ambit of the arbitration agreement contained in the SSHA.

129. It is submitted that since these disputes are not arbitrable, there was no question of permitting the claimants to lead evidence by the learned arbitrator. It is submitted that the contention raised by the claimants that the Inter Corporate Deposit Agreements did not reflect the real arrangement between the parties was raised for the first time in the reply filed by the claimants to the application filed by the respondent no.4 under section 16 of the Arbitration Act. Learned carbp13-17g.doc senior counsel placed reliance on the findings rendered by the learned arbitrator on this issue in paragraphs 353 and 354 of the impugned order and would submit that no interference with the impugned order passed by the learned arbitrator is warranted. Learned senior counsel placed reliance on the judgment of the Hon'ble Supreme Court in case of Payal Singh vs. Coca Cola Company, (2015) 8 SCC 699 and in case of Rastriya Ispat Limited vs. Dewon Chand, (2012) 5 SCC 306, judgment of this Court in case of Reliance Industries Limited vs. Balasore Alloys Limited, (2014) 2 Bom C.R.15 and the judgment of the Hon'ble Supreme Court in case of Duro Felguera S.A. vs. Gangaram Part Limited, (2017) 9 SCC 729.

130. Mr.Mehta, learned senior counsel distinguished the judgment of this Court in case of Rakesh S. Kathotia (supra) on the ground that the said proceedings were under section 9 of the Arbitration Act and the agreement under consideration of this Court in the subject matter was admittedly between the two groups. He placed reliance on paragraphs 9, 13, 14, 21 and 22 of the said judgment.

131. Lastly learned senior counsel submits that M/s.Neelkanth Soham Developers Private Limited, the claimant no.3 is wrongly deleted by the learned arbitrator in the impugned order. His clients has no objection if the said party is added in the arbitral proceedings carbp13-17g.doc before the learned arbitrator. The statement is accepted.

132. Mr.N.H. Seervai, learned senior counsel for the Urban Infrastructure Trustees Limited (respondent no.1) and Urban Infrastructure Venture Capital Fund (respondent no.3) adopts the arguments advanced by Mr.Shyam Mehta and made additional submissions. Learned senior counsel invited my attention to few paragraphs of the judgment of the Hon'ble Supreme Court in case of Cheran Properties Limited (supra) relied upon by the learned senior counsel for the claimants and would submit that the provisions of law considered by the Hon'ble Supreme Court in the said judgment and the facts were totally different from the facts of this case and that the said judgment is clearly distinguishable. He submits that the Hon'ble Supreme Court was called upon to consider in the said judgment as to whether the test embodied in section 35 of the Arbitration Act was fulfilled or not so as to bind the petitioner who was not a party to the arbitration proceedings. The record established that the transfer of shares of K.C. Palanisamy to his nominees was to be on the express condition that the nominee would abide by the terms of the agreement in relation to take over of the management of S.P.I.L. Cheran Properties while purchasing the shares, was conscious of and accepted the terms of the SSHA and its letter dated 17th August, 2004 clearly indicated acceptance of the said position.

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133. It is submitted that the Hon'ble Supreme Court in the facts and circumstances of the case held that the award was binding on Cheran Properties as it was "person claiming under" party to the parent agreement, as provided in section 35 of the Arbitration Act. He submits that however in the facts of this case, the claimants have attempted to join non-parties and non-signatories to various separate and independent arbitration agreements despite having expressly given up and/or failed in their attempt to join those parties before the Hon'ble Supreme Court in the Arbitration Application No.12 of 2015 filed under section 11(9) of the Arbitration act. He submits that the judgment of the Hon'ble Supreme Court in case of Chloro Controls India Private Limited (supra) has not been watered down in case of Cheran Properties Limited (supra). He relied upon paragraphs 1, 2, 5, 7, 8, 40, 42 and 44 of the said judgment in case of Cheran Properties Limited (supra).

134. Learned senior counsel submits that the judgment of the Hon'ble Supreme Court in case of Indowind Energy Limited (supra) was a case under section 11 of the Arbitration Act and not the case under section 35 of the Arbitration Act. The factual conspectus in case of Indowind Energy Limited (supra) and Cheran Properties Limited (supra) were totally different. The Hon'ble Supreme Court in case of Indowind Energy Limited (supra) had dealt with the plea carbp13-17g.doc pre award scenario whereas in case of Cheran Properties Limited (supra) has dealt with post award scenario. He submits that the judgment of the Hon'ble Supreme Court in case of Cheran Properties Limited (supra) is not an authority on the proposition that in all the cases affiliate and/or group companies and/or wholly owned subsidiary companies could be compelled with the arbitration where there was no intent of the parties nor commonality of the subject matter. He submits that reliance thus placed by the claimants on the judgment of the Hon'ble Supreme Court in case of Cheran Properties Limited (supra) is totally misplaced.

135. Insofar as the submission of the claimants on the issue as to whether they were entitled to lead oral evidence in the said application filed by some of the respondents under section 16 of the

Arbitration Act is concerned, learned senior counsel submits that sections 91 and 92 of the Indian Evidence Act, 1872 will clearly apply to the facts of this case as the respective agreements are not only in writing but in fact have "entire agreement" clause. He placed reliance on the judgment of the Hon'ble Supreme Court in case of New India Assurance Company Limited vs. Kusumanchi Kameshwara Rao & Anr. (1997) 9 SCC 179 and more particular paragraph 6 and the judgment of Hon'ble Supreme Court in case of A. Abdul Rashid Khan (Dead) & Ors. vs. P.A.K.A. Shahul Hamid & Ors. (2000) 10 carbp13-17g.doc SC 636 and more particularly paragraph 4.

136. It is submitted by the learned senior counsel that in this case the claimants had issued individual notices invoking arbitration agreement and thereafter had issued composite notices invoking arbitration agreement. The claimants thereafter filed six separate arbitration cases before the learned arbitrator. He submits that the Hon'ble Supreme Court in case of Cheran Properties (supra) had considered the post award situation whereas in this matter, the proceedings were before the learned arbitrator in which the learned arbitrator accepted the plea of jurisdiction raised by some of the respondents. He placed reliance upon sections 18 to 27 of the Arbitration Act. He submits that section 24 of the Arbitration Act can apply only at the final hearing stage and not at the stage of sections 17 and 16 of the Arbitration Act. He distinguished the judgment of this Court in case of Vinay Bubna (supra), in case of Mrs.Pushpa P.Mulchandani & Ors. (supra), ONGC vs. Saw Pipes (supra) relied upon by the learned senior counsel for the claimants.

137. It is submitted that the judgment of this Court in case of Vinay Bubna (supra) was under section 34 of the Arbitration Act and not under section 16 and is clearly distinguishable in the facts of this case. The judgment of this Court in case of Mrs.Pushpa P.Mulchandani & Ors. (supra) was under section 34 of the carbp13-17g.doc Arbitration Act and not under section 16. He distinguished the judgment of Supreme Court in case of ONGC vs. Saw Pipes (supra) on the ground that the said judgment was also under section 34 of the Arbitration Act. The proposition laid down by the Supreme Court in case of ONGC vs. Saw Pipes (supra) are not in dispute. Learned senior counsel distinguished the judgment of Supreme Court in case of The Godhra Electricity Co.Ltd. & Another (supra). He placed reliance on paragraph (16) thereof on the issue as to whether the oral evidence can be led under the provisions of sections 91 and 92 of the Indian Evidence Act.

138. Learned senior counsel distinguished the judgment of the Hon'ble Supreme Court in case of Ameet Lalchand Shah & Ors. (supra). He submits that the facts before this Court in the said judgment were totally different. In the said matter, the Court had considered a single project and had considered the situation subsequent to the amendment of the section 8 of the Arbitration Act whereas in this case, the parties are governed by the unamended section 8.

139. Insofar as submission of the learned senior counsel for the claimants that the respondents had admitted the existence of the Supplemental Agreement and had proceeded with on the basis of demurrer is concerned, it is submitted by the learned senior counsel carbp13-17g.doc that the respondent nos. 3 and 4 did not admit the contents and the authenticity of the alleged Supplemental Agreement. He placed reliance on the judgment of Supreme Court in case of Roop Kumar vs. Mohan Thedani, (2003) 6 SCC 595 and in particular paragraphs 12 and 17 in support of the submission that the parole evidence to contradict the written document is not permissible. He submits that the

Hon'ble Supreme Court in the said judgment has interpreted section 92 of the Indian Evidence Act.

140. Reliance is placed on the judgment of the Hon'ble Supreme Court in case of A.Abdul Rashid Khan (Dead) & Ors. vs. P.A.K.A. Shahul Hamid & Ors., (2000) 10 SCC 636 and in particular paragraph (4) thereof in support of the submission that the parole evidence cannot be permitted to contradict the written document. He placed reliance on the judgment of Supreme Court in case of New India Assurance Company Ltd. vs. Kusumanchi Kameshwara Rao & Anr., (1997) 9 SCC 179 and in particular paragraph (6).

141. Learned senior counsel placed reliance on the Arbitration Application No.12 of 2015 filed by the claimants before he Hon'ble Supreme Court under section 11(6) read with section 11(9) of the Arbitration Act and more particularly paragraph (14) and the prayers in the said application. He submits that admittedly the said intervention application filed by the claimants in the said Arbitration carbp13-17g.doc Application No.12 of 2015 was withdrawn by the interveners. An application for impleadment was made seeking impleadment of the respondent nos.3 to 10 which application also stood withdrawn.

142. Mr.Zal Andhyarujina, learned counsel for the respondent no.2 (UIREF) submits that his client is a foreign company, incorporated in the Republic of Mauritius, with a limited life and was a party to the arbitration agreements contained in SSHA dated 26 th June, 2008 and SSHA dated 20th September, 2007 in respect of which the claimants have filed Case No.5 of 2015 and Case No.9 of 2015 before the learned arbitrator respectively. His client was not a party to any other agreement except the SSHA dated 26 th June, 2008 and 20th September, 2007.

143. It is submitted by the learned counsel that in Case No.5 of 2015 and 9 of 2015, the claimants impleaded several non-parties and included disputes which fell outside the scope of the arbitration agreements contained in the aforesaid two Subscription cum Shareholders Agreements. The claimants also impleaded his clients in Case Nos.6, 7, 8 and 10 in respect of agreements to which his client was not a party. His client therefore filed application under section 16 of the Arbitration Act challenging the jurisdiction of the learned arbitrator to determine the claims made against his client. Similar applications were filed by various other parties. The learned carbp13-17g.doc arbitrator has rightly accepted the contentions raised by his client in the impugned order dated 5th December, 2016. He placed reliance on the relevant paragraphs of the impugned order at pages 793 and 799 of the arbitration petition.

144. Learned counsel for the respondent no.2 placed reliance on clause 21.9 of the two agreements referred to aforesaid which provides for 'Entire Agreement'. He submits that in view of the said clause, the learned arbitrator rightly held in paragraph (292) of the impugned order that the said clause besides constituting the binding agreement between the parties precludes the party to a written agreement from taking recourse to pre-contractual negotiations and thus any such pre-contractual negotiations would not have contractual force. He also placed reliance on clause 21.6 of the aforesaid two agreements which provides for 'variation' and would submit that the effect of variation clause was that the terms of the aforesaid two agreements could be varied only in writing duly executed and with the consent of the parties to the aforesaid two agreements.

145. It is submitted that the learned arbitrator rightly dealt with this issue in paragraphs (220) and (263) of the impugned order and rightly held that any prior agreement or understanding or arrangement or negotiations stood superseded in view of the 'Entire carbp13-17g.doc Agreement Clause'. It is submitted by the learned counsel that the respondent no.2 was not even in existence when the so called understanding was allegedly arrived at. The respondent no.2 itself came into existence only in the year 2007.

146. Insofar as the Supplemental Agreement whether stood incorporated by reference or not is concerned, learned counsel placed reliance on paragraph (299) of the impugned order and would submit that the learned arbitrator rightly held that the incorporation of fresh terms into an existing contract amounts to novation and/or alteration of that contract. Only the parties by mutual agreement can novate and/or alter a contract. Even one of the party of the contract cannot unilaterally add or alter any terms and/or conditions to an existing contract. He submits that even otherwise where the parties are the same, no reverse incorporation, i.e. by an earlier document into a subsequent document is possible. If the parties are different, then only the parties to the subsequent agreement can incorporate terms and conditions of an earlier document and not vis-a-versa.

147. Learned counsel submits that the concept of incorporation by reference can be invoked only when the documents to which a reference is made is in existence. So called Supplemental Agreement is prior to both the Subscription and Shareholders Agreement dated 20th September,2007 and 26th June, 2008. He placed reliance on the carbp13-17g.doc judgment of Supreme Court in case of Anil Kak vs. Sharada Raje (2008) 7 SCC 695 and in particular paragraph (32). He submits that for invoking the principles of doctrine of incorporation, a document must be in existence. It cannot be brought in existence later on. Admittedly, the so called Supplemental Agreement does not contain any arbitration agreement. Learned counsel placed reliance on the judgment of Supreme Court in case of M.R. Engineers & Contractors Private Limited vs. Som Datt Builders Limited, (2009) 7 SCC 696 and the judgment of this Court in case of POL India Projects Limited vs. Aurelia Reederei Eugen Friederich GMBH Schiffahrtgesellschaft & Company KG & Others, (2015) 7 Bom.C.R. 757.

148. Learned counsel placed reliance on the findings rendered by the learned arbitrator in paragraphs 313, 317, 318 and 325 of the impugned order on this issue and would submit that the so called Supplemental Agreement was completely irrelevant to the arbitration proceedings. It is submitted by the learned counsel that the claimants totally failed to satisfy that there was incorporation by reference. The learned arbitrator rightly observed in paragraph (324) of the impugned order that the intrinsic evidence in the Supplemental Agreement itself shows that the Supplemental Agreement was not a concluded contract.

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149. Learned counsel submits that the learned arbitrator has constructed and interpreted the so called Supplemental Agreement read with other documents. The construction and interpretation of the document by the learned arbitrator is a matter of law. It is submitted that the contract between the two other parties cannot be made a part of another part between different parties and

consolidation of such two agreements is not permissible. Learned counsel placed reliance on the judgment of Chancery Division in case of Inntrepreneur Pub Company (CPC), Inntrepreneur Pub Properties Gamma Limited vs. Duncan Sweeney, (2000) EWHC 1060 (Ch) and in particular the relevant paragraphs which has been extracted and dealt with by the learned arbitrator in paragraphs 285 to 287 of the impugned order.

150. Learned counsel for the respondent no.2 also placed reliance on the judgment of Delhi High Court in case of Gujarat Mineral Development Corp. Ltd. vs. Simplex Infrastructure Limited in First Appeal No. 618 of 2017 and in particular paragraph (13) in support of his submission that the scope and exercise of jurisdiction of this Court in exercise of powers under section 37 of the Arbitration Act would be co-terminus with the scope of section 34 of the Act and thus scope of section 37 is very limited.

151. Mr.Cyrus Ardheshir, learned counsel appearing for the carbp13-17g.doc respondent no.5 (Jai Corporation) submits that his client was not a signatory to either SHA or SSHA at all. His client also had not executed any 'Deed of Adherence' with any of the parties to the proceedings. The said so called Supplemental Agreement was not even sent to his client on 27th April, 2008 or at any other date. The name of his client was not even mentioned in the said so called Supplemental Agreement.

152. Learned counsel invited my attention to the notice dated 8th September, 2014 issued by the claimants invoking the arbitration agreement and more particularly paragraphs 4 and 5 thereof and the reply dated 10th October, 2014 sent by his client calling upon the claimants to withdraw the said notice insofar as his client is concerned on the ground that his client was not a party to any arbitration agreement. It is submitted by the learned counsel that the claimants in the Arbitration Application No.12 of 2015 filed by the Hon'ble Supreme Court under section 11(6) read with 11(9) of the Arbitration Act had not even impleaded the respondent no.5 as a party respondent in the said proceedings. The impleadment application was subsequently filed by the claimants however it was contended by the claimants that the respondent no.5 was to be impleaded as an affiliate. There was no whisper that the respondent no.5 was party to any Supplemental Agreement. He relied upon carbp13-17g.doc paragraph (10) of the said application and would submit that there was no reference to any so called Supplemental Agreement in the said application for seeking impleadment of the respondent no.5.

153. Learned counsel invited my attention to the reply filed by the respondent no.5 in the impleadment application filed by the claimants before the Hon'ble Supreme Court and would submit that it was specific plea raised by his client that so called Supplemental Agreement was never sent to the respondent no.5 nor there was any reference to the respondent no.5 in the said so called Supplemental Agreement. He also invited my attention to paragraph 3(III, IV and V) of the said reply raising a plea that no arbitration agreement existed between the claimants and the respondent no.5. The said impleadment application was dismissed as not pressed by the claimants in view of the disposal of the Arbitration Application No. 12 of 2015 filed by the claimants.

154. It is submitted that the existence of the alleged arbitration agreement between the claimants and the respondent no.5 had been all throughout disputed by his client. He submits that the

claimants thus could not have joined the respondent no.5 as a party before the learned arbitrator. The learned arbitrator thus rightly passed an order for deletion of the respondent no.5 in the impugned order and more particularly in paragraphs 368 (II) and (III).

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155. Dr.Birendra Saraf, learned counsel for the respondent no.6 submits that by an order dated 28th September, 2012, Sharanya Trading Pvt. Ltd. under Scheme of Amalgamation approved by this Court by an order dated 2nd December, 2016 was amalgamated with Teesta Retail Private Limited. Teesta Retail Private Limited is the successor-in-title of Shinano Retail Pvt. Ltd.

156. Learned counsel placed reliance on section 7(4) of the Arbitration Act and also invited my attention to the copy of Subscription cum Shareholders Agreements dated 25 th August, 2007 and copy of the unsigned Memorandum of Understanding between UIVCL, the respondent no.4 herein and Neelkanth Group alleged to have been faxed. He submits that the said alleged unsigned Memorandum of Understanding was not sent to the respondent no.6. The respondent no.6 is neither a party to any of these agreements nor signatory to the same. He submits that the respondent no.6 has units of two investment trust. The arbitration agreement cannot bind the unit holders of Venture fund. The respondent no.6 is a separate entity all together. The respondent no.6 did not accept that it was an affiliate of any of the party to the arbitral proceedings. Mr.Joshi, learned senior counsel for the claimants accepted this position.

157. It is submitted that no part of section 7 would apply to the respondent no.6. The respondent no.6 had invested in one of the carbp13-17g.doc fund and was not part to any agreement relied upon by the claimants. He relied upon paragraphs 45, 89, 114, 180, 328 and 346 of the impugned order passed by the learned arbitrator and would submit that the findings rendered by the learned arbitrator cannot be interferred with by this Court in this appeal filed under section 37 of the Arbitration Act.

158. Learned counsel placed reliance on clause 4.2 of the Shareholders Agreement and would submit that the said provision clearly places restriction on renunciation of shares by shareholders unless such renunciation is in favour of an affiliate. Similarly clause 5.1 of the Shareholders Agreement places restrictions on the transfer of shares by a party to the agreement. Clause 5.2.1 of the Shareholders Agreement entitles for transfer its shareholding to an affiliate. However, the said affiliate should execute a Deed of Adherence as a condition of such transfer. The said Shareholders Agreement does not make any affiliate party to the Shareholders Agreement or the arbitration agreement incorporated therein.

159. It is submitted that only upon a transfer taking place in favour of the affiliate and such an affiliate executing a Deed of Adherence as per the Shareholders Agreement that the transferee affiliate would be bound by the terms of the Shareholders Agreement or the arbitration agreement therein. His client has not signed the carbp13-17g.doc said alleged Memorandum of Understanding nor the party thereto. He submits that since there was no exchange of any letter or any other document recording arbitration agreement between the claimants and the respondent no.6, section

7(4) (b) of the Arbitration Act would not be attracted insofar as respondent no.6 is concerned.

160. Learned counsel distinguished the judgment of Hon'ble Supreme Court in case of Chloro Controls India (supra) on the ground that his client is neither a party nor a signatory to any of the agreement relied upon by the claimants. He also distinguished the judgment of this Court in case of Jyotsna K. Valia vs. T.S. Parekh, 2007(4) Mh.L.J. 517 and would submit that this Court had placed reliance on order 37 of the Code of Civil Procedure which contain no mandate that an agreement shall be in writing. There was no requirement that the agreement shall be signed by both parties nor does it contain a requirement of 'exchange' of communication.

161. It is submitted by the learned counsel that in none of the e- mails relied upon by the claimants, the claimants have referred his client as part of so called Urban Group. The respondent no.6 was not a party to any of those e-mails/documents. It is submitted that those arbitral proceedings before the learned arbitrator had commenced based on the order of the Hon'ble Supreme Court dated 25th August, 2015 made in Arbitration Petition No.12 of 2015. The respondent carbp13-17g.doc no.6 was not a party to the said proceedings filed by the claimants before the Hon'ble Supreme Court.

162. It is submitted that the only parties who were impleaded in the said arbitration application were the respondent nos.1, 2 and 7 to

10. Though the respondent no.6 herein was sought to be impleaded by the claimants as 'proposed respondent no.10 by filing an Impleadment Application bearing No.2 of 2015, the said application was however not argued by the claimants and no order was passed thereon by the Hon'ble Supreme Court. The said arbitration petition itself was withdrawn based on consensual agreement only between the claimants and the respondent nos.1 and 2 to the said application. The respondent no.6 was not a party to the said consensual agreement.

163. It is submitted by the learned counsel that based on the said order dated 25th August, 2015 passed by the Hon'ble Supreme Court, the claimants could not have impleaded respondent no.6 as a party respondent in the arbitration proceedings and thus the learned arbitrator rightly passed an order for deletion of the respondent no.6 from the statement of claim. He submits that no interference is thus warranted by this Court in the impugned order passed by the learned arbitrator.

164. Mr.Joshi, learned senior counsel for the claimants in carbp13-17g.doc rejoinder submits that except respondent no.6, all other respondents were the affiliates and hence were parties to the arbitration agreement. He placed reliance on the paragraphs (227) to (230) of the order passed by the learned arbitrator and would submit that the existence of the Supplemental Agreement had not been disputed by any of the respondents before the learned arbitrator. He submits that the findings rendered by the learned arbitrator in paragraph (324) is inconsistent with the findings rendered in paragraphs (230) and (231). The learned arbitrator could not have refused to permit the claimants to lead intrinsic and extrinsic evidence before rendering a finding that the Supplemental Agreement was not concluded and before passing the final order accepting the plea of jurisdiction raised by respondent nos. 1 to 6 and thereby causing serious prejudice to the case of the claimants against all the parties including the affiliates under the SSHA.

165. It is submitted that the decision rendered by the learned arbitrator under section 16 of the Arbitration Act accepting the plea of jurisdiction is final order and not a prima-facie view about the existence of the Supplemental Agreement or arbitration agreement. He placed reliance on section 24 of the Arbitration Act in support of the submission that the said provision mandates an opportunity to be rendered to a party to the proceedings to lead oral as well as carbp13-17g.doc documentary evidence.

166. Insofar as 'Entire Agreement Clause" and 'variation clause' relied upon by the respondents is concerned, learned senior counsel for the claimants submits that the said two clauses would not cover all the agreements entered into between the parties. The Supplemental Agreement was much vital than the SHA and the SSHA. The Supplemental Agreement covers all the affiliates of respondent no.4 except respondent no.6.

167. Learned senior counsel once again strongly placed reliance on the judgment of Supreme Court in case of Chloro Controls India (supra) and judgment of Supreme Court in case of Indowind Energy (supra) and submits that though these judgments may differ on facts, however later judgment in case of Chloro Controls India (supra) has to be considered by this Court as the same squarely applies to the facts of this case. He submits that the judgment of Supreme Court in case of Indowind Energy (supra) and in case of S.N. Prasad (supra) were delivered prior to the judgment of Three Judges Bench of the Hon'ble Supreme Court in case of Chloro Controls India (supra) and thus this Court is bound by the principles laid down by the Hon'ble Supreme Court in case of Chloro Controls India (supra) and Cheran Properties (supra). He submits that the judgment of Hon'ble Supreme Court in case of Indowind carbp13-17g.doc Energy (supra), the Supreme Court has not dealt with 'Group of Companies' which was exception to the general law. The judgment of Supreme Court in case of Indowind Energy (supra) and S.N. Prasad (supra) are thus clearly distinguishable. It is submitted by the learned senior counsel that the principles laid down by the Hon'ble Supreme Court in case of Cheran Properties (supra) is also binding on the non signatories to an arbitration agreement and clearly applies to the facts of this case.

168. Insofar as the submission of the respondents on the issue of oral evidence under sections 91 and 92 is concerned, Mr.Joshi, learned senior counsel for the claimants submits that all the respondents were representated by several eminent counsel before the learned arbitrator and thus the statement made by the respondents with regard to the Supplemental Agreement that they would argue on the basis of demurrer was an inappropriate language used by the counsel cannot be accepted by this Court. The respondents recorded concession before the learned arbitrator thereby preventing the claimants to lead the oral evidence and thus cannot be allowed to oppose the submission of the claimants that the opportunity for leading oral evidence was mandatory to prove that the Supplemental Agreement was existing and concluded and/or acted upon by all the parties.

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169. Learned senior counsel placed reliance on the paragraphs (227) to (239) of the impugned order and would submit that the concession made by the respondents was not limited to the existence of some of the documents but was to the existence of the Supplemental Agreement as well as its

impact, effect or incorporation into the SHA / SSHA. The learned arbitrator thus could not have rendered a finding that the Supplemental Agreement was not a final, binding and/or concluded contract between the parties without rendering an opportunity to leading oral evidence to the claimants. The learned arbitrator committed a gross error in rendering such findings and that also without rendering an opportunity to lead oral evidence.

170. Insofar as the scope under section 37 of the Arbitration Act is concerned, it is submitted that an appeal under section 37 is akin to the first appeal and all the grounds/points available and urged in the original proceedings can be re-urged on merits and thus the scope of appeal under section 37 cannot be considered as limited or equivalent to the scope of section 34 of the Arbitration Act. He submits that since the order passed by the learned arbitrator accepting the plea of jurisdiction is a final order under section 16, the scope of section 37 challenging such final order cannot be restricted. The aggrieved party is entitled to agitate the question of fact as well carbp13-17g.doc as by law. He submits that the judgment of Delhi High Court in case of NHAI vs. BSC-RBM-Pati Joint Venture, 2018 SCC OnLine Del.6780 and Gujarat Mineral Development Corporation Ltd. vs. Simplex Infrastructure Limited (supra) would not apply to the facts of this case.

171. All the parties after their oral submissions also filed written arguments before this Court.

REASONS AND CONCLUSIONS :-

172. There are six arbitral disputes (being Arbitration Case Nos.5, 6, 7, 8, 9 and 10 wherein the respondent nos.1 to 6 had filed applications under section 16 of the Arbitration Act inter-alia praying for a declaration that the learned arbitrator has no jurisdiction over the respondent nos.1 to 6 (applicants) nor it has jurisdiction to adjudicate the disputes and differences between the respondent nos.1 to 6 and the claimants. The claimants had impleaded the same respondents in all the six matters although in paragraph 3 of each of the six disputes, the reference was made to a separate agreement from which the dispute arose. It is not in dispute that each of such agreement has been entered into only between some of the parties who have been the parties before the learned arbitrator.

173. A perusal of the statement of claim, insofar as the Case No.5 of 2015 is concerned, indicates that it was the case of the carbp13-17g.doc claimants that the said statement of claim was filed in respect of the disputes and differences between the Neelkanth Group and Urban Group regarding its Subscription Cum Shareholders Agreement (SSHA) dated 26th June 2008 between the claimant no.1 and the respondent no.2 (UIREF) and Nilayami Realtors Pvt. Ltd. (respondent no.9) and Supplemental Agreement between the Urban Group and Neelkanth Group. It was the case of the claimants that much prior to 2006-07, Mr.Anand Jain and Urban Group had transactions / Interactions with Mr.Mohan V. Patel and Neelkanth Group. Mr.Anand Jain and others expressed desire to have association with Mr.Mohan V. Patel and other to have joint venture for the purpose of carrying on real estate business.

174. On 24th August, 2007, the first agreement namely Shareholders Agreement (SHA) was entered into between the UITL, the respondent no.1 as trustee of UIVCF, the respondent no.3 and the

claimant no.1-NMIPL and Asim Realty (now Neelkanth Urban Developers Pvt. Ltd., respondent no.10-SPV). On 20 th September, 2007, the second agreement i.e. Subscription Cum Shareholders Agreement (SSHA) was entered into between UIREF i.e. the respondent no.2, NMIPL i.e. the claimant no.1 and Neelkanth Ricelands Pvt. Ltd. i.e. the respondent no.8 (SPV). The said SSHA was executed at Mauritius.

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175. The third agreement, Subscription Cum Shareholders Agreement (SSHA) was made on 26 th June, 2008 between UIREF i.e. the respondent no.2, NMIPL i.e. the claimant no.1 and Nilayami Realtors Pvt. Ltd., the respondent no.9. On 18 th October, 2008, three Subscription Cum Shareholders Agreement (SSHA) were made. One of them was made between UITL i.e. the respondent no.1 as trustee of the respondent no.2, the claimant no.1 and the respondent no.7. The other two SSHA were made between UITL as trustee of the respondent no.2, the claimant no.1 and the respondent no.8 and the respondent no.1 as trustee of of the respondent no.2, the claimant no.1 and the respondent no.9.

176. It was the case of the claimants that all six agreements have to be read with Supplemental Agreement. It is the case of the claimants that on 22nd April, 2008, the said Supplemental Agreement was faxed by the claimant no.1 to the Urban Group with all Annexures. On 26th June, 2008, another Subscription Cum Shareholders Agreement (SSHA) was executed between the claimant no.1, the respondent no.2 and the respondent no.9 for subscribing to the shares of the Special Purpose Vehicle. Various Inter Corporate Deposit Agreements were entered into between some of the parties. It is the case of the claimants that all Inter Corporate Deposit Agreements entered into between the Urban carbp13-17g.doc Group and Neelkanth Group from 19th October, 2006 were governed by the Supplemental Agreement and were required to be dealt with and/or given accounting treatment accordingly.

177. It was the case of the claimants that from June-July, 2010, Urban Group held several meetings in the guise of arriving at settlement and/or finding out solutions to the stalemate so created in JV businesses. The parties accordingly decided to approach Mr.Krishnamurthy, General Manager, HDFC Ltd. for resolving the matter and bring about settlement on all pending issues between the parties. The said Mr.Krishnamurthy held 54 meetings and spent more than 3 years to resolve the disputes between the parties. It is the case of the claimants that the claimants invoked arbitration under the SHA and SSHAs by various notices dated 22 nd October, 2013 (excluding SHA of the respondent no.10). The respondent nos.1 to 4 raised various issues in response to the notices invoking arbitration agreements including an issue that no entity other than the signatories to the arbitration agreements could be the party to the arbitration. Insofar as the notices invoking arbitration agreement consisting of Inter Corporate Deposit Agreements are concerned, it was contended by the respondent nos.1 to 4 that there was no arbitration agreement recorded in the Inter Corporate Deposit Agreements.

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178. A perusal of the prayers in the statement of claim indicates that the claimants had applied for declaration to the effect that SSHA dated 26th August, 2008 read with Supplemental Agreement between Neelkanth Group and Urban Group is valid, subsisting and binding upon the parties and had prayed for specific performance thereof. The claimants had also applied for other monetary reliefs against the respondent nos.1 to 6 in the statement of claim. The respondent nos.1 to 6 thereafter filed an application under section 16 of the Arbitration Act raising an issue of jurisdiction of the learned arbitrator on various grounds.

179. It is not in dispute that the claimants thereafter filed an arbitration petition (12 of 2015) before the Hon'ble Supreme Court under section 11(9) of the Arbitration Act inter-alia praying for appointment of an arbitrator. In the said arbitration petition, the claimants had impleaded only the respondent nos.1 and 2 (respondent nos.1 and 4 herein) as the party-respondents. The claimants had filed a separate impleadment Application No.2 of 2015 in the said Arbitration Petition No.12 of 2015 inter-alia praying for impleadment of the respondent nos.1 to 6 as parties to the said arbitration petition.

180. It is not in dispute that the Hon'ble Supreme Court passed an order in the said Arbitration Petition No.12 of 2015 on 25 th carbp13-17g.doc August, 2015. The Hon'ble Supreme Court recorded the statement of the respondent nos.1 and 2 in the said arbitration petition agreeing to the name of Shri Justice R.M. Lodha, a former Chief Justice of the India as a sole arbitrator and permitted the claimants to withdraw the said Arbitration Petition No.12 of 2015 leaving all other questions to be decided by the learned arbitrator arising out of the dispute between the claimants and the respondent nos.1 and 2 before the Hon'ble Supreme Court.

181. This Court shall now decide whether the respondent nos.1 to 6 in the arbitral proceedings were parties to the arbitration agreements between the parties and whether the learned arbitrator had jurisdiction to entertain, try and adjudicate upon the disputes, if any, between the claimants and the respondent nos.1 to 6 under SHA, SSHA and the Supplemental Agreement or not. With a view to arrive at a conclusion on this crucial issue, this Court shall now deal with some of the relevant provisions of the agreements entered into between the parties for rendering a finding on the above issue in right perspective. The learned arbitrator has dealt with the pleadings and the averments made in Case No.5 of 2015. It is not in dispute that the pleadings and the averments made in Case No.5 of 2015 and Case No.6 of 2 015 are identical.

182. All the six agreements have identical clauses. However carbp13-17g.doc parties to those agreements are not identical. Clause 1.1 (b) of the SSHA defines the expression "Affiliate." Sub-clause (l) of clause 1.1 defines the expression "Deed of Adherence" substantially in the form set out in Schedule I. Sub-clause (hh) of clause 1.1 defines the expression "Third Party" that is 'not a signatory or party or bound by the obligations under the said SSHA.' Clause 4.4 provides for "Rights of third party." Clause 22.1 of the said agreement provides for "Benefits of Agreement." Clause 27 provides for "Variation" and Clause 30 provides for "Entire Agreement" which are extracted as under : -

> "27. Variation :

No variation of amendment of this Agreement shall be valid and binding unless such variation or amendment is recorded in a written document executed amongst the Parties.

30. Entire Agreement :

This Agreement constitutes and represents the entire agreement between the parties with regard to the rights and obligations of the parties as Shareholders and cancels and supersedes all prior arrangement, agreements or understandings, if any, whether oral or in writing, between the parties on the subject matter hereof or in respect of matters dealt with carbp13-17g.doc herein provided."

183. This Court shall now decide whether the expression "Affiliate" defined in clause 1.1(b) of the SSHA was bound by the terms of the SHA or SSHA without being shareholders of the Special Purpose Vehicle and without executing a Deed of Adherence.

184. It was the case of the claimants before the learned arbitrator and also before this Court that the description of UITL in recital includes its "affiliates" unless repugnant to the context or meaning thereof. According to the claimants, the affiliates of the UITL are expressly included in the definition of UITL as a party. It was also the case of the claimants that the recital wherein Neelkanth and UITL are collectively referred to as "Parties" and individually as the "Party." It was the case of the claimants that the intention of the parties was that several persons and entities are included when the word "party" is used in the contract and that word does not confine itself only to one company named in the SHA / SSHA. While the description of UITL includes its "affiliates," significantly referring to Neelkanth Group, the same does not include its affiliate.

185. It was the case of the claimants that UIVCL (respondent no.4) was to be the representative of all the entities who invested as also the representative the Group as a whole and thus all such carbp13-17g.doc parties also are bound by the agreed terms. There was no such requirement, in as far as the Neelkanth Group was concerned. It was the case of the claimants that the respondent no.4 was expressly referred to as an affiliate in the agreement dated 24 th August, 2007 and was referred to as an Investment Manager in the other five agreements wherein definition of affiliate includes Investment Manager/Advisor.

186. Shareholding structure is provided in Clause 3 of the Agreement while Clause 4 makes provision for issue of further equity shares and other securities. Clause 4.2 enables a party to renounce the equity shares held by it in favour of its affiliates. There are various conditions attached to it. Affiliates and renouncing parties were required to execute a Deed of Adherence as a condition precedent of such renunciation. Clause 4.3 provided that allotment of unsubscribed portion of equity shares further issued by the SPV to a third party shall be subject to the condition that such third party executes the Deed of Adherence.

187. Clause 4.4 imposes restriction on rights of a third party who acquired unsubscribed shares which it may have by being shareholder and by virtue of executing the Deed of Adherence and not

having any other rights and privileges in the SPV. Clause 5.1.1 imposes restrictions on transfer of equity shares/debentures on carbp13-17g.doc Investor and/or their affiliates and also the Promoter until expiry of lock-in period. Clause 5.2.1 overrides the restrictive provision of Clause 5.1.1 and permits transfer of equity shares without any restrictions. Clause 5.2.2 provides that in the event a person ceases to be an affiliate of a party and such affiliate holds equity shares, the cessation shall be informed by the affiliate and parent party to other parties and the parent party shall acquire or cause any of its affiliate to acquire those shares of ceased affiliates. Clause 5.2.3 enables the parties to the agreement to designate any of its affiliates to purchase the shares which such party is entitled to purchase provided the affiliate undertakes to be bound by the terms and conditions of the agreement and executes the Deed of Adherence. Clause 5.11 imposes restrictions on transfer of shares by Neelkanth.

188. A perusal of the agreement dated 18 th October, 2018 clearly indicates that the parties and the signatories to the said agreement were UITL i.e. the respondent no.1 and the claimant no.1. They are collectively referred to as "Parties" and individually as the "Party." A perusal of the agreement clearly indicates that the parties have recorded the terms and conditions and more particularly their rights and obligations inter-se in relation to the Operation, Administration and Management of the company. The Neelkanth has subscribed 60% of equity shares of the SPV whereas UITL i.e. carbp13-17g.doc the respondent no.1 has subscribed 20% of the paid-up share capital of the company. Insofar as the remaining 20% is concerned, it is provided in the said agreement that the Neelkanth/ Company has already entered/will enter into agreement with other investors. The said agreement thus contemplated further steps to be taken by the Neelkanth Group and the said agreement was thus not binding such class of shareholders.

189. A perusal of clause 4.7.1 clearly indicates that in the said agreement, Neelkanth Group and the respondent no.1 have been shown as "Parties" whereas the investors other than the claimant no.1 and the respondent no.1 have been shown in the category of "Other Investors." It is clear that the Investors / Shareholders who are not signatories to the Agreement were thus shown as "Other Investors." A perusal of clause 4.2 and 5.2.3 clearly indicates that the intention of the parties was absolutely clear that affiliates of UITL, respondent no.1 shall not be bound by the agreement. Clause 4.2 permitted the parties to renounce the equity shares held by it in favour of its affiliates, subject to such party executing a Deed of Adherence as a condition of such renunciation.

190. Similarly, clause 5.2.3 clearly provided that the parties who are entitled to purchase shares under the agreement were allowed to designate any of its affiliates to purchase those shares carbp13-17g.doc subject to condition that those affiliates would undertake to be bound by the terms and conditions of the agreement and would execute a Deed of Adherence. In my view, under clause 5.2 of the said agreement, an affiliate would not be bound by the terms and conditions of the agreement unless a transfer of shares under the said provision takes place to an affiliate and such affiliate executed a Deed of Adherence.

191. It is not the case of the claimants that any of the respondent nos.1 to 6 had executed any such Deed of Adherence. A perusal of Clause 15.4 clearly indicates that the said provision enables each party to terminate the agreement by consent of all the parties. In my view, the learned arbitrator has

rightly held that an affiliate who is neither signatory to the agreement not a shareholder of the SPV was given a right under the said agreement to terminate the said agreement itself. It is not the case of the claimants that any of these so called affiliates were the shareholders of SPV. The agreement does not draw any distinction between the affiliates in relation to UITL - the respondent no.1 and the Neelkanth.

192. Clause 21.1 does not mention of any affiliates and thus such affiliates is not bound by the terms of the agreement. On interpretation of clauses 4.1, 7.1, 12.3, 12.5 and 18.1 of the agreement, it is clear that the affiliate is not bound by any of the carbp13-17g.doc provisions of SHA or SSHA. The agreement nowhere provides that affiliates are automatically included in the definition of UITL/ Investor unlike Neelkanth so as to bind a Foreign Fund as a party to a Domestic Fund and vice versa. Neither SHA nor SSHA provides that affiliates of investors become a party to the agreement. In my view, the arguments of the learned senior counsel for the claimants that the affiliate of a party to the first part is automatically bound by the SHA or SSHA has no merit and is contrary to the plain reading of various provisions of those agreements. It was not the case of the claimants that any of the affiliates or shareholders were required to execute any Deed of Adherence as provided in the agreement. In my view, all these shareholders of the parties even otherwise could not be considered as parties to the agreement unless the same were signatories to such agreement or otherwise specifically provided in the agreement.

193. A perusal of the impugned order passed by the learned arbitrator clearly indicates that each and every submission on this issue has been dealt with by the learned arbitrator by recording at least 18 reasons while rejecting the submissions of the learned senior counsel for the claimants and accepting the submissions of the contesting respondents. The learned arbitrator has rightly rejected the contention of the learned counsel that the respondent carbp13-17g.doc nos.5 and 6 were the parties to the expressed terms of SHA or SSHA. In my view, there is no merit in the submission of the learned senior counsel for the claimants that the definition of "shareholder" is though restricted, the definition of "affiliate" and "party" are much wider or that if the definition of "affiliates" is given narrow meaning, the said definition would be otiose.

194. The claimants did not dispute that after execution of SSHA, the claimant no.1 had transferred its share in the joint venture company i.e. Nilayami Realtors Private Limited, respondent no.9 herein to one of its affiliates i.e. Neelkanth Soham Developers Pvt. Ltd. At that time, Neelkanth Soham Developers Pvt. Ltd. executed a Deed of Adherence in accordance with SSHA. It is not in dispute that Deeds of Adherence in accordance with SSHA were also executed on transfer of shares by the claimants i.e. Neelkanth Kalindi Realtors Developers Pvt. Ltd., respondent no.4 and Neelkanth Devansh Developers Pvt. Ltd., respondent no.2 respectively. In my view, the execution of such Deed of Adherence by one of such affiliates who were transferred such share by the claimant no.1 in accordance with the terms of the said SSHA would clearly indicate that the parties had understood the said terms of the SSHA to mean that the affiliates were bound by the said SSHA subject to various conditions and an executing a Deed of Adherence which was not executed by carbp13-17g.doc any of the alleged affiliates of the respondents.

195. Insofar as the judgment of this Court in the case of Rakesh S. Kathotia vs. Milton Global Ltd. (supra) relied upon by the learned senior counsel for the claimants is concerned, a perusal of the said judgment clearly indicates that the said appeal before the Division Bench of this Court was arising out of the order passed in the application filed under section 9 of the Arbitration Act which was rejected on the ground that there was no identity of the parties to the arbitration agreement. The parties in that matter had admitted that a Joint Venture Agreement (JVA) was admittedly entered into between the two groups. Under the said JVA, various amounts were to be infused by way of capital for the purpose of expansion of manufacturing and marketing activities. In the said agreement, the two groups were exhaustively defined so as to include the respective Groups and immediate relatives taken together and such other entities controlled by them or their immediate relatives directly or indirectly. The recitals in the JVA clearly indicates that each of the groups would act jointly in respect of their constituent members through a authorized representative. Both the Groups had nominated their representatives in the Board of Directors. The Division Bench in such facts at hand had adverted to the judgment of the Hon'ble Supreme Court in the case of Chloro Controls India Private carbp13-17g.doc Limited vs. Severn Trent Water Purification Inc. & Others (supra).

196. In my view, the facts before this Court in these groups of matters are totally different than the facts before the Division Bench of this Court in the case of Rakesh S. Kathotia vs. Milton Global Ltd. (supra) and are clearly distinguishable in the facts of this case. The said judgment of the Division Bench of this Court in the case of Rakesh S. Kathotia vs. Milton Global Ltd. (supra) thus would not assist the case of the claimants. None of these agreements in question has any reference or mention of Urban Group in the entire body of the said agreements. Insofar as the judgment of the Hon'ble Supreme Court in the case of Chowgule & Co. Pvt. Ltd. vs. Union of India & Others (supra) relied upon by Mr.Joshi, learned senior counsel for the claimants is concerned, in my view, the said judgment would not assist the case of the claimants even remotedly.

197. In my view, the submission of the learned senior counsel that even if the Deed of Adherence is not signed by an affiliate, atmost such affiliate would not have voting right as shareholder but still would be bound by the other provisions of the SHA or SSHA is totally contrary to the plain reading of aforesaid provisions of those agreements. In my view, all the provisions of the said agreements have to be read as a whole. It is futile to urge by the claimants that such affiliates though may not have power to vote however, would carbp13-17g.doc be still bound by the other terms and conditions of the SHA or SSHA. In my view, there is no merit in the submission of the learned senior counsel for the claimants that in the impugned order, the recitals and definitions of "affiliates" in the agreements have been made otiose by the learned arbitrator or that the learned arbitrator has ignored the back ground in which the parties had entered into such agreements. This Court shall now consider the issue as to whether the Supplemental Agreement stood incorporated in the SHA and/or SSHA.

198. It is not in dispute that none of the parties to the statement of claim had signed the said Supplemental Agreement. It was not the case of the claimants that the said Supplemental Agreement was sent by fax by the claimant no.1 to the Urban Group on 22 nd April, 2008. Some of the SHA and SSHA had already been executed much prior to the date of 22nd April, 2008 when the

said Supplemental Agreement was faxed by the claimants to one of the parties. A perusal of such Supplemental Agreement placed on record by the claimants indicates that when describing the Urban Infrastructure Trustees Ltd., the respondent no.4 in the arbitral proceedings, it was provided that the expression shall mean and include its Trustee affiliate/associate entitles. Similarly while describing the Neelkanth Group also, it was provided that the said Group would include their carbp13-17g.doc descendant and entitles, affiliate/associate, in which they individually or jointly amongst themselves hold controlling interest. Clause (j) of the said Supplemental Agreement provided that the said understanding shall form integral part of the shareholders, agreement between Neelkanth and Urban in respect of all SPV entitled the project covered thereunder (in past, present and future) and in the event of exit of Urban and any SPV for any reason, shall ensure adherence of that execution by the new investor.

199. It was vehemently urged by Mr.Joshi, learned senior counsel for the claimants that though the said Supplemental Agreement was not signed by any of the parties, the claimants had produced various correspondence, statement of accounts exchanged between the parties including the affiliates, participation of affiliates in various common Joint Venture Projects, participation before the learned Mediator so as to settle the dispute between the parties in support of the case of the claimants that the said Supplemental Agreement was all throughout implemented and acted upon by the parties. It was also vehemently urged by the claimants before this Court that though the opportunity sought by the claimants to lead evidence to prove the existence of such Supplemental Agreement and also to prove that such Supplemental Agreement was all throughout implemented and acted upon by all the parties and stood carbp13-17g.doc incorporated in the SHA and SSHA which admittedly recorded the arbitration agreement, the learned arbitrator did not give an opportunity to the claimants to lead any oral evidence and has rendered a final and concluded finding that no such Supplemental Agreement was concluded between the parties. This Court thus would consider both these submissions together as the same being interlinked and deserves to be dealt with together.

200. It was the case of the claimants that SHA or SSHA did not provide for any ratio of shareholdings held by the parties or held by the affiliates. It is the case of the claimants that the correspondence between the parties relied upon by the learned counsel clearly show that both parties held shares in the SPVs as stated in the Supplemental Agreement. Such ratio of shareholdings was provided in such Supplemental Agreement. It was the case of the contesting respondents that the claimants had merely faxed the alleged Supplemental Agreement without any covering letter and that there was no follow up by the claimants with respondent no.4 with regard to execution of the Supplemental Agreement. The claimants did not also render any explanation as to why the Supplemental Agreement which was alleged to have been arrived at in August 2006 was suddenly reduced in writing and faxed in April 2008. A draft MoU dated 14th January 2012 which was forwarded by the claimants to the carbp13-17g.doc respondent no.4 in the course of negotiations for settlement referred to alleged Supplemental Agreement and was also annexed with the aforesaid MoU. It is not in dispute that at least two of the six Agreements dated 24th August, 2007 and 20th September, 2007 had already been executed prior to the so called Supplemental Agreement having been faxed by the claimant no.1.

201. A perusal of the said Supplemental Agreement clearly indicates that though the said Supplemental Agreement was reduced form of the oral agreement allegedly arrived at in August/September 2006, the said Supplemental Agreement recorded the subsequent events. The said Supplemental Agreement refers to Shareholders Agreements entered into between Neelkanth and Urban even in the past but there was no Shareholders Agreement between Neelkanth and Urban prior to August/September, 2006 i.e. when the alleged oral Supplemental Agreement was arrived at. The fax sent on 22 nd April, 2008 also provided for only the respondent no.4 and the Neelkanth Group as parties. The Supplemental Agreement does not refer to or mention Urban Group at all.

202. A perusal of the Supplemental Agreement further indicates that there is no date mentioned on the Supplemental Agreement. There are several blank portions in regard to the day and month though the year mentioned in the said Supplemental Agreement as carbp13-17g.doc '2007.' Clause 1 in the said Supplemental Agreement mentions UIVCL and its registered office is left blank. There is no mention of Urban Group in the said Supplemental Agreement. A perusal of the averments made in the Statement of Claim filed by the claimants indicates that it was the case of the claimants that Neelkanth Group had accepted the proposal of the Urban Group to form a joint venture and pursuant to this agreement, the joint venture between the two Groups came into existence in or about August/September, 2006. It was allegedly agreed between the parties that the said SHA / SSHA would be read with the Supplemental Agreement. The draft of the Supplemental Agreement was prepared, revised and exchanged between the two Groups.

203. It was the case of the claimants that the Supplemental Agreement however, was not executed by the Urban Group on one or the other excuses. The said Supplemental Agreement however had been allegedly acted upon. It was also the case of the claimants in the statement of claim that till Neelkanth brought in the funds, all funding requirements for the SPVs up to the stage of completion of the projects would be brought in by the Urban Group and such excess funding would carry interest @ 12% per annum. It was also the case of the claimants that pursuant to the Supplemental Agreement, Inter Corporate Deposit Agreements were executed carbp13-17g.doc between 19th October, 2006 and 19th February, 2007 with Dharti Investments. A draft MoU dated 14th January, 2012 was prepared and was sent to Mr.Parag Parekh. The said Supplemental Agreement was referred to in the said draft MoU as "part of agreements" between the two Groups.

204. A perusal of the affidavit in reply filed by the claimants to the applications filed by the respondent nos.1 to 6 under section 16 of the Arbitration Act clearly indicates that it was urged for the first time by the claimants that the true transaction between the parties was governed by the SHA / SSHA read with the Supplemental Agreement. During the course of the argument by the learned senior counsel for the claimants before the learned arbitrator, he submitted a note in writing which recorded that "the fax dated 22 nd April, 2008 embodies the terms of the concluded oral contract arrived at in August / September, 2006, only updated so as to take into account the subsequent events / investments. The word "draft" is used in paragraph 4.19 only to indicate that the reduction of the concluded oral contract into writing was being exchanged so as to settle the language in which it was expressed. It was alleged that the aforesaid concluded contract as reduced in writing was acted upon.

205. A perusal of the allegations in the statement of claim and the affidavit in reply to the applications filed under section 16 of the carbp13-17g.doc Arbitration Act clearly shows inconsistencies insofar as the existence of Supplemental Agreement or that the said Supplemental Agreement was enforced and acted upon. On one hand, it was alleged in the statement of claim and more particularly in paragraph 4.19 thereof that Supplemental Agreement was only a draft prepared, revised and exchanged between the two Groups which indicated that the said Supplemental Agreement was not final and on the other hand, it was urged across the bar before the learned arbitrator by the claimants that the word "draft" was used in paragraph 4.19 only to indicate that the draft of concluded oral contract in writing was being exchanged so as to settle the language in which it was expressed.

206. In my view, the learned arbitrator has rightly held that the so called explanation of the claimants during the course of the arguments about the stand taken in paragraph 4.19 of the statement of claim was clearly an afterthought. No such plea was raised by the claimants in the statement of claim or in replies to applications section 16 by the respondent nos.1 to 6. Learned arbitrator has rightly held that if the explanation given by the claimants across the bar is accepted, it would mean that the fax dated 22 nd April, 2008 sent by the claimant no.1 embodies the oral contract. The said Supplemental Agreement does not record that the same was a memorandum of oral contract or it was a memorandum that records carbp13-17g.doc the terms of the concluded oral contract arrived at in August / September, 2006 or that it was only an updated document of the oral contract and taken into account the subsequent events / investments.

207. Learned arbitrator has rightly held that the said Supplemental Agreement was not a contemporaneous document recording the terms and conditions of the oral agreement which has been arrived at in August / September, 2006. The said Supplemental Agreement was surfaced for the first time on 22 nd April, 2008 though it mentions the year 2007 when a fax was sent by the Neelkanth Group to UIVCL. Though the claimants had urged before the learned arbitrator that the said Supplemental Agreement was part of or stood incorporated in SHA / SSHA which contains the arbitration agreement, there was no such plea raised in the Statement of Claim by the claimants.

208. Clause 30 of the agreement clearly provided that the said agreement constitutes and represents the entire agreement between the parties with regard to the rights and obligations of the parties as shareholders and cancels and supersedes all prior arrangements, agreements or understandings, if any, whether oral or in writing, between the parties on the subject matter thereof or in respect of matters dealt with herein provided. In view of this clause read with Clause 27, it is clear beyond reasonable doubt that the alleged oral carbp13-17g.doc agreement of August/ September, 2006 which was referred by the claimants and the so called Supplemental Agreement, if any, stood cancelled and superseded by the Entire Agreement Clause in all the six agreements. In my view, the Supplemental Agreement thus relied upon by the claimants could not become integral part of the SHA / SSHA.

209. It is not in dispute that none of the SHA / SSHA contains the terms of such Supplemental Agreement in writing or the alleged oral Supplemental Agreement. On plain reading of the averments made in paragraph 4.19 of the Statement of claim, it is clear that the Supplemental

Agreement relied upon by the claimants was only a draft and not a final agreement. The question of the draft Supplemental Agreement thus forming part of or to be read with newly executed SHA / SSHA did not arise. There are several inconsistencies in the case of the claims before the learned arbitrator which have been rightly highlighted by the learned arbitrator while rejecting the case of the claimants.

210. Insofar as the judgment of the Hon'ble Supreme Court in the case of Godhra Electricity Co. Ltd. & Another vs. The State of Gujarat and another (supra) relied upon by the learned senior counsel for the claimants is concerned, it has held by the Hon'ble Supreme Court that in the process of interpretation of the terms of a carbp13-17g.doc contract, the Court can frequently get great assistance from the interpreting statements made by the parties- themselves or from their conduct in rendering or in receiving performance under it. The parties can, by mutual agreement, make their own contracts; they can also, by mutual agreement, remake them. It is further held that one party cannot build up his case by making an interpretation in his own favour.

211. It is held that it is the concurrence therein that such a party can use against the other party. This concurrence may be evidenced by the other party's express assent thereto, by his acting in accordance with it, by his receipt without objection of performances that indicate it, or by saying nothing when knows that the first party is acting on reliance upon the interpretation. It is held that the real reason against taking into account the subsequent conduct of the parties is the rule which excludes extrinsic evidence in the construction of written contract. The Hon'ble Supreme Court has held that if the meaning of the word or phrase or sentence in clear extrinsic evidence is not admissible. When there is latent ambiguity, extrinsic evidence in the shape of an interpreting statement in which both parties have concurred should be admissible.

212. A perusal of the record clearly indicates that it was all throughout the case of the contesting respondents that there was carbp13-17g.doc no Supplemental Agreement entered into between the claimants and the respondent nos.1 to 6 or any other party. This was not the case of the parties having understood the existence of the Supplemental Agreement or that the parties were ad-idem about the existence of the Supplemental Agreement or that the same was the concluded or final agreement binding on both the parties and more particularly that the same stood incorporated in the SHA / SSHA. There is no dispute about the principles of law laid down by the Hon'ble Supreme Court in the case of Godhra Electricity Co.Ltd. & Another vs. The State of Gujarat & Another (supra). However the said principles of law would assist the case of the respondent nos.1 to 6 and not the case of the claimants.

213. In my view, there is no merit in the submission of the learned senior counsel for the claimants that any of the respondents had acted upon any of the provisions of the Supplemental Agreement or that the learned arbitrator had overlooked the fact that there were four Special Purpose Vehicles or several Directors of the parent companies had been replaced by appointment of affiliates. In my view, there is no substance in the submission of the learned senior counsel that interpretation of clause 5.2.3 of the agreement or that Clause 19 of the agreement which provides for arbitration agreement refers to the expression 'parties' included affiliates. I do not find any carbp13-17g.doc infirmity in the findings rendered by the learned arbitrator that the said Supplemental Agreement

was not a complete, conclusive and binding contract and did not stand incorporated in the SHA / SSHA.

214. The Hon'ble Supreme Court in the case of Modi & Co. vs. Union of India, AIR 1969 SC 9 and in the case of Provash Chandra Dalui vs. Biswanth Banerjee 1989 Supp (1) SCC 487 has held that if the words are clear, there is very little the court can do about it. In construing a contract, the Court must look at the words used in the contract unless they are such that one may suspect that they do not convey the intention correctly. Learned arbitrator after adverting to these two judgments of the Hon'ble Supreme Court has rightly held that the intention of the parties is to be gathered from the words used in the agreement. If words are unambiguous and are used after full understanding of their meaning by experts, it would be difficult to gather their intention different from the language used in the agreement.

215. It is held that if upon a reading of the document as a whole, it can fairly be deduced from the words actually used therein that the parties had agreed on a particular term, there is nothing in law which prevents them from setting up that term. The provisions of SHA / SSHA being very clear and the intention of the parties also being clear upon plain reading of the provisions of the said carbp13-17g.doc agreement, the Court cannot give another meaning to the provisions of contract under the guise of interpretation of contract. The principles of law laid down by the Hon'ble Supreme Court in the case of Modi & Co. Union of India (supra) and in the case of Provash Chandra Dalui v. Biswanth Banerjee (supra) would apply to the facts of this case and has been rightly adverted by the learned arbitrator in the impugned order.

216. I will now consider the submission of the learned senior counsel for the claimants that though the learned arbitrator had recorded a statement made by the contesting respondents that on demurrer, they had admitted the Supplemental Agreement, the learned arbitrator rendered a finding contrary to such statement holding that the claimants had failed to prove that the said Supplemental Agreement was a final and concluded agreement. A perusal of paragraph 230 of the impugned order indicates that the learned arbitrator has observed that the contesting respondents in the course of the arguments has proceeded on the assumption that the Supplemental Agreement exists and thus it was not necessary for the claimants to prove the existence of the Supplemental Agreement. Learned arbitrator accordingly held that the Supplemental Agreement reproduced in the Statement of Claim may be read as it is and its impact, effect or incorporation into the SHA / carbp13-17g.doc SSHA can be examined to find out whether or not there exists arbitration agreement relating to Supplemental Agreement between the Claimants and contesting Respondents. Learned arbitrator rightly held that there is no need to record evidence.

217. The claimants had urged before the learned arbitrator that the respondents had proceeded on the basis that the Supplemental Agreement exists and therefore the question of applicability of sections 91 and 92 of the Evidence Act did not arise. A perusal of the impugned order indicates that the learned arbitrator has rejected the said contention on the ground that the assumption that the alleged Supplemental Agreement exists does not rule out the applicability of sections 91 and 92 of the Evidence Act as it was claimants' contention that the Supplemental Agreement is a reduced form of an oral agreement and the terms thereof had become integral part of the SHA / SSHA. The

objection regarding admissibility of evidence is available when the evidence is sought to be tendered. It is only after seeing the nature of the evidence that the arbitral tribunal can rule whether it falls within the prohibition of sections 91 or 92 or not. It is also rightly held by the learned arbitrator that it is open for the respondents to raise a plea that oral evidence to establish that such agreement which was reduced form of oral agreement became integral part of written agreements cannot be permitted to be led as it carbp13-17g.doc is clearly hit by section 92.

218. In support of this submission, the parties relied upon several judgments of the Hon'ble Supreme Court which have been extensively dealt with by the learned arbitrator in the impugned order including the submission advanced on applicability of section 24 of the Arbitration Act. The learned arbitrator also considered, whether the said provision can be pressed in service and oral evidence has to be permitted even at the stage of hearing of application under section 16 of the Arbitration Act or not.

219. The learned arbitrator has rightly held that the submission of the claimants that under the express terms of the SHA / SSHA themselves, all the contesting respondents are parties to the written contract is based on interpretation of the SHA / SSHA and does not require evidence to be recorded. Learned arbitrator has rightly held that irrespective of the factual aspects involved, the arbitral tribunal has to see whether objection relating to its jurisdiction can be decided on the basis of material on record without recording evidence. Section 24 of the Arbitration Act does not command that at the stage of consideration of the application under section 16 if a request is made by a party to lead oral evidence, the arbitral tribunal must in all such cases allow such party to lead evidence. The respondent nos.1 and 4 also did not dispute the legal position, in the course of carbp13-17g.doc arguments, that in an appropriate case, evidence can be allowed at the stage of a section 16 application but they submitted that in the facts and circumstances of this case, no oral evidence was required.

220. Insofar as the judgment of this Court in the case of Vinay Bubna v. Yogesh Mehta & Ors. (supra) relied upon by the learned senior counsel for the claimants is concerned, this Court in the said judgment had not dealt with an application for leading oral evidence at the stage of hearing of the application under section 16 of the Arbitration Act and is thus clearly distinguishable in the facts of this case and would not assist the case of the claimants.

221. Insofar as the judgment of the Hon'ble Supreme Court in the case of Oil and Natural Gas Corporation Limited (supra) relied upon by the learned senior counsel for the claimants on the issue as to whether the procedure prescribed in section 24 of the 1996 Act is mandatory or not is concerned, learned arbitrator has rightly distinguished the said judgment on the ground that insofar as consideration of the application under section 16 is concerned, the provisions of the Arbitration and Conciliation Act, 1996 does not lay down any particular procedure. It has been consistently held that the arbitral tribunal should rule on its jurisdiction first before embarking upon the merits of the dispute.

222. Insofar as the judgment of this Court in the case of Mrs. carbp13-17g.doc Pushpa P. Mulchandani and Ors. vs. Admiral, Radhakrishin Tahiliani (Retd.) and Ors. (supra) relied upon by

the learned senior counsel for the claimants is concerned, in my view, the said judgment does not even remotedly apply to the facts of this case and would not assist the case of the claimants.

223. Insofar as the judgment of the Hon'ble Supreme Court in the case of SBP & Co. Vs. Patel Engineering Ltd. (supra) relied upon by the learned senior counsel for the claimants is concerned, the said judgment does not deal with the issue as to whether oral evidence is required to be permitted in every case at the stage of hearing of the application under section 16 of the Arbitration Act or not. The main issue before the Hon'ble Supreme Court was whether the order passed by the Chief Justice under section 11 of the Arbitration Act was an administrative order or not and whether such application under section 11 could be disposed of on the basis of affidavits and documents produced by the parties or oral evidence was required to be led in certain circumstances or not. The said judgment of the Hon'ble Supreme Court thus would not assist the case of the claimants.

224. Insofar as the judgment of the Hon'ble Supreme Court in the case of M.S. Commercial v. Calicut Engineering Works Ltd. (supra) relied upon by the learned senior counsel for the claimants is carbp13-17g.doc concerned, learned arbitrator in that matter had given an opportunity to lead evidence at the stage of hearing of the application under section 16 of the Arbitration Act. With respect to the said judgment of the Hon'ble Supreme Court, in my view, the said judgment is not a precedent on the issue as to whether the learned arbitrator is bound to permit the parties to lead evidence at the stage of hearing of application under section 16 as a matter of law as soon as the request is made by party to lead evidence under section 16 of the Arbitration Act or not. In my view, the said judgment of the Hon'ble Supreme Court would not assist the case of the claimants.

225. Insofar as the judgment of the Gujarat High Court in the case of Van Oord Acz India Pvt. Ltd. vs. Gujarat Adani Port Pvt. Ltd. (supra) relied upon by the learned senior counsel for the claimants is concerned, the Gujarat High Court has held that the question of jurisdiction can be raised before the arbitrator/s appointed under section 11 mainly because of the fact that the said dispute can be settled on the basis of evidence led before the arbitrator. The said judgment of the Gujarat High Court was delivered prior to the judgment of the Hon'ble Supreme Court in the case of SBP & Co. Vs. Patel Engineering Ltd. (supra). In the said judgment, the Gujarat High Court even otherwise has not dealt with the issue as to whether oral evidence is required to be permitted at the stage of carbp13-17g.doc hearing of the application under section 16 of the Arbitration Act or not and thus the said judgment would not assist the case of the claimants.

226. Insofar as the judgment of the Hon'ble Supreme Court in the case of Maharshi Dayanand University & Anr. vs. Anand Coop. L/C Society Ltd. & Anr. (supra) relied upon by the learned senior counsel for the claimants is concerned, the Hon'ble Supreme Court has held that the learned arbitrator has to decide whether the existence of an arbitration agreement in terms of section 7 of the Act is established and also to decide whether the claim now made is a claim that comes within the purview of the contract or not. It is held that only in case it is found to be an agreement within the meaning of section 7 of the Act, only on deciding these two aspects the arbitrator can go into the merits of the claim made by the claimants. In my view, the said judgment thus would not even remotedly apply to the facts of this case and would not assist the case of the claimants.

227. Insofar as the judgment of the Supreme Court in the case of McDermott International Inc. vs. Burn Standard Co. Ltd., (2006) 11 SCC 181 is concerned, the said judgment also would not even remotedly apply to the facts of this case and would not assist the case of the claimants. Insofar as the issue as to whether sections 91 and 92 of the Evidence Act could be pressed in service carbp13-17g.doc by the respondents or not while opposing an application of the claimants for leading oral evidence at the stage of hearing of the application under section 16 of the Arbitration Act or not is concerned, both the parties have relied upon various judgments of the Hon'ble Supreme Court.

228. It is held by the learned arbitrator that no amount of evidence is permissible to contradict, vary, add or subtract from the terms of written agreement. sections 92 of the Evidence Act, 1872 prohibits leading evidence dehors the terms of the agreement, whether documentary or oral, to get out of the express terms thereof. It was the case of the claimants that since the respondents had proceeded on the basis that the Supplemental Agreement existed and therefore the question of applicability of sections 91 and 92 of the Evidence Act did not arise.

229. Learned arbitrator has rightly rejected the contention of the claimants that the assumption of the alleged Supplemental Agreement exists does not rule out the applicability of sections 91 and 92 of the Evidence Act as it is claimants' contention that the Supplemental Agreement is a reduced form of an oral agreement and the terms thereof have become integral part of the SHA / SSHA. It is rightly held by the learned arbitrator that once the claimants have come out with the case that they should be permitted to lead oral carbp13-17g.doc evidence to establish that such agreement which was reduced form of oral agreement became integral part of written agreements, it is open for the respondents to raise the plea that such evidence cannot be permitted to be led as it is clearly hit by section 92.

230. Learned arbitrator while rejecting the application of the claimants to lead oral evidence adverted to the following judgment of the Hon'ble Supreme Court :-

i). New India Assurance Company (supra)

ii). Abdul Rashid Khan (supra)

iii). Roop Kumar (supra)

iv). Krishnabai Deshmukh (supra)

v). Bai Hira Devi (supra) (supra) and

vi). Ramesh B. Desai & Ors.

231. The statement of law culled out from the aforesaid judgments adverted by the Hon'ble Supreme Court are :-

i). Section 92 of the Evidence Act, 1872 prohibits leading evidence dehors the terms of the agreement, whether documentary or oral, to get out of the express terms thereof;

ii). In view of section 92 of the Indian Evidence Act; where any contract is required by law to be reduced in writing, then no oral evidence or understanding to the contrary or what is apart from the said contract would be admissible in law;

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iii). What section 91 does is to declare that certain kinds of facts are legally ineffective in the substantive law and this results in forbidding the fact to be proved at all.

iv). When there is dispute in regard to the true character of a writing, evidence dehors the document can be led to show that the writing was not the real nature of the transaction, but was only an illusory, fictitious and colourable device which cloaked something else, and that the apparent state of affairs was not the real state of affairs.

232. Insofar as the judgment of the Division Bench of this Court in the case of Meher Singh (supra) relied upon by the learned senior counsel for the claimants is concerned, Division Bench of this Court while considering the provisions of section 9-A of the Code of Civil Procedure, 1908 has held that for determination of the preliminary issue which may be mixed question of law and facts, the parties are required to lead evidence. Without permitting the parties to lead evidence the issue of jurisdiction cannot be finally determined. In my view, the said judgment of this Court would not assist the case of the claimants for the reasons that in this case, learned arbitrator has rightly recorded a finding that submission of the claim is under the expressed term "SHA / SSHA" themselves against all contesting respondents who allegedly are parties to the written contract based carbp13-17g.doc on interpretation of SHA / SSHA and does not require the evidence to be recorded. In the facts of this case, learned arbitrator has rightly held that no oral evidence was required to be led at the stage of hearing of section 16 application.

233. The Hon'ble Supreme Court in the case of Ramesh B. Desai (supra) has explained the concept of demurrer and has held that demurrer was an act of objecting or taking exception or protest. It is a pleading by a party to a legal action that assumes the truth of the matter alleged by the opposite party and sets up that it is insufficient in law to sustain his claim or that there is some other defect on the face of the pleadings constituting a legal reason why the opposite party should not be allowed to proceed further. After adverting to the said judgment in the case of Ramesh B. Desai (supra) the learned arbitrator has held that except the fact that the Supplemental Agreement exists, the inferences drawn by the learned senior counsel cannot be drawn for the reasons recorded in the impugned order. In my view, the learned arbitrator has rightly held that the claimants were bound to show the existence of an arbitration agreement in writing as contemplated in section 7 of the Arbitration Act and not simplicitor the existence of oral agreement.

234. Admittedly it was the case of the claimants that they had not pressed in service the doctrine of incorporation under section 7(5) carbp13-17g.doc of the Arbitration Act of the arbitration agreement recorded in SHA / SSHA in the Supplemental Agreement. It was the case of the claimants that the provisions of the Supplemental Agreement stood interpreted in the SHA / SSHA. Admittedly there is no arbitration agreement recorded in the Supplemental Agreement.

235. The Calcutta High Court in the case of P.T. Tirtamas Comexindo (supra) relied upon by the learned counsel for the respondent nos.1 and 4 held that it is clear that the record" required in section 7(4)(b) is a bilateral record of consent which would exclude a situation where the consent of either one of the parties is not recorded. It is held that mere response in writing to a telephonic message would not do. It would be a unilateral record of the act of one of the parties. Considering those facts, Calcutta High Court has held that there was in fact no arbitration agreement is envisaged under section 7 of the Arbitration Act.

236. Applying the test laid down by the Calcutta High Court in the case of P.T. Tirtamas Comexindo (supra) to the facts of this case, it is clear that none of the respondents have admittedly signed any such Supplemental Agreement which was sought to be incorporated by the claimants in the SHA / SSHA which document had recorded an arbitration agreement. The principles of law laid down by the Calcutta High Court in the case of P.T. Tirtamas carbp13-17g.doc Comexindo (supra) would apply to the facts of this case. I am in respectful agreement with the views expressed by the Calcutta High Court in the said judgment. In my view, none of the mandatory requirements of section 7 of the Arbitration Act required to be complied with to prove the existence of the arbitration agreement have been satisfied by the claimants insofar as the Supplemental Agreement is concerned.

237. This Court in the case of Pramod Chimanbhai Patel vs. Lalit Constructions, (2002) 3 Mh.L.J. 845 relied upon by the learned senior counsel for the respondent nos.1 and 4, has held that parliament has clearly intended by saying so in clear words that the agreement would be an agreement in writing if it is contained in a document signed by the parties. This Court has held that though the acceptance of promises and obligations by conduct of parties is known to law, in cases where one party signs the documents and delivers it to the other party and the other party does not refute it but acts on it, it would be difficult to apply such a method of acceptance to a unilaterally signed separate arbitration agreement. If such unilaterally signed arbitration agreement is accepted as valid, it could enable a party to unilaterally sign an arbitration agreement after having decided on its scope and the terms of submissions to arbitration bind the other party.

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238. The principles of law laid down by this Court in the case of Promod Chimanbhai Patel (supra) squarely applies to the facts of this case. Learned arbitrator has rightly adverted both these judgments and has rightly rendered a finding that the fax message dated 22nd April, 2008 was unilaterally signed by the claimants and therefore the Supplemental Agreement does not amount to an arbitration agreement under section 7(4)(b) of the Arbitration Act. It is held that the fax does not record consent of any of the contesting respondents. It is an admitted position that none of the contesting respondents had given consent to become a party to the said Supplemental Agreement

and consequently question of the Supplemental Agreement having stood incorporated in SHA / SSHA did not arise.

239. The claimants also failed to show before the learned arbitrator any written consent or authority from the other contesting parties who were not signatories to the SHA / SSHA authorizing the respondent no.4 to give consent on behalf of those contesting respondents to accept the terms and conditions of the Supplemental Agreement or to accept that the said Supplemental Agreement stood incorporated in the SHA / SSHA. In my view, none of the conditions prescribed in section 7 of the Arbitration Act were thus satisfied with by the claimants in support of their contention that the carbp13-17g.doc said Supplemental Agreement stood incorporated in the SHA / SSHA and thus the arbitration agreement recorded in SHA / SSHA would bind all the parties though were not parties to the SHA / SSHA.

240. Insofar as the judgment of this Court in the case of Jyotsna K.Valia vs. T.S. Parekh & Co., 2007 (3) Bom. C.R. 772 relied upon by the learned senior counsel for the claimants is concerned, the said judgment is pressed in service by the claimants in support of the submission that a written contract or a contract in writing need not always be a contract signed by both the parties and may consist of exchange correspondence of a letter or letters written by one and assented to by the other without signature or even of a memorandum or printed document not signed by either party. This Court had considered the provisions of Order XXXVII of Code of Civil Procedure, 1908 by holding that a written contract contemplated under the said provision need not always be signed by both the parties. This Court did not consider the ingredient of the arbitration agreement required to be satisfied under section 7 of the Arbitration Act in the said judgment. The said judgment has been thus rightly distinguished by the learned arbitrator in the impugned order.

241. The Hon'ble Supreme Court in the case of M.R. Engineers & Contractors Private Limited vs. Som Datt Builders Limited, (2009) 7 SCC 696 has considered the scope and intent of carbp13-17g.doc section 7(5) of the Arbitration Act and has held that an arbitration clause though an integral part of the contract, is agreement within an agreement. It is a collateral term of contract, independent of and distinct of its substantive terms. It is not the case of the claimants that the said Supplemental Agreement did show any reference to any arbitration clause from SHA / SSHA into the said Supplemental Agreement. In my view, the submission of the claimants is contrary to the provisions contained in section 7 of the Arbitration Act. Be that as it may, it was not the case of the claimants that the claimants had pressed in service the doctrine of incorporation prescribed under section 7(5) of the Arbitration Act.

242. Clause 2(j) of the Supplemental Agreement even otherwise does not make any specific reference to the arbitration clause of SHA / SSHA nor the said Supplemental Agreement indicates any intention of the parties to incorporate the arbitration clause in the SHA / SSHA into a Supplemental Agreement.

243. Insofar as the judgment of the Supreme Court in the case of Anil Kak vs. Sharada Raje, (2008) 7 SCC 695 relied upon by the learned counsel for respondent nos.1 and 4 before the learned arbitrator is concerned, the Hon'ble Supreme Court has held that principle of incorporation by

reference was evolved so as to avoid unnecessary repetition of the same documents again and again in carbp13-17g.doc different parts of the original document. A document must be in existence. It cannot be brought into existence later on. In my view, the learned arbitrator has rightly accepted the arguments on behalf of the respondent nos.1 and 4 that in this case, when the alleged oral agreement of August / September, 2006 was entered into, the SHA / SSHA were not in existence and, therefore, there was no question of oral agreement being incorporated by reference in the Supplemental Agreement.

244. The concept of incorporation by reference can be invoked only when the documents to which a reference is made is in existence. In this case, the claimants alleged the oral agreement prior to SHA / SSHA and relied upon by the Supplemental Agreement which admittedly did not contain any arbitration agreement and that also not signed by any of the parties. In my view, the third parties who were not the signatories to the SHA / SSHA thus could not be considered as parties to the said agreement including the arbitration agreement recorded therein. In my view, the learned arbitrator has rightly rejected the submission of the claimants that since it was asserted by the claimants that their case was not of incorporation by reference, as a necessary corollary, their arguments that by virtue of clause 2(j) of the Supplemental Agreement, the arbitration agreement in SHA / SSHA would apply to the dispute carbp13-17g.doc arising out of the Supplemental Agreement also deserves to be rejected.

245. In paragraph 324 of the impugned order, the learned arbitrator rightly held that the intrinsic evidence in the Supplemental Agreement itself shows that the Supplemental Agreement was not a concluded contract. It is held that the case of the claimants that with regard to Supplemental Agreement has not been consistent. The claimants have tried to improve upon their case after filing the Statements of Claim firstly in their replies to the applications under section 16 and thereafter by way of a written note submitted through learned senior counsel for the claimants in the course of arguments.

246. Learned arbitrator has rightly held that Supplemental Agreement was not a final, binding and/or concluded contract between the parties. Even if it is assumed that the Supplemental Agreement was acted upon, cannot be subject matter of arbitration because there is no arbitration agreement nor it is in writing as asserted by the claimants that the fax dated 22 nd April, 2008 embodied the terms of the oral contract arrived at in August / September, 2006. In my view, the learned arbitrator has rightly held that the so called oral agreement does not contain an arbitration agreement as contemplated under section 7 of the Arbitration Act. The Supplemental Agreement did not form an integral part of each carbp13-17g.doc SHA / SSHA. Learned arbitrator accordingly held that the persons who are not parties to the SHA / SSHA cannot be made parties to the arbitrations in case Nos. 5 to 10. The disputes under the Supplemental Agreement cannot be the subject matter of arbitration.

247. A perusal of the statement recorded by the learned arbitrator that the contesting respondents during the course of arguments had proceeded on the assumption that the Supplemental Agreement exists which statement was made by the contesting respondents on demeanour would not be conclusive to conclude that the contesting respondents had admitted that all the parties who were

impleaded as party-respondents to the statement of claim were parties to the Supplemental Agreement or that they had agreed that the Supplemental Agreement stood incorporated in SHA / SSHA and the arbitration agreement recorded in SHA / SSHA would be binding on such parties also. It was also all throughout disputed by all third parties that they were either parties to SHA / SSHA or to the Supplemental Agreement. In the facts and circumstances of this case, in my view, no infirmity can be found in the impugned order passed by the learned arbitrator rejecting the application to lead evidence at the stage of hearing under section 16 of the Arbitration Act.

248. Learned arbitrator on the basis of the pleadings and the carbp13-17g.doc documents and also on plain reading of the Supplemental Agreement has rightly rendered a finding that the said Supplemental Agreement in any event is not final, conclusive and binding agreement. It was not the case of the claimants that the said Supplemental Agreement was sent to all the parties including the parties who were not the parties to the SHA / SSHA and the terms and conditions of the said Supplemental Agreement were accepted by all such third parties including that the same stood incorporated as a part of SHA / SSHA. The learned arbitrator has rightly exercised the jurisdiction not to permit the claimants to lead any oral evidence on this issue. In my view, merely because of an application is made by the party to the application under section 16 of the Arbitration Act to lead oral evidence, the learned arbitrator is not bound to permit such oral evidence as a matter of course and to convert an application under section 16 into a trial.

249. Insofar as the reliance placed by the contesting respondents on clause 30 of the agreements providing for "Entire Agreement Clause" is concerned, a perusal of the SHA / SSHA clearly indicates that none of those agreements refers to any terms of the supplemental agreement. The Preamble of all those agreements clearly indicate that the parties had agreed to enter into those agreements to record their rights and obligations inter-se in relation to carbp13-17g.doc Operation, Administration and Management of the Special Purpose Vehicles. In my view, the Entire Agreement Clause covers the entire subject matter of the SHA / SSHA's and recorded all the rights and obligations of the parties under the said agreement in toto. If any other terms and conditions were agreed in prior in point of time as canvassed by the learned senior counsel for the claimants, the parties were free to record such prior terms and conditions in those SHA / SSHA's.

250. The intention of the parties by providing such specific "the Entire Agreement Clause" was clear that all these SHA / SSHA's were final and binding agreements recording all the terms and conditions which were agreed upon by the parties specifically under those SHA / SSHA's. It is clear that the said agreements constituted and represented the entire agreement between the parties with regard to the rights and obligations of the parties and had cancelled or suspended all prior arrangement, agreements or understandings if any, whether oral or in writing, between the parties on the subject matter thereof or in respect of matters dealt with and provided therein. In my view, the provisions of the said SHA / SSHA's are being absolutely clear and thus there was no scope for the claimants to urge that the alleged oral agreement of August/September, 2006 allegedly recorded in the said supplemental agreement stood carbp13-17g.doc incorporated in those SHA / SSHA. The question of permitting the claimants to lead any oral evidence to prove the terms contrary to the terms and conditions agreed by and between the parties in writing did not arise.

251. In my view, the learned Arbitrator has rightly recorded a finding that the Entire Agreement Clause covers the entire subject matter of the SHA / SSHA's. Each of the agreement was the whole agreement between the parties with regard to their rights and obligations under those agreements and covered the subject matter of the agreements in its entirety. The learned Arbitrator, while recording such finding rightly placed reliance on the judgment of the Chancery Division in case of Inntrepreneur Pub Company (CPC), Inntrepreneur Pub Properties Gamma Limited vs. Duncan Sweeney, 2002 WL 820071. In the said judgment, the High Court of Justice (Chancery Division) had dealt with identical clause recording an acknowledgement by the parties that the agreement constituted the entire agreement between them. The learned senior counsel for the claimants could not distinguish the said judgment either before the learned Arbitrator or before this Court.

252. In my view, the claimants cannot be allowed to urge that the contractual negotiations prior to the date of execution of those SHA / SSHA could stand incorporated in those agreements in spite of carbp13-17g.doc there being "Entire Agreement Clause". In my view, the learned Arbitrator rightly rejected the application of the Claimant to lead oral evidence which application was even otherwise contrary to section 91 and 92 of the Indian Evidence Act. I do not find any infirmity with this view of the learned Arbitrator. The judgment of the High Court of Justice (Chancery Division) therefore relied upon by the learned Arbitrator and by the contesting respondents squarely applies to the facts of this case.

253. Insofar as the judgment of the Calcutta High Court in the case of Juggilal Kamlapat vs. N.V. International, AIR 1955 Cal. 65 relied upon by the learned senior counsel for the claimants before the learned arbitrator is concerned, the issue before the Calcutta High Court was, whether the modification of the terms of the contract had superseded the original concluded contract or not. In this case, the case of the claimants is reverse. The said judgment of the Calcutta High Court is clearly distinguishable in the facts of the case and would not assist the case of the claimants. In my view, the learned Arbitrator rightly distinguished the said judgment of the Calcutta High Court on the ground that their could not be a modification or supplemental agreement when the main agreement itself was not executed prior to the date of such supplemental agreement. It is also not the case of the claimants that the carbp13-17g.doc claimants have pressed in service the doctrine of incorporation under section 7(5) of the Arbitration Act. It is also not the case of the claimants that the arbitration agreement was contained in exchange of letters, telex, telegrams or other means of telecommunications provided in section 7(4) (b) of the arbitration Act or an arbitration agreement was pleaded by the claimants in the statements of claim and was not denied by the contesting respondents as set out in section 7 (4) (c) of the Arbitration Act. In my view, the claimants have thus not satisfied the conditions of section 7 (4) or 7 (5) of the Arbitration Act and could not establish the existence of any arbitration agreement in Supplemental Agreement or in SHA / SSHA against all the respondents.

254. The case of the claimants before the learned Arbitrator and before this Court is that the supplemental agreement is formed as an integral part of each SHA / SSHA and since each of such SHA / SSHA's contained an arbitration agreement, such arbitration agreement in each of such SHA / SSHA applied to a dispute arising out of the terms of the supplemental agreements which stood incorporated in each of such SHA / SSHA's. In view of these arguments, section 7(5) of the

Arbitration Act even otherwise would not have been attracted to the facts of this case.

255. Insofar as the judgment of the Delhi High Court in case of carbp13-17g.doc Lets Engineering and Technology Services Pvt. Ltd. vs. Manoj Das, 2013 SCC OnLine Del 47 relied upon by the claimants before the learned Arbitrator is concerned, in my view, the learned Arbitrator has rightly distinguished the said judgment on the ground that it was not the case of the claimants that any arbitration agreement was arrived at between the parties by exchange of correspondence.

256. The Calcutta High Court in case of P.T. Tirtamas Comexindo (supra) and this Court in case of Pramod Chimanbhai Patel (supra) had also considered in great detail the mandatory requirements of section 7(4) of the Arbitration Act to construe an arbitration agreement between the parties. In case of P.T. Tirtamas Comexindo (supra) the Calcutta High Court held that under section 7 (4) of the Arbitration Act, there must be an agreement which must be in writing and signed by both the parties. The Calcutta High Court has also construed section 7(4) (b) and section 7 (4) (c) and have held that a party alleging existence of arbitration agreement by relying upon those provisions also must specifically satisfy all those mandatory requirements under those provisions and in absence thereof cannot be allowed to urge that an arbitration agreement existed between the parties.

257. This Court in case of Pramod Chimanbhai Patel (supra) carbp13-17g.doc has held that section 7(4) has been enacted to eliminate the controversy regarding the existence of an arbitration agreement between the parties. The parliament has clearly intended by saying so in clear words that the agreement would be in writing if it is contained in a document signed by the party. It is held that under section 74, the documents mentioned therein would be arbitration agreements in writing only when they are exchanged between the parties. The exchange signifies an assent by both parties and a demonstrable minds of both the parties as to the existence of the arbitration agreement.

258. This Court held that when the parliament says document signed by both parties it intends a document signed by both the parties. It is neither the case of the claimants that the said supplemental agreement recorded a separate arbitration agreement nor is the case of the claimants that the said supplemental agreement was sent by the claimants to all the respondents including the respondents, who were not parties or signatories to those SHA / SSHA. In my view, on this ground also, the claimants failed to prove that the said supplemental agreement was a concluded or binding agreement or stood incorporated in those SHA / SSHA. The principles of law laid down by the Calcutta High Court in case of P.T. Tirtamas Comexindo (supra) applied to the facts of this case I am in carbp13-17g.doc respectful agreement with the said judgment. The judgment of this Court in case of Pramod Chimanbhai Patel (supra) squarely applied to the facts of this case. I am bound by the said judgment.

259. Insofar as the judgment of this Court in case of Jyotsna K.Valia vs. T.S. Parekh & Co. (supra) relied upon by the claimants before the learned Arbitrator is concerned, this Court had considered the provisions of Order XXXVII of the Code of Civil Procedure, 1908. In this case, even otherwise, since it was not the case of the claimants that the parties had recorded the arbitration agreement in any of the correspondence or any of the document exchanged between the parties, or the claimants had alleged the existence of arbitration agreement in the statements of claim and allegedly not

denied by the contesting respondents. The judgment of this Court in case of Jyotsna K.Valia vs. T.S. Parekh & Co. (supra) has been thus rightly distinguished by the learned Arbitrator.

260. Insofar as the judgment of the Hon'be Supreme Court in case of M.R. Engineers & Contractors Private Limited vs. Som Datt Builders Limited (supra) relied upon by the claimants before the learned Arbitrator and before this Court is concerned, the Hon'ble Supreme Court has held that an arbitration clause though an integral part of the contract, is an agreement within an agreement. It is the collateral terms of contract, independent and distinct of its carbp13-17g.doc substantive terms. The learned Arbitrator rightly held that the supplemental agreement did not show any reference showing the intention of the parties to incorporate the arbitration clause from SHA / SSHA into the so called supplemental agreement.

261. In my view, if the arguments of the learned senior counsel for the claimants are accepted that the provisions of supplemental agreement stood incorporated in those SHA / SSHA including the arbitration agreement and based on such incorporation, the arbitration agreement recorded in those SHA / SSHA would be applicable also to the parties to the supplemental agreement, it would be in express violation of the provisions of section 7(5) of the Arbitration Act.

262. Insofar as the judgment of the Hon'ble Supreme Court in case of Anil Kak v. Sharada Raje (supra) relied upon by the contesting respondents is concerned, it has been held by the Hon'ble Supreme Court that principles of incorporation by reference was evolved so as to avoid unnecessary repetition of the same documents again and again in different parts of the original document. For invoking the said principle a document must be in existence. It cannot be brought into existence later on. The executor of a document must know about the other documents which he intends to incorporate in the original document. In my view, in these carbp13-17g.doc circumstances, the alleged prior oral agreement could not stand incorporated in the subsequent agreement. In view of an admitted position that such SHA / SSHA was not even in existence on the date of the original alleged oral agreement of August/September, 2006. The judgment of Hon'ble Supreme Court in case of Anil Kak vs. Sharada Raje (supra) would apply to the facts of this case and would assist the case of the respondent.

263. The learned arbitrator, after considering the pleadings and documents and exhaustive arguments of all the parties has recorded a finding that the intrinsic evidence in the supplemental agreement itself shows that the supplemental agreement was not a concluded contract and was not final and binding between the parties. There was inconsistent stand taken by the claimants before the learned Arbitrator and also before this Court.

264. I do not find any infirmity in the findings rendered by the learned Arbitrator. In my view, the learned Arbitrator is right in holding that even if it is assumed that the terms of the supplemental agreement were acted upon by the parties, the same could not be subject matter of the arbitration. In view of there being no arbitration agreement recorded in the said supplemental agreement nor in any other mode prescribed under section 7(4) or 7(5) of the Arbitration Act. The learned Arbitrator has rightly held that the persons who were carbp13-17g.doc not the parties to the SHA / SSHA could not be made parties to the arbitration in case Nos.5 to 10.

265. Learned senior counsel for the claimants strongly placed reliance on the judgment of the Hon'ble Supreme Court in case of Chloro Controls India Private Limited and also in case of Cheran Properties Limited (supra). Insofar as the judgment of the Hon'ble Supreme Court in case of Chloro Controls India Private Limited (supra) is concerned, learned senior counsel for the claimants strongly placed reliance on the said judgment in support of the submission that there were several circumstances allegedly placed on record to demonstrate that the mutual intention of the parties was to bind both the signatories and the non-signatory "Affiliates" to the SHA / SSHA. It was vehemently urged that the transaction amongst the parties was of composite nature and the performance of binding obligations under SHA / SSHA was not physibal without aid, execution and performance of ancillary agreements such as any corporate deposit agreements and share applications. Reliance is also placed on various statements of accounts alleged to have been exchanged between the parties including the parties who were admittedly not the parties as well the signatories to those SHA / SSHA.

266. The Hon'ble Supreme Court in case of Chloro Controls carbp13-17g.doc India Private Limited (supra) has held that a non signatory or a third party could be subjected to arbitration without his consent, however, only in exceptional circumstances The Hon'ble Supreme Court has considered the ambit and scope of section 45 of the Arbitration and Conciliation Act, 1996. The issue before the Hon'ble Supreme Court was whether the principles laid down by the Hon'be Supreme Court in case of Holdings (P) Ltd. vs. Jayesh H. Pandya & Anr., 2003 (5) SCC 531 was correct exposition of law in case where multiple agreements were signed between different parties and where some of those agreements contain arbitration clause and not all and where the parties were not identically common in proceedings before the Court and where the parties to an action were claiming under or through a party to the arbitration agreement, they were bound by the arbitration agreement recorded in some of the agreements though not in all the agreements.

267. The Hon'ble Supreme Court after construing section 45 of the Arbitration Act held that the expression "any person claiming through or under" takes within its fold, persons who are in legal relationship through or under multiple and multi-party agreements, though they were not at all the signatories to any one agreement or arbitration clause. The Hon'ble Supreme Court held that the onus would lie over the party to show that in fact and in law it was claiming carbp13-17g.doc through or under the signatory party as contemplated in section 45. In the said judgment Chloro Controls India Private Limited (supra), the Hon'ble Supreme Court explained the "Group of Companies" doctrine.

268. After adverting to the judgment of the Hon'ble Supreme Court in case of Chloro Controls India Private Limited (supra), the learned Arbitrator held that the Hon'ble Supreme Court had noted that the principal agreement specifically referred to various agreements or even terms and conditions thereof and all the five agreements duly signed by the parties were primarily to fulfill their obligations. The companies which executed the various agreements were the companies signatory to the principal agreement or the holding companies or the companies belonging to the respondent group in which they had got merged. All the subsequent agreements were ancillary or in incidental agreements to the principal agreements. The foundation was provided under the principal agreement but all the agreed terms could only be fulfilled by performance of the ancillary

agreements. It is held that if the ancillary agreements were not performed in a collective manner, the principal agreement would be of no consequence.

269. The learned Arbitrator rightly distinguished the judgment of the Hon'ble Supreme Court in case of Chloro Controls India carbp13-17g.doc Private Limited (supra) also on the ground that in that case all those agreements were so intrinsically interlinked with the other agreements that they were incapable of being beneficially performed without performance of others or severed from the rest and was a composite transaction between the parties to achieve common object. All the agreements were executed simultaneously supporting the view that the parties had intended to have all those agreements as a composite transactions and in furtherance of the mother agreement. In paragraph 346 and 347 of the impugned order the learned Arbitrator has rightly distinguished the said judgment of the Supreme Court in case of Chloro Controls India Private Limited (supra) on various grounds. The pleadings in the statements of claim filed by the claimants are totally vague and does not demonstrate as to how the "Group of Companies" doctrine was applicable to the facts of this case.

270. The Hon'ble Supreme Court had clearly held in the said judgment that the said doctorine was applied only in exceptional circumstances which the claimants miserably failed to demonstrate before this Court and also before the learned Arbitrator. In this case the oral agreement allegedly arrived at in the month of September, 2006 was first in point of time. A mother or principle agreements in this case i.e. SHA / SSHA was admittedly executed after such alleged carbp13-17g.doc oral agreements. The claimants at the fag end of the arguments, as and by way of afterthought urged that those SHA / SSHA's incorporating supplemental agreement were the mother agreement. In my view, the learned Arbitrator is rightly held that by no stretch of imagination such multiple agreements (oral as well as written) could ever been treated as a mother / principle agreement. In my view there was no case in the statements of claim filed by the claimants that the SHA / SSHA or the supplemental agreement were so intrinsically interlinked with other agreements and those other agreements were incapable of being performed beneficially without performance of the others or could not be severed from the rest.

271. The learned arbitrator also rightly rejected the contentions of the claimants that there was any commonality of interest and purpose and a common objective between all the parties. There were several inconsistencies in the provisions of the terms of supplemental agreement and also in the intercorporate deposit agreements and more particularly the differences in payment of rate of interest provided in the intercorporate deposit agreements and the supplemental agreement. The learned arbitrator after recording detailed reasons rightly rejected the case of the claimants that the intercorporate deposit agreements were mere camouflage and did not reflect the real nature of the transaction or were illusory, fictitious carbp13-17g.doc and colorable devices which clocked the real understanding between the parties.

272. Insofar as the judgment of the Hon'ble Supreme Court in case of Demerara Distilleries Pvt. Ltd & Ors. (supra), relied upon by the claimants before the learned arbitrator is concerned, the learned arbitrator rightly distinguished the said judgment on the ground that the Hon'ble Supreme Court in the said judgment has recorded a finding that the petitioners Nos.2, 3 and 4 therein were parties to

the agreement and that the agreement had been signed on their behalf by another party. The learned arbitrator rightly held that in this case, however, it is not possible to hold that the transaction was composite in nature. In my view even if the supplemental agreement existed on the date of execution of the SHA / SSHA, the same was cancelled / superseded by those SHA / SSHA's in view of "Entire Agreement Clause". The claimants also failed to prove one single agreement being mother agreement and the other agreements as ancillary agreements.

273. In my view, the learned Arbitrator has rightly held that the "Group of Companies" doctrine is not applicable to the facts of this case on the touch stone of the tests laid down by the Hon'ble Supreme Court in case of Chloro Controls India Private Limited (supra). The learned arbitrator clarified that he had examined the carbp13-17g.doc case on the assumption that the principles laid down by the Hon'ble Supreme Court in case of Chloro Controls India Private Limited (supra) are applicable to the domestic arbitration, but in the facts and circumstances of the present matters it is found that the "Group of Companies" doctrine on the touch stone of the tests laid down by the Hon'ble Supreme Court in the said judgment is not applicable.

274. Under section 99 of the Indian Evidence Act, it is clearly contemplated that the agreement that varies the terms of the document has to be a contemporaneous agreement. It is not in dispute that those six SHA / SSHA's were executed within a span of two years of the supplemental agreement recording the alleged oral agreement of August / September, 2006. The learned senior counsel for the claimants could not satisfy this Court that section 99 of the Indian Evidence Act did not apply to the facts of this case or that his clients had complied with the said provision.

275. Insofar as the judgment of the Hon'ble Supreme Court in case of Indowind Energy Limited Vs. Wescare (India) Limited & Ors., (2010) 5 SCC 306 strongly relied upon by the contesting respondents and also by the learned arbitrator in the impugned order is concerned, the question before the Hon'be Supreme Court in the said judgment was whether an arbitration clause found in a document between two parties could be considered as a binding arbitration carbp13-17g.doc agreement on a person who is not a signatory to the agreement and whether a company should be said to be a party to a contract contained in arbitration agreement even though it did not sign the agreement containing in arbitration clause, with reference to its subsequent conduct. The Hon'ble Supreme Court in the said judgment held that the contract could be entered into even orally and the contract could also be spelt out from the correspondence or conduct but an arbitration agreement is different from a contract. In the said judgment it is held by the Supreme Court that the arbitration agreement would come into existence only in the manner contemplated under section 7 of the Arbitration Act. In the facts and circumstances of this case, the learned Arbitrator applied the principles of law laid down by the Hon'ble Supreme Court in case of Indowind Energy Limited (supra) and rightly rejected the contentions raised by the claimants that the supplemental agreement was accepted by and between the parties or that the said supplemental agreement stood incorporated in the said SHA / SSHA.

276. The claimants, however, have made a sincere effort to distinguish the judgment of the Hon'ble Supreme Court in case of Indowind Energy Limited (supra) on the ground that the judgment of the Supreme Court in case of Chloro Controls India Private Limited (supra) was a later judgment and

decided by a larger bench carbp13-17g.doc than the bench which decided the case of Indowind Energy Limited (supra), holding that in certain circumstances, even the parties who are not parties or the signatories to the arbitration agreement can be made parties to the arbitration proceedings.

277. It is not in dispute that the claimant nos.2, 3 and 4 who claims to be group companies of the claimant no.1 were also not parties to any of the said agreement of SHA / SSHA. The respondent no.4 i.e. Urban Infrastructure Ventures Capital Limited was also not a party to the arbitration Petition filed by the claimants before the Hon'ble Supreme Court under section 11(9) of the Arbitration Act seeking appointment of an arbitrator. The claimants did not seek appointment of an arbitrator on the basis that the respondent no.4 and respondent no.2 had represented the so called Urban Group. Only the respondent nos.1 and 2 before the Hon'ble Supreme Court had agreed to refer the disputes and differences between themselves and the claimants to the learned arbitrator appointed by the Hon'ble Supreme Court. Though some of the respondents who have been impleaded by the claimants in the arbitral proceedings before the learned Arbitrator were sought to be impleaded to the said Arbitration Application No.12 of 2015 by filing a separate application for their impleadment, the said impleadment application, however, was not pressed by the claimants before the Hon'ble Supreme Court.

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278. The learned senior counsel for the claimants could not demonstrate before this Court that when a statement was made by the respondent nos.1 and 2 before the Hon'ble Supreme Court that the disputes between them and the claimants could be referred to arbitration, such statement was made not only on their behalf but also on behalf of the other contesting respondents. No such statement on behalf of the respondents for their impleadment as parties before the learned arbitrator was made by them nor recorded by the Hon'ble Supreme Court. Such plea came to be raised by the claimants for the first time only in reply to the application filed by the contesting respondents under section 16 of the Arbitration Act.

279. A perusal of the application for impleadment filed by the claimants before the Hon'ble Supreme Court clearly indicates that the claimants had applied for such impleadment of UIVCL (respondent no.4) on the ground that respondent no.4 was allegedly an affiliate of the respondent nos.1 and 2 defined under the SHA / SSHA. In my view, if that was the case of the claimants, claimants were not required to file any impleadment application so as to implead the respondent no.4 to the arbitration application No.12 of 2015. On perusal of the pleadings in the Arbitration Application No.12 of 2015 and the impleadment application clearly indicates that several inconsistent pleas had been raised by the claimants. Admittedly, carbp13-17g.doc respondent no.4 was not impleaded as a party respondents in the application before the Hon'ble Supreme Court filed under section 11(9) of the Arbitration Act. It was also not pleaded by the claimants in the statements of claim that the respondent no.4 was not impleaded to the Arbitration application No.12 of 2015 on the ground that an objection was raised by the registry of the Hon'ble Supreme Court that respondent no.4 could not have been impleaded as a party in the said application under section 11(9) of the Arbitration Act.

280. It is not in dispute that all the contesting parties had already disputed the existence of arbitration agreement in response to the notice invoking arbitration agreement by the claimants. Such objections were also raised by the contesting respondents when they were sought to be impleaded as parties to the said Arbitration Application No.12 of 2015 by filing reply in the impleadment application. There was thus no question of the contesting respondents being represented by the respondent nos.1 and 2 before the Hon'ble Supreme Court or those two respondents making any statement on behalf of the contesting respondents. The claimants never applied for any clarification before the Hon'ble Supreme Court when the said Arbitration Application No.12 of 2015 was disposed of by the Supreme Court or any time till date. Though the contesting respondents raised plea under section 16 of the Arbitration Act or carbp13-17g.doc even during the course of arguments on the said application filed by the contesting respondents.

281. Insofar as the respondent no.2 i.e. UIREF is concerned, the said party was not a party to any other agreement except the SSHA dated 26th June, 2008 and 20th September, 2007 in respect of which the claimants had filed Case Nos.5 of 2015 and 9 of 2015 before the learned arbitrator respectively. The claimants, however, impleaded the said UIREF also in Case Nos.6, 7 and 8 to 10 in respect of the agreements to which the said UIREF was not a party. The respondent no.2, thus, had filed separate arbitration application under section 16 of the Arbitration Act before the learned arbitrator challenging the jurisdiction of the learned arbitrator insofar as those firm cases are concerned.

282. Mr.Andhyarujina, learned counsel for the respondent no.2 placed on record that his clients was not even in existence when the said alleged oral agreement was entered into in the month of August / September, 2006 but came into existence only in the year 2007. Various judgments relied upon by Mr.Andhyarujina, learned counsel for the respondent no.2 including the judgment of this Court in case of POL India Projects Limited vs. Aurelia Reederei Eugen Friederich GMBH Schiffahrtgesellschaft & Company KG & Ors., (2015) 7 Bom C R 757 would assist the case of his client.

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283. Insofar as the reliance placed by Mr. Dwarkadas learned senior counsel for the claimants on the correspondence exchanged between the parties and the learned mediator Mr.Krishnamurthy in support of the submission that the supplemental agreement was acted upon by and between the parties is concerned, in my view, even though the meetings were held with the learned Mediator, the same would not prove the existence of the arbitration agreement or that the supplemental agreement was acted upon. No such case was made out by the claimants either before the learned Arbitrator or before this Court.

284. A perusal of clause 1.1 (zz) defined in the term "Third Party", clause 4.2 and 5.2, clause 1 of the Deed of Adherence, clause 5.2.1 and 5.2.3 of the SHA / SSHA clause 4.7.3 and 4.7.4, clause 5.3.1, 5.4.1, 7.1, 12.2 to 12.5, 15.4, 16.1 and 18.1 clearly indicates that the respondent no.4 in the arbitral proceedings and the respondent no. 1 herein was a third party and was not at all party to the SHA / SSHA and thus was not concerned with any of those agreements at all. The learned arbitrator has

rightly directed the deletion of the respondent no.4 in the arbitral proceedings from the statements of claim.

285. The judgments of the Hon'ble Supreme Court in case of Payal Chawla Singh Vs. Coca-Cola Co., (2015) 13 SCC 699, in carbp13-17g.doc case of Rashtriya Ispat Nigam Limited vs. Dewan Chand Ram Saran, (2012) 5 SCC 306 and in case of Reliance Industries Limited vs. Balasore Alloys Limited, 2014 SCC OnLine Bom 43 relied upon by the learned senior counsel for the respondent no.4 would assist the case of the respondent no.4 and would apply to the facts of this case.

286. Insofar as the judgment of the Hon'ble Supreme Court in case of Cheran Properties (supra) strongly relied upon by the learned senior counsel for the claimants is concerned, the question before the Hon'ble Supreme Court was as to whether, the test embodied in section 35 of the Arbitration and Conciliation Act, 1996 was fulfilled or not so as to bind the Cheran Properties (supra) who was not a party to the arbitration proceedings. A perusal of the said judgment indicates that a finding was recorded by the Hon'ble Supreme Court with the transfer of shares by Mr. K.C. Palanisamy was to be on the express condition that the said nominee would abide by the terms of the share purchase agreement in relation to take over the management of the Sporting Pastime India Limited. Cheran Properties (supra) was fully aware of the said situation and had accepted the terms of the share purchase agreement. Such acceptance of the terms and conditions were on record of the Hon'ble Supreme Court. In these circumstances, the Hon'ble carbp13-17g.doc Supreme Court held that the award was binding on Cheran Properties (supra) as it was a person claiming under a party to the parent agreement as contemplated in section 35 of the Arbitration Act. However, in the facts of this case, the claimants had joined non- parties and non-signatories to the impleadment application before the Hon'ble Supreme Court and thereafter in the statements of claim though all such contesting parties were not parties to the SHA / SSHA/s or even to the supplemental agreement.

287. A perusal of paragraph 44 of the judgment of the Supreme Court in case of Cheran Properties (supra) clearly indicates that the Hon'ble Supreme Court had considered the share purchase agreement as the parent agreement and has not watered down the requirement of "mother agreement" as held mandatory in case of Chloro Controls India Private Limited (supra) when seeking to non party to an arbitration. The facts before the Hon'ble Supreme Court in case of Cheran Properties (supra) were totally different and are clearly distinguishable in the facts of this case. I am not inclined to accept the submissions of the learned Counsel for the claimants that the judgment of the Hon'ble Supreme Court in case of Indowind Energy Limited (supra) has been reversed in the judgment of Cheran Properties (supra).

288. Insofar as the judgment of the Hon'ble Supreme Court in carbp13-17g.doc the case of Ameet Lalchand Shah & Ors. (supra) relied upon by the learned senior counsel for the claimants is concerned, a perusal of the said judgment indicates that the Hon'ble Supreme Court in the said judgment had considered several contracts entered into by the parties for one single purpose. Parties were common in all the agreements. In these circumstances, the Hon'ble Supreme Court has held that the dispute between the parties to various agreements could be resolved only by referring all the four agreements and the parties thereon to arbitration. However in this case, the facts are

totally different. All the parties who were included as the parties to the statement of claim were not parties to the SHA / SSHA and also to the Supplemental Agreement. The judgment of the Hon'ble Supreme Court in the case of Ameet Lalchand Shah & Ors. (supra) would not assist the case of the claimants.

289. Insofar as respondent no.5 is concerned, admittedly respondent no.5 was not a signatory to SHA / SSHA's at all. The respondent no.5 had also not executed a Deed of Adherence with any of the parties to the proceedings. The claimants could not produce any document either before the learned arbitrator or even before this Court showing that the said supplemental agreement was sent to the respondent no.5 or that the same was accepted by the respondent no.5. The claimants also could not prove that the party to carbp13-17g.doc whom the said supplemental agreement was faxed by the claimants had accepted the said supplemental agreement on behalf of the respondent no.5 or any other respondents.

290. A perusal of the Arbitration Application No.12 of 2015 filed by the claimants before the Hon'ble Supreme Court clearly indicates that the respondent no.5 was not even impleaded as a party respondent in the said proceedings. Though the respondent no.5 was sought to be impleaded as an Affiliate in the impleadment application, no such impleadment application was pressed by the claimants before the Hon'ble Supreme Court. There was no reference to any supplemental agreement in the said application for impleadment filed by the claimants for seeking impleadment of respondent no.5. The respondent no.5 had already raised a specific plea before the Hon'ble Supreme Court in reply to the said application for impleadment that the said supplemental agreement was never sent to the respondent no.5 by the claimants nor there was any reference to the respondent no.5 in the said supplemental agreement. The learned arbitrator was thus right in directing the claimants to delete the name of the respondent no.5 from the arbitral proceedings.

291. Insofar as the respondent no.6 is concerned, the respondent no. 6 was amalgamated with Sharanya Trading Pvt. Ltd.

carbp13-17g.doc by an order dated 02.12.2016 passed by this Court. The said Sharanya Trading Pvt. Ltd. is the successor in the title of Shinano Retail Pvt. Ltd. The facts of respondent no.6 are similar to the facts of respondent no.5. The respondent no.6 was also neither a party to any SHA / SSHA nor was the signatory to any of those documents. The respondent no.6 also had disputed that it was an Affiliate of any of the party to the proceedings. Mr.Joshi, learned senior counsel for the claimants admitted that it was not the case of the claimants that the respondent no.6 was an affiliate of any of the other respondents.

292. Clause 4.2 of the shareholders of the SHA / SSHA clearly indicates that restrictions are imposed under the said provision on renunciation of shares by the shareholders unless such renunciation was in favour of an Affiliate. Similar restriction is also imposed under clause 5.1 of the SHA / SSHA on transfer of shares by party to the agreement. Clause 5.2.1 permits a shareholder to transfer his shareholding to an Affiliate however, on the condition that such an Affiliate should execute a Deed of Adherence as a condition of such transfer. The said SHA / SSHA does not make any "Affiliate" a party to the shareholders agreement or to the arbitration agreement incorporated

therein. It is not the case of the claimants that the respondent no.5 or respondent no.6 had executed any such Deed of Adherence. The respondent no.6 also was not sent any supplemental carbp13-17g.doc agreement by the claimants nor the same was accepted by any other party on behalf of the respondent no.6. In my view, the learned arbitrator thus rightly directed the claimants to delete the name of the respondent no.6 from the arbitral proceedings filed by the claimants.

293. Insofar as intercorporate deposit agreements are concerned, a perusal of the record clearly indicates that all such incorporated deposit agreements were executed by the borrowers and were secured by a demand promissory note signed by the borrower and the promoters of claimant nos.2, 3 and 4 who had given a letter of commitment guaranteeing the payment of intercorporate deposits. In my view, the learned Arbitrator has rightly rejected the contentions of the claimants that all such intercorporate deposit agreements were mere camouflage and did not reflect the real nature of the transaction or that the same was illusory, fictitious and colorable devices. The parties to those incorporate deposit agreements were not parties to the SHA / SSHA and thus did not form part of the common transaction with SHA / SSHA and also the supplemental agreement. The parties to the incorporate deposit agreement thus could not be even otherwise impleaded as parties to the arbitral proceedings in view of there being no arbitration agreement between the claimants and the parties to those carbp13-17g.doc intercorporate deposit agreement.

294. During the course of the arguments of those proceedings Mr.Mehta learned senior counsel for the respondent no.4, on instruction, states that the claimant no.3 - Neelkanth Soham Developers P. Ltd. has been wrongly directed to be deleted by the learned arbitrator in the impugned order from the arbitral proceedings and thus his client has no objection if the said party is impleaded as claimant no.3 to the statements of claim filed by the claimants. Statement is accepted.

295. In my view, the entire order passed by the learned arbitrator is a well reasoned order passed after dealing with the pleadings, documents and after considering large number of judgments of the Hon'ble Supreme Court and this Court. None of the findings rendered by the learned arbitrator are perverse and thus no interference is warranted with those findings or fact. Since the order passed by the learned arbitrator accepting the plea of jurisdiction raised by the contesting respondents under section 16 of the Arbitration Act is final and has a conclusive effect on the arbitral proceedings, this Court had permitted the claimants as well as all the parties to the proceedings to make their submissions in great detail and has heard those group of appeals finally.

296. I therefore pass the following order :-

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a). The impugned order passed by the learned arbitrator on 5th December, 2016 allowing the applications filed by respondent nos.1 to 6 under section 16 of the Arbitration and Conciliation Act, 1996 in Case No.5 to 10 of 2015 insofar as claimant no.3 is concerned is modified. The claimant no.3 to be continued as a party to the Statements of Claim filed by the claimants.

b). Except the modification of the impugned order made by this Court in paragraph (a) aforesaid, the rest of the order impugned in the aforesaid petitions is upheld. All the aforesaid arbitration petitions are dismissed. There shall be no order as to costs.

(R.D. DHANUKA, J.)

297. At this stage, learned counsel appearing for the petitioners seeks continuation of the ad-interim order passed by this Court. Learned counsel for the petitioners does not dispute that no fresh dates are fixed by the learned arbitrator insofar as the claims in question are concerned. Mr.Seervai, learned senior counsel appearing for the respondent nos.3 and 4 (original respond nos.1 and 3) states that atleast for next two months, the fresh dates may not be fixed by the learned arbitrator. In view of the statement made by the learned senior counsel, the application for continuation of the ad-interim order granted by this Court is rejected.

(R.D. DHANUKA, J.)