IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL APPLICATION (OJ) NO. 421 of 2014

In ADMIRALITY SUIT NO. 19 of 2014

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE R.M.CHHAYA

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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MV NICOLAOS A....Applicant(s)

Versus

INDIAN FARMERS FERTILIZERS COOPERATIVE....Respondent(s)

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Appearance:

MR SAURABH SOPARKAR, SENIOR ADVOCATE with MR AMITVA MAJMUDAR, ADVOCATE with MS JYOTIKA JAIN, ADVOCATE with MR HARSH PAREKH, ADVOCATE for the Applicant(s) No. 1

MR DEVAN PARIKH, SENIOR ADVOCATE assisted by MR KUNAL NANAVATI, ADVOCATE with MS PRIYAL PARIKH, ADVOCATE for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE R.M.CHHAYA**

Date : 05/09/2017

CAV JUDGMENT

1. Heard Mr. Saurabh Soparkar, learned Senior Advocate with Mr. Amitva Majmudar, learned advocate with Ms. Jyotika Jain, learned advocate with Mr. Harsh Parekh, learned advocate for the applicant—original defendant and Mr. Devan Parikh, learned Senior Advocate with Mr. Kunal Nanavati, learned advocate with Ms. Priyal Parikh, learned advocate for the opponent - original plaintiff.

2. By this application, the applicant - original defendant has prayed for the following reliefs:-

> "A. YOUR LORDSHIPS be pleased refer the parties in Admiralty Suit No 19 Of 2014 to arbitration as provided in the bill of lading contract, in terms of the mandatory provision of Section 45 of the Arbitration and Conciliation Act, 1996; and/or
>
> B. YOUR LORDSHIPS be pleased to pass an order rejecting the Plaint filed in the instant suit under Order 7, Rule 11(a) and/or Order 7, Rule 11(d) of the Code of Civil Procedure, 1908; and/or
>
> C. YOUR LORDSHIPS be pleased to vacate and/or set aside the *ex parte*

order of arrest of the Defendant Vessel; and/or to dismiss the Admiralty Suit No.19 of 2014;

D. ... ..."

3. Before reverting to the issue involved in the present application, it would be appropriate to take note of the following facts:-

3.1 By an order dated 19.7.2014 passed by this Court (Coram: S.R. Brahmbhatt, J.) in Admiralty Suit no.19 of 2014, the defendant—vessel — M V NICOLAOS A was ordered to be arrested, while the defendant — vessel was anchored at Kandla Port.

3.2 That, the applicant herein moved an application being O.J. Civil Application no.420 of 2014 claiming that the defendant — vessel is owned by the applicant and prayed for modification of the order dated 19.7.2014 and prayed for release of the defendant — vessel on applicant furnishing a Bank guarantee. This Court (Coram: S.R. Brahmbhatt, J.), vide order dated 13.8.2014, was pleased to dispose of the said Civil Application and directed the Registrar that on furnishing the Bank guarantee, issue release order which will permit the vessel to sail and the earlier arrest order came to be vacated.

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3.3 The present application is filed by the applicant for the prayers which are noted hereinabove. In the application, it is the case of the applicant that the applicant has approached this Court through the registered owner, namely, Island Gem Navigation Company Limited, which is incorporated under the laws as applicable in Cyprus.

3.4 It is the case of the applicant that the opponent herein has raised the purported claim on the basis of the bill of lading contract dated 24.6.2014. It is the case of the applicant that in the Suit, the opponent has only relied upon the front side of the bill of lading and the back side was not produced which was sent by the lawyer of the opponent on a request made by the lawyer of the applicant. It is the case of the applicant that the bill of lading contract expressly provides "English law and arbitration to apply". It is further the case of the applicant that Clause 1 of the said bill of lading contract provides that "all terms and conditions, liberties and exception of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated." The applicant relied upon the endorsement on the bill of lading to the effect that the front side of the bill of

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lading provides that "to be used with charter-parties" and identifies expressly the charter party dated 17.6.2014.

3.5 It is further the case of the applicant that the charter party dated 17.6.2014 was concluded between the applicant and Norvik Shipping North America Inc. Canada on the amended NYPE 1946 from whereby the applicant chartered and Norvik Shipping North America Inc. Canada agreed to take on charter the defendant – vessel for 35 to 40 days for a trip from China to the west coast of India – Pakistan range via Singapore being the current voyage. Relying upon the said charter party at Annexure-C to the application, the applicant has referred to and relied upon Clause 19 of the said charter party, which provides for "English law, General Average, Arbitration in London, BIMCO/LMAA 1998 Arbitration Clause to apply." On that basis, it is further contended by the applicant that as per Clause 87 of the "BIMCO/LMAA Arbitration 1998 Clause", the contract shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with the said contract shall be referred to arbitration in London in accordance with the Arbitration Act, 1996 or any statutory modification or re-enactments thereof and in short, it is the case of the applicant that the

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said Clause shall apply to the instant case. The applicant, on the aforesaid basis therefore, contended that the bill of lading is final and conclusive evidence of the terms of the contract of carriage as between the carrier and the consignee/endorsee and it is the specific case of the applicant that the opponent is endorsee and by agreeing to the bill of lading to be endorsed in its name, had conveyed their acceptance to the terms of the contract of the carriage as stipulated in the bill of lading. It is further the case of the applicant that the bill of lading expressly provides for arbitration and English law and specially referring to the charter party and its arbitration clause clearly spells out the intention of the parties, namely, the applicant and the opponent. It is the case of the applicant that such arbitration clause does not lead to any inconsistency or insensibility or absurdity between the charter party contract and the bill of lading contract. It is the case of the applicant that India has notified the England as a reciprocating territory under the New York Convention being Part II of the Arbitration and Conciliation Act, 1996 (Indian Act) and therefore, this Court should refer the parties to arbitration in accordance with the terms of bill of lading and as provided under Section 45 of the Indian Arbitration and

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Conciliation Act, 1996.

3.6 It is also contended that in view of the provisions of Section 45 of the Arbitration and Conciliation Act, 1996 (Indian Act), the prayer of decree cannot be sustained in lieu of the arbitration clause and therefore, it is contended that the Suit be stayed or the same may be dismissed and the parties be referred to the arbitration. It is also contended that the final relief/interim relief cannot be granted. It is also contended that the Code of Civil Procedure, 1908 applies to the Admiralty Suit and there is no provision under Code of Civil Procedure, 1908 or under the Arbitration and Conciliation Act, 1996 (Indian Act) for a Court to grant interim measures with respect to an arbitration taking place outside the territory of India. It is therefore contended that the action in *rem* against the defendant, purely to obtain security without any substantive relief, cannot be sustained and this Court has no jurisdiction to determine the dispute between the applicant and the opponent. In this factual backdrop raised in the present application, the aforesaid prayers are prayed for.

3.7 The applicant has also relied upon the copy of bill of lading, the conditions of carriage attached to the bill of lading, time charter

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dated 17.6.2014 between the Island Gem Navigation Company Limited, NICOLAOS A and Norvik Shipping North America Inc. The applicant has also relied upon the charter party dated 17.6.2014 and has also relied upon the applicability of Clause 87 in particular.

4. In response to the aforesaid application, the opponent has filed the affidavit-in-reply and has denied the contentions raised in the application. The applicant has denied that there exists any agreement with respect to the arbitration and has contended that the validity of the arbitration agreement has yet to be subjected to judicial scrutiny. The opponent has enumerated the factual matrix of two different charter party agreements as well as time charter in relation to the defendant – vessel and the manner in which the goods were received by the opponent.

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4.1 It is the case of the opponent that the terms and conditions of the bill of lading were never supplied to the opponent and the same was supplied only after clearance of the goods on the indemnity by Kisan International Trading and therefore, it is contended that the terms and conditions of the bill of lading cannot be thrust upon the opponent without the opponent accepting the same in writing. It is the case

of the opponent that the opponent has never entered into any agreement to arbitrate as per the provisions of the Arbitration Act.

4.2 The opponent has further contended that the present Suit is filed to recover the losses suffered by it from the defendant – vessel under the Admiralty Jurisdiction of this Court and it is further contended that such proceedings are not arbitrable. It is specifically contended that there is no subsisting arbitration agreement between the opponent herein and all parties to the Suit so as to refer the subject matter of the present Suit to arbitration.

4.3 It is also contended that the bill of lading is merely a document of title and cannot be said to be a valid arbitration agreement between the parties to the Admiralty Suit. It is contended that the present Suit arises on account of short landing of cargo by the defendant – vessel and such dispute cannot be referred to arbitration. It is reiterated that only first page of the bill of lading was sent by email on 8.7.2014.

4.4 It is also contended that the charter party dated 17.6.2014 entered into between Norvik Shipping North America Inc. and the owners of

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the vessel contains Clause 46, which provides that the vessel or owners are not responsible for cargo quantity and/or condition before it is stowed in vessel's hold or after it leaves the vessels tackle over side. The opponent has also relied upon the other clauses of the bill of lading and more particularly, provisions as regards joint draft survey of the vessel by owners/charterers/shippers/receivers. On the aforesaid basis, it is the case of the opponent that as per the aforesaid clause, the applicant - original defendant has expressly agreed and warranted to be fully liable with the charterers/shippers/receivers in the event of any shortage of cargo at disport, which is to be determined as per the joint draft survey. It is the case of the opponent that the said document has been duly signed by the applicant and the present case is a case of short landing of cargo to the tune of 505.932 metric tonnes and the receivers i.e. the opponent - original plaintiff has legally and validly instituted the present Suit for recovery of a sum of USD 249792 plus interest and costs from the original defendant.

4.5 It is contended that no arbitral dispute is referable to arbitration and in terms of Clause 46 of the relevant charter party dated 17.6.2014, the owners are fully liable for any

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short landing at disport. It is contended that the purported arbitration agreement canvassed by the applicant cannot be made applicable in the facts and circumstances of the case and the same is not maintainable. It is reiterated that the purported arbitration agreement cannot be said to be a valid arbitration agreement under the provisions of the Arbitration and Conciliation Act, 1996 (Indian Act) and therefore, it is contended that the present application deserves to be dismissed. It deserves to be noted that along-with the reply, the opponent has also relied upon the email dated 15.9.2014, the charter party between Norvik Shipping North America Inc. and Dachex Shipping Private Limited, Singapore along with the conditions attached thereto. The opponent has also relied upon the communication addressed by Kisan International Trading dated 8.7.2014, email dated 23.7.2014, email dated July 22, 2014.

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5. In response to the affidavit-in-reply, the applicant herein has filed a rejoinder and has denied the contentions raised in the reply in toto. It is reiterated by the applicant that the Suit is filed by the opponent on the basis of bill of lading contract dated 24.6.2014 and admittedly, the bill of lading contract expressly provides “English law and arbitration

to apply". It is contended by the applicant that the opponent is precluded from selectively choosing to be bound by certain terms of bill of lading contract allowing them title to sue; whilst at the same time not being bound by the other terms which provide an obligation to refer the disputes to arbitration. It is also the case of the applicant that the opponent has never sought for any rectification of the bill of lading. It is also the case of the applicant that the opponent would be relinquishing title to sue under the bill of lading contract should they disown the arbitration clause. It is alternatively contended by the applicant that assuming though not admitting that the bill of lading was a stand alone document and that the terms and conditions of a charter party had not been incorporated into the bill of lading, the opponent would still be bound by the arbitration clause under the bill of lading contract. It is also contended that in absence of a stipulation as to the seat of arbitration in the arbitration agreement, the country whose law has been chosen by the party would be the seat of arbitration and therefore, it is contended that even if the bill of lading contract is read in isolation, the same expressly provides for arbitration seated in England. It is contended that even if the party is purported to be unaware of the document

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which is sought to be incorporated into the contract would not relieve the party of their obligations as set out in the document which has been incorporated into the underlying contract.

5.1 It is further contended by the applicant that the opponent admits that Kisan International Trading of Dubai had provided the copy of the charter party dated 17.6.2014 entered into between Norvik Shipping North America Inc. and Dachex Shipping Private Ltd., Singapore on 15.9.2014 and that the bill of lading contract between the applicant and the said Kisan International Trading has been assigned to the opponent. It is the say of the applicant that Kisan International Trading, agent of the opponent having ostensible authority to bind the opponent to the terms of the bill of lading contract and even the charter party agreement between Norvik Shipping North America Inc. and Dachex Shipping Private Ltd. dated 17.6.2014 also provides for arbitration in London with English law to apply and thus, the parties are therefore bound by terms as set out in charter party dated 17.6.2014 between Norvik Shipping North America Inc. and Dachex Shipping Private Ltd. It is further contended that that even if the case of the opponent that only front page of the bill of lading was transmitted to the

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opponent even the front side of bill of lading provides that it was CONGEN Bill of Lading Edition 1994. The applicant has also denied the fact of short landing of goods to the tune of 505.932 metric tonnes of DAP. It is contended that Kisan International Trading received the copy of the signed charter party by Norvik Shipping North America Inc. on 15.9.2014 and the same was supplied to the opponent on the same day. It is therefore denied by the applicant that the terms and conditions of the bill of lading were never supplied to the opponent. It is also denied that only after the clearance of goods or on the indemnity by Kisan International Trading that the bill of lading was supplied to the opponent. It is contended that the bill of lading is inter-alia a contract of carriage between the carrier and the lawful holder of the bill of lading and the mere fact that a party has been negligent in failing to obtain the reverse side of the bill of lading would not discharge the party of their obligations as stipulated in the reverse side of the bill of lading. It is reiterated that even front portion of the bill of lading does contain CONGEN Bill of Lading Edition 1994. It is therefore denied that the opponent never entered into any agreement to arbitrate as per the provisions of the Arbitration and Conciliation Act, 1996.

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5.2 It is further contended by the applicant that the claim of the opponent - plaintiff in the present Suit is based upon the contract of carriage as contained in the bill of lading. It is contended by the applicant that any dispute arising from the contract of carriage is arbitrable as a matter of Indian law. It is also denied by the applicant that there is no subsisting arbitration agreement between the applicant and the opponent.

5.3 It is further denied by the applicant that the bill of lading is merely a document of title. It is contended that over and above it being the document of title, the bill of lading also functions as a receipt and a contract of carriage between the carrier and the holder of the bill of lading. It is further contended that the contract of carriage in the present case expressly makes reference to arbitration and English law to apply and therefore, it is denied that the present dispute arising out of short landing of cargo by the applicant, cannot be referred to the arbitration. In fact, the applicant has also denied the further contentions and assertions made in the reply by the opponent.

6. It may further be noted that the opponent

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herein has filed a further affidavit dated 23.4.2015 and has brought on record documents such as communication dated 11.6.2014 whereby the proposal of supply of DAP was made by the opponent with Kisan International Trading, the supply note issued by Kisan International Trading dated 12.6.2014, email dated 17.6.2014, Load Port Draft Survey Report dated 24.6.2014, Hold Cleanliness Certificate dated 24.6.2014, emails dated 24.6.2014, communication dated 30.6.2014, email dated 7.4.2014, analytical report/quality certificate dated 24.6.2014, quantity certificate dated 24.6.2014, email dated 8.7.2014, communication dated 18.7.2014, communication dated 17.7.2014, email dated 18.7.2014, certificate dated 17.7.2014, email dated 30.9.2014, email dated 5.8.2014 and communication dated 8.8.2014. It is also noteworthy that by a further affidavit-in-rejoinder dated 25.4.2015, the applicant has denied the documents brought on record by way of additional affidavit.

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7. Over and above the oral submissions made by the learned counsels appearing for the respective parties, both the parties have also submitted their notes/written submissions which are also taken into consideration.

8. Mr. Saurabh Soparkar, learned Senior Advocate

as well as Mr. Amitva Majmudar, learned advocate for the applicant have contended as under:-

8.1 That, the relationship of parties is governed by the bill of lading and the present opponent is endorsee of bill of lading and therefore, by virtue of bill of lading, the opponent has approached this Court. It was contended that the concerned bill of lading provides that freight is payable by charter party dated 17.6.2014 and the bill of lading also mentions CONGEN Bill of Lading Edition 1994 and therefore, if the parties act upon the format, they are supposed to know the contents thereof. It was contended that as it is as per the format which is a standard format, the same in unequivocal terms provides that "English law and arbitration shall apply". It was contended that the front as well as reverse side of bill of lading clearly incorporate the terms of charter party dated 17.6.2014, whereby clear intention of the parties is borne out. It was further contended that the front portion of the bill of lading clearly mentions the following:-

[a] To be used with charter parties.

[b] For conditions of carriage see overleaf.

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[c] Freight payable as per the charter party dated 17.6.2014.

8.2 It was further contended that the bill of lading has been endorsed in favour of the opponent and signed and stamped by Kisan International Trading and it is also signed and stamped on behalf of the master of the vessel and thus, it was contended that the intention of the parties to incorporate the terms of the charter party are clear. It was further contended that the terms of bill of lading and charter party clearly mention the law and arbitration clause. The reverse side of the bill of lading clearly mentions that "English law and arbitration to apply". Even Clause 1 clearly mentions that "all terms and conditions, liberties and exception of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated." It was further contended that the terms of charter party clearly provides that "English law, General Average, Arbitration in London, BIMCO/LMAA 1998 Arbitration Clause to apply." It was further contended that Clause 87 of BIMCO/LMAA 1998 provides for the method and manner of the arbitration. It was therefore contended that the opponent as endorsee of the bill of lading has title to sue under the bill of lading. It was further contended that on one

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hand, the opponent has sued under the bill of lading and has taken benefits of the rights under the bill of lading and thus, the opponent has contended that it is not bound by obligations under the bill of lading and therefore, the opponent cannot choose to be selectively bound by only selective terms of bill of lading. It was further contended that as per the endorsement made on the bill of lading, the entire quantity of cargo has been endorsed over to IFFCO and therefore, IFFCO has stepped into place of Kisan International Trading and is bound by rights and obligations flowing from the bill of lading by virtue of the said endorsement. It was contended that in fact, the right to receive cargo also flows by virtue of such endorsement in favour of the opponent. Relying upon the judgment of the Apex Court in the case of **Chloro Controls India Private Limited v. Severn Trent Water Purification Inc. & Ors., (2013) 1 SCC 641**, it was contended that the opponent has become a party to the contract in substitution of the party namely Kisan International Trading by virtue of statutory or consensual novation. It was contended that Kisan International Trading, original party has assigned to IFFCO the underlying contract i.e. bill of lading together with the agreement to arbitrate which it incorporates i.e. by incorporating terms of

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the charter party into the bill of lading, or the benefit of a claim which has already come into existence. It was further contended that the opponent by its own admission and document had procured funds to the tune of USD 19 million from the Bank by submitting documents which included the bill of lading and therefore, the opponent either knew or ought to have known the terms on the reverse side of the bill of lading. It was also contended that Section 8 as well as Section 45 of the Arbitration and Conciliation Act, 1996 (Indian Act) clearly provide that a party claiming through or under the original party to the contract can make a request to the Court for matter to be referred to the arbitration. It was contended that in the instant case, the amended provisions of Section 45 shall apply and allowed successors to an agreement to also request for arbitration unlike the old/ unamended Section 8, where successors/ assignees could not claim through or under the original parties to the contract and the provisions of the Arbitration and Conciliation Act, 1996 as it stands today envisages that the assignees to a contract can also be bound by the arbitration agreement. It was therefore contended that the opponent as endorsee of the bill of lading is bound by the arbitration clause as incorporated in the bill of lading.

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The applicant has also relied upon the judgment of **Chloro Controls India Private Limited** (supra) as well as the judgment of the Apex Court in the case of **British India Steam Navigation Co. Ltd. v. Shanmughavilas Cashew Industries & Ors., (1990) 3 SCC 481** and has contended that the opponent, as endorsee, is bound by the arbitration clause provided in the conditions of bill of lading.

8.3 It was further contended that the intention of the parties makes it very clear that the arbitration clause has been incorporated through reference. Relying upon the judgment in the case of **M V Vinalines Fortuna v. Saurashtra Fuels Private Limited, 2014 SCC OnLine Guj 477,** it was contended that the opponent is bound by such conditions of Arbitration and Conciliation Act, 1996. It was further contended that there is an arbitration clause in the charter party dated 17.6.2014 which is incorporated in the bill of lading and hence, aspects are to be decided by the Act. It was also contended that thus, there is a valid arbitration clause incorporated into the bill of lading and such arbitration clause should be given effect to and parties be referred to arbitration as the agreement is neither null and void or inoperative or incapable of being performed and

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no grounds are taken by the opponent to that effect. On the aforesaid basis, it was also contended that the fact that the opponent was not aware about the same is not a valid defence. It was further contended that if the same is referred to the arbitration, then, there is no lis left before this Court and suit then would become only suit for security only and therefore, the plaintiff cannot arrest or file a suit for the prayers prayed for. It was also contended that the arbitration clause in agreement can be included through reference and parties to a contract can be bound by the arbitration agreement which may be present in another contract if the original contract specifically incorporates the terms of the other contract. It was contended that the arbitration clause incorporated through reference satisfies the conditions of an arbitration agreement being "in writing" as envisaged under Section 7 of the Arbitration and Conciliation Act, 1996. Relying upon the judgment in the case of **Owners and Parties Interested in the Vessel M.V. "BALTIC CONFIDENCE" v. State Trading Corporation of India Ltd. & Anr., (2001) 7 SCC 473,** it was contended that even in case on hand, bill of lading incorporates the terms of agreement by which the opponent is bound by virtue of being

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endorsee of the same. It is submitted that thus, no suit for security can lie and for the same, reliance was placed on the decision rendered in the case of **Bharat Aluminium Corporation Ltd. v. Kaiser Technical Services, (2014) Bom CR 269.** It was further contended that this Court has taken a different view in the case of **M.V. Vinalines Fortuna (supra).**

8.4 It was also contended that the charter party closest to the owner would be applicable. It was contended that even assuming without admitting that, even if the second charter party dated 17.6.2014 is made applicable, there is a similar provision of similar law i.e. English law and arbitration clause to apply even in the said charter party. Therefore, in either case, the matter should be referred to the arbitration. It was contended that it is the plea taken by the opponent that the opponent was not aware about the conditions of bill of lading and that he came to know only on 8.7.2014. It is contended that even if it is presumed that the same was not received by the opponent, it is a standard format and the opponent is engaged in large cargo import and therefore, the opponent is deemed to have knowledge of the same. It is also contended that in any event, it is a standard format

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which in the front of it, puts to the notice, that the conditions overleaf shall apply. It was further contended that the opponent applied before the Bank on the basis of the bill of lading as a document of title and it is binding on opponent as endorsee even though they may not have any knowledge of it and therefore, the agreement with Kisan International Trading is irrelevant. It was contended that it being in standard format of contract under CONGEN bill, the bill of lading has to be as per the standard format as published by BIMCO and the opponent ought to have known as a matter of trade usage and practice that the format includes law and arbitration clause. It was also contended that there is no challenge to the validity of the arbitration agreement. It was submitted that there is not even a prima facie finding that no valid arbitration exists and therefore, the parties should be referred to arbitration. It was contended that it is not the case of the opponent that the arbitration agreement is invalid. It is also not the case of the opponent that the arbitration agreement is null and void, inoperative or incapable of being performed and hence, in view of the fact that a valid arbitration agreement exists between the parties, the Court must refer the parties to arbitration. It was contended that as envisaged under Sections 8 and 45 of the

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Arbitration and Conciliation Act, 1996 (Indian Act), the arbitration agreement can be in writing or through incorporation as in the present case, where the terms of charter party have been incorporated in the bill of lading. It was further contended that thus, the awareness of existence of arbitration clause is not a ground enunciated under Section 8 or Section 45 of the Arbitration and Conciliation Act, 1996 (Indian Act) as if such an argument is accepted, then, in every case, the party would be able to frustrate the arbitration by claiming that he is not aware about such an arbitration clause.

8.5 Relying upon the judgment of the Apex Court in the case of **M.V. Elisabeth & Ors. v. Harwan Investment and Trading Pvt. Ltd. Hanoekar House, Swatontapeth, Vasco-de-Gama, Goa, 1993 Supp (2) SCC 433,** it was contended that the present Suit is no longer an action in *rem* as the applicant as owner has entered the appearance. It was contended that as held by the Apex Court in the case of **M.V. Elisabeth & Ors.** (supra), the action begins as an action in *rem* first and moves against the vessel. It was contended that it is upon the appearance of the owner of the vessel that the matter becomes an action in *personam* and moves against the

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person/owner. It was submitted that the reliance placed on the judgment of the Apex Court in the case of **Booz Allen and Hamilton v. SBI Home Finance, (2011) 5 SCC 532** is misconceived as the said case does not deal with admiralty dispute. Relying upon the reference book by Mustill and Boyd - "The Law and Practice of Commercial Arbitration in England", 2nd Edition – Page 149 and 150, it was contended that the same states that it would be wrong to draw a general rule that admiralty matter cannot be referred to arbitration.

8.6 Mr. Soparkar, learned Senior Advocate for the applicant has relied upon the following judgments which are as under:-

In the case of **Owners and Parties Interested in the Vessel M.V. "BALTIC CONFIDENCE"** (supra), it has been observed as under:-

> "4. The question that arises for determination is, whether the High Court, on construction of the terms and conditions of the Charter Party Agreement and the condition in the Bills of Lading incorporating the terms and conditions of the Charter Party Agreement into it was right, in holding that the parties in the suit are not bound by the agreement contained in Clause 62 of the Charter Party Agreement for purpose of arbitration of the disputes raised in the suit. Before

proceeding to consider the question further it will be convenient to quote Clause 62 of the Charter Party Agreement and the relevant clause in the Bills of Lading. Clause 62 of the Charter Party Agreement is as follows:

"This Charter Party shall be governed by and construed in accordance with English Law and any dispute arising out of this Charter Party shall be referred to arbitration in London in accordance with the Arbitration Acts 1950 and 1979 or any statutory modification or re-enactment thereof for the time being in force. Unless the parties agree upon a sole arbitrator, one arbitrator shall be appointed by each party and the arbitrators so appointed shall appoint a third arbitrator, the decision of the three-man tribunal thus constituted or any two of them, shall be final. On the receipt by one party of the nomination in writing of the other party's arbitrator, that party shall appoint their arbitrator within fourteen days, failing which the decision of the single arbitrator appointed shall be final. For disputes where the total amount claimed by either party does not exceed USD 50000 the arbitration shall be conducted in accordance with the Small Claims Procedure of the London Maritime Arbitrators Association."

5. Clause 1 of the Conditions of Carriage of the Bills of Lading reads as follows:

"All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated."

6. The question for consideration is whether the parties agreed that Clause 62, the arbitration clause in the Charter Party Agreement shall be applicable to disputes arising under the Bills of Lading. For determination of this question it is necessary to ascertain the intention of the parties to the Bills of Lading. This question has engaged the attention of courts in India and in England fro time to time.

10.In the case of Astro Valiente Compania Naviera SA v. Pakistan Ministry of Feed and Agriculture (No2) The Emmanuel Coloctronies (No2). The Queen's Bench Division (Commercial Court), (1982) 1 All ER 823, considered the case in which the charter party provided, inter alia, that the charter party contract was to be completed and superseded by the signing of a Bill Lading and further that the Bill of lading was to contain a clause providing for arbitration in London by two arbitrators and umpire and that any claim was to be made in writing with nine months of final discharge. The shipment was acknowledged by a Bill of Lading which included a clause that 'All other conditions, exceptions, demurrage, general average and for disbursement as per (the) charter-party'. The Bill of Lading did not specifically provide for arbitration. The question arose whether the buyers were bound to arbitrate. In that connection, it was observed, inter alia, that: "Provided that the Bill of Lading itself directed attention to the Charter Party, it was permissible and proper to look at the Charter Party to ascertain the terms to be incorporated

in the Bill of Lading. Applying that principle, the Bill of Lading, by referring to 'All other conditions... As per (the) charter-party' specifically required reference to the Charter Party, which in turn clearly and specifically provided that the arbitration clause was to be one of the conditions incorporated in the Bill of Lading. The buyers were therefore bound to arbitrate under the arbitration clause in the Charter Party and their appeal would accordingly be dismissed."

13. The Queen's Bench Division (Commercial Court), in the case of Pride shipping Corporation v. Chung Hwa Pulo Corporation & Anr. (The "Oinoussin Pride"), (1991) Vol.1 Lloyd's Law Reports 126, held that:

"In the absence of authority I would conclude that, if practical, effect should be given to the expressed intention of the parties to the bills, namely, to incorporate the arbitration clause in them, and that it is not only practical but necessary to do so by adding those words to cl.17 in order to give effect to that expressed intention. Authority however, is not absent. In The Rena K, (1978) 1 Lloyd's Rep.545, in a case virtually on all fours with the present one in that the incorporation clause of the bills of lading specifically incorporated the arbitration clause of the charter-party, and which is to be distinguished only on the ground that the charter-party there was a voyage charter-party, whereas here there is a time charter-party, Mr. Justice Brandon at p.551, col.1 said:

The addition of these words ("including the arbitration clause") must, as it seems to me, mean that the parties to the bills of lading intended the provisions of the arbitration clause in the charter-party to apply in principle to disputes arising under the bills of lading, and if it is necessary, as it obviously is, to manipulate or adapt part of the wording of that clause in order to give effect to that intention, then I am clearly of the opinion that this should be done."

(Emphasis supplied)

14. In the case of Daval Aciers D'usinor Et De Sacilor and others v. Armare S.R.L. (The "Nerano"), (1996) Vol1 Lloyd's Law Reports page 1, the Court of Appeal, dismissing the appeal, held inter alia, that:

"(1) looked at one its own, the provision on the front of the bill of lading only incorporated the conditions of the charter (which it was common ground would not include the arbitration clause in the charter) and the reference to English jurisdiction could (in the absence of any reference to arbitration) only be a reference to the English Courts; however if the provisions was considered with cl.1 on the back of the bill of lading a different meaning emerged; the provision on the face of the bill of lading did not expressly prohibit the incorporation of terms other than conditions from the charter, nor was the reference to English jurisdiction couched in language that excluded an English arbitration agreement which would ex hypothesi be subject to English jurisdiction, the two provisions read together were not

inconsistent with each other (see p.4 col.1) (2) the parties had not merely used general words of incorporation, they had expressly identified and specified the charter arbitration clause as come thing to be incorporated into their contract; by identifying and specifying the charter-party arbitration clause it was clear that the parties to the bill of lading contract did intend and agree to arbitration so that to give force to that intention and agreement the words in the clause had to be read and construed as applying to those parties (see p.4 col.2);

(3) the Court was engaged on the process of construing the words the parties had written down and used; in their context the words were to be given the meaning the law ascribed to them and the arbitration agreement did not thereby cease to be an agreement in writing if the words of the arbitration clause were to be manipulated or adapted (see p.5 col.1);.."

(Emphasis supplied)

16. This Court in the case of Union of India v. D.M. Revri & Co., held inter alia:

"There were, after integration, two Secretaries in the Ministry of Food & Agriculture, but the argument that this even rendered the arbitration agreement vague and uncertain, is based on a highly technical and doctrinaire approach and is opposed to plaint common sense. A contract is a commercial document between the parties and must be interpreted in such a manner as to give it efficacy rather

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than to invalidate it. It would not be right while interpreting a contract entered into between two lay parties, to apply strict rules of construction which are ordinarily applicable to formal documents. The meaning of such a contract must be gathered by adopting a common sense approach and it must not be allowed to be thwarted by a narrow pedantic and legalistic interpretation. The Secretary in the Ministry of Food and Agriculture in charge of the Department of Food, would be the Secretary in the Ministry of Food and Agriculture concerned with the subject matte of the contract and under clause (17), he would be the person intended by the parties to exercise the power of nominating the arbitrator. Furthermore, the respondents did not raise any objection to the appointment of the arbitrator and participated in the arbitration proceedings without protest, indicating the clear intendment of the parties that the Secretary in the Ministry of Food & Agriculture concerned with the subject matter of the contract should be the person entitled to nominate the arbitrator (488 B-E, 489 A-E)."

(Emphasis supplied)

17. In the case of Alimenta S.A. etc. v. National Agricultural Co-operative Marketing Federation of India Ltd. & Anr. , this court considered the case in which:

"NAFED, an Indian undertaking and Alimenta, A Swiss Company, entered into two contracts for sale and supply of HPS groundnut kernels. Clause 11 of the first contract stipulated: "Other terms and conditions as per FOSFA-20 contract terms". Clause 9 of the subsequent

contract stipulated: All other terms and conditions for supply not specifically shown and covered hereinabove shall be as per previous contract signed between us for earlier supplies of HPS" The FOSFA (Federation of Oils, Seeds and Fats Association) - 20 contract provided: "Any dispute arising out of this contract,...shall be referred to arbitration in London (or elsewhere if so agreed)...". When disputes arose between the parties under both contracts while Alimenta sought to commence arbitration proceedings invoking Clause 11 and Clause 9 of the contracts, NAFED filed a petition under Section 33 of the Arbitration Act alleging inter alia that there was no valid arbitration agreement between the parties. The NAFED contended that it was not at all aware of any arbitration clause in FOSFA-20 contract and accordingly, it could not agree to incorporate any such arbitration clause in the contracts in question. The High Court disallowed the petition under Section 33 in respect of the first contract but allowed the same in respect of the second contract. Affirming the judgment of the High Court and dismissing the appeals Supreme Court held:

(1) The arbitration clause of an earlier contract can, by reference, by incorporated into a later contract provided, however, it is not repugnant to or inconsistent with the terms of the contract in which it is incorporated. In the instant case the arbitration clause in the FOSFA-20 contract provided "any dispute arising out of this contract" and as such there would be no inconsistency between this clause and the terms of the first

contract and hence, no difficulty in incorporation of the arbitration clause in the first contract. Such incorporation would be quite intelligible (para 7).

The contention that the arbitration clause in FOSFA-20 contract was not germane to the subject matter of the first contract and therefore, was not incorporated in the contract, cannot be accepted. Even assuming that the subject matters of the FOSFA-20 contract and the first contract in question were different, the former being a CIF contract, while the latter an f.o.b. contract, no question as to the germaneness of the arbitration clause to the subject matter would be relevant. Where, as in the instant case, the parties are aware of the arbitration clause of an earlier contract, the subject matter of which is different form the contract which is being entered into by them, but incorporate the terms of the earlier contract by reference by using general words, there would be no bar to such incorporation merely because the subject matters of the two contracts are different, unless, however,the incorporation of the arbitration clause will be insensible or unintelligible. In the instant case, the arbitration clause in FOSFA-20 contract will fit in the first contract and it will be neither insensible nor unintelligible. Therefore, the arbitration clause FOSFA-20 contract was incorporated into the first contract. (para 12) (2) However, though the first contract includes the terms and candidness of supply and as Clause 9 of the second contracts refers to these terms and conditions of supply, it is difficult

to hold that the arbitration clause is also referred to and, as such, incorporated into the second contact. When the incorporation clause refers to certain particular terms and conditions, only those terms and conditions are incorporated and not the arbitration clause. The normal incidents of terms and conditions of supply are those which are connected with supply, such as, its mode and process, time factor, inspect and approval, if any, reliability for transit, incidental expenses etc. The arbitration clause is not a terms of supply. There is not necessity in law that when a contract is entered into for supply of goods, the arbitration clause must form part of such a contract. Accordingly, only those terms and conditions are incorporated into the second contract and not the arbitration clause (para 14)."

19. From the conspectus of the views expressed by courts in England and also in India, it is clear that in considering the question, whether the arbitration clause in a Charter Party Agreement was incorporated by reference in the Bill of Lading the principal question is, what was the intention of the parties to the Bill of Lading? For this purpose the primary document is the Bill of Lading in to which the arbitration clause in the Charter Party Agreement is to be read in the manner provided in the incorporation clause of the Bill of Lading. While ascertaining the intention of the parties attempt should be made to give meaning to the incorporation clause and to give effect to the same and not to invalidate or

> frustrate it giving a literal, pedantic and technical reading of the clause. If on a construction of the arbitration clause of the Charter Party Agreement as incorporated in the Bill of Lading it does not lead to inconsistency or insensibility or absurdity then effect should be given to the intention of the parties and the arbitration clause as agreed should be made binding on parties to the Bill of Lading. If the parties to the Bill of Lading being aware of the arbitration clause in the Charter Party Agreement have specifically incorporated the same in the conditions of the Bill of Lading then the intention of the parties to abide by the arbitration clause is clear. Whether a particular dispute arising between the parties comes within the purview of the arbitration clause as incorporated in the Bill of Lading is a matter to be decided by the arbitrator or the court. But that does not mean that despite incorporation of the arbitration clause in the Bill of Lading by specific reference the parties had not intended that the disputes arising on the Bill of Lading should be resolved by arbitrator."

In the case of **British India Steam Navigation Co. Ltd.** (supra), it has been observed as under:-

> "47. Whether a charterparty operates as a demise or not depends on the stipulations of the charterparty. The principal test is whether the master is the employee of the owner or of the charterer. In other words where the master becomes the employee of the

charterer or continues to be the owner's employee. Where the charterparty is by way of demise, the charterer may employ the ship in carrying either his own goods or those of others. Where the charterparty does not operate as a demise, the charterer's right vis-a-vis the owner depends upon the terms of the contract. "The contract of carnage is personal to the 907 charterer, and he cannot call upon the shipowner to under- take liabilities to third persons or transfer to third persons his own liabilities to the shipowner unless the contract so provides." A charterparty has to be construed so as to give effect, as far as possible, to the intention of the parties as expressed in the written contract. The stipulations of charterparty may be incorporated in a bill of lading so that they are thereby binding on the parties. It is an accepted principle that when stipulations of the charterparty are expressly incorporated, they become terms of the contract contained in the bill of lading, and they can be enforced by or against the shipper, consignee or endorsee. The effect of a bill of lading depends upon the circumstances of the particular case, of which the most important is the position of the shipper and of the holder. Where there is a bill of lading relating to the goods, the terms of the contract on which the goods are carried are prima facie to be ascertained from the bill of lading. However, if a shipper chose to receive a bill of lading in a certain from without protest he should ordinarily be bound by it. Thus, it cannot be said that the bill of lading

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> is not conclusive evidence of its terms and the person executing it is not necessarily bound by all its stipulations, unless he repudiates them on the ground that, as he did not know, and could not reasonably be expected to know, of their existence, his assent to them is not to be inferred from his acceptance of the bill of lading without objection. Where there is a charterparty, the bill of lading is prima facie, as between the shipowner and an indorsee, the contract on which the goods are carried. This is so when the indorsee is ignorant of the terms of the charterparty, and may be so even if he knows of them. As between the shipowner and the charterer the bill of lading may in some cases have the effect of modifying the contract as contained in the charterparty, although, in general, the charterparty will prevail and the bill of lading will operate solely as an acknowledgment of receipt."

In the case of **Chloro Controls India Private Limited,** it has been observed as under:-

> "2. Chloro Controls (India) Private Ltd., the appellant herein, filed a suit on the original side of the High Court of Bombay being Suit No.233 of 2004, for declaration that the joint venture agreements and supplementary collaboration agreement entered into between some of the parties are valid, subsisting and binding. It also sought a direction that the scope of business of the joint venture company,

Respondent No. 5, set up under the said agreements includes the manufacture, sale, distribution and service of the entire range of chlorination equipments including the electro-chlorination equipment and claimed certain other reliefs as well, against the defendants in that suit. The said parties took out two notices of motion, being Notice of Motion No.553 of 2004 prior to and Notice of Motion No.2382 of 2004 subsequent to the amendment of the plaint. In these notices of motion, the principal question that fell for consideration of the learned Single Judge of the High Court was whether the joint venture agreements between the parties related only to gas chlorination equipment or whether they included electro-chlorination equipment as well. The applicant had prayed for an order of restraint, preventing Respondent Nos. 1 and 2, the foreign collaborators, from acting upon their notice dated 23rd January, 2004, indicating termination of the joint venture agreements and the supplementary collaboration agreement. A further prayer was made for grant of injunction against committing breach of contract by directly or indirectly dealing with any person other than the Respondent No.5, in any manner whatsoever, for the manufacture, sale, distribution or services of the chlorination equipment, machinery parts, accessories and related equipments including electro-chlorination equipment, in India and other countries covered by the agreement. The defendants in that suit had taken out another Notice of Motion No.778 of 2004, under Section 8 read with Section 5 of the1996 claiming that

arbitration clauses in some of the agreements governed all the joint venture agreements and, therefore, the suit should be referred to an appropriate arbitral tribunal for final disposal and until a final award was made by an arbitral tribunal, the proceedings in the suit should be stayed.

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

S. No.	Date of Agreement	Details of Agreement	Parties to the Agreement	Whether contains arbitration clause
1	16.11.1995	Shareholders Agreement	1. Capital Controls (Delware) Company, Inc. (Respondent No.2) 2. Chloro Controls India Pvt. Ltd. (Appellant) 3. Mr. M.B. Kocha (Respondent No.9)	Yes
2	16.11.1995	International Distributor Agreement	1. Capital Controls Company Inc., (Colmar) now Severn Trent Water Purification Inc.(Respondent No.1) 2. Capital Controls (India) Private Ltd. (Respondent No.5)	No

3	16.11.1995	Managing Directors' Agreement	1. Capital Controls (India) Private Ltd.(Respondent No.5) 2. Mr. M.B. Kocha (Respondent No.9)	No
4	16.11.1995	Financial & Technical Know-how License Agreement	1. Capital Controls Company Inc., (Colmar) now Severn Trent Water Purification Inc. (Respondent No.1) 2. Capital Controls (India) Private Ltd.(Respondent No.5)	Yes
5	16.11.1995	Export Sales Agreement	1. Capital Controls Company Inc., (Colmar) now Severn Trent Water Purification Inc. (Respondent No.1) 2. Capital Controls (India) Private Ltd. (Respondent No.5)	Yes
6	16.11.1995	Trademark Registered User License Agreement	1. Capital Controls Company Inc., (Colmar) now Severn Trent Water Purification Inc. (Respondent No.1) 2. Capital Controls (India) Private Ltd. (Respondent No.5)	No
7	Aug-97	Supplemen-ntary Collaboration Agreement	1. Capital Controls Company Inc., (Colmar) now Severn Trent Water Purification Inc. (Respondent No.1) 2. Capital Controls (India) Private Ltd.(Respondent No.5)	Yes

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19. It appears that the joint venture company, Respondent no.5, was incorporated on 14th November, 1995. As discussed above, the joint venture agreements were primarily a project between Respondent Nos. 1 and 2 on the one hand and the appellant company along with its proprietor, Respondent No. 9, on the other. The purpose of these joint venture agreements as indicated in the Memorandum of Association of this joint

venture company was to design, manufacture, import, export, act as agent, marketing etc. of gas and electro-chlorination equipments. In order to achieve this object, the parties had decided to execute various agreements. It needs to be emphasized at this stage itself that, as is clear from the above narrated chart, the agreements had been signed between different parties, each agreement containing somewhat different clauses. Therefore, there is a need to examine the content and effect of each of the seven agreements that are stated to have been signed between different parties. Content, scope and purpose of the agreements subject matter of the present appeals

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

52. The appellant had filed a

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

55.2 In substance, the suit and the reliefs claimed therein relate to the dispute with regard to the agreed scope of business of the joint venture company as regards gas based chlorination or electro based chlorination. This major dispute in the present suit being relatable to joint venture agreement therefore, execution of multiple agreements would not make any difference. The reference of the suit to arbitral Tribunal by the High Court is correct on facts and in law.

55.3 The filing of the suit as a derivative action and even the joinder

of respondent Nos.3 and 4 to the suit were primarily attempts to escape the impact of the arbitration clause in the joint venture agreements. Respondent Nos. 3 and 4 were neither necessary nor appropriate parties to the suit. In the facts of the case the party should be held to the bargain of arbitration and even the plaint should yield in favour of the arbitration clause.

55.4 All agreements executed between the parties are in furtherance to the Shareholders Agreement and were intended to achieve only one object, i.e., constitution and carrying on of business of chlorination products by the joint venture company in India and the specified countries. The parties having signed the various agreements, some containing an arbitration clause and others not, performance of the latter being dependent upon the Principal Agreement and in face of clause 21.3 of the Principal Agreement, no relief could be granted on the bare reading of the plaint and reference to arbitration of the complete stated cause of action was inevitable.

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

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

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

70. Normally, arbitration takes place between the persons who have, from the outset, been parties to both the arbitration agreement as well as the substantive contract underlining that

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

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

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

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

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

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

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

73. A non-signatory or third party could be subjected to arbitration

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

CI. In a case like the present one, where origin and end of all is with the Mother or the Principal Agreement, the fact that a party was non-signatory to one or other agreement may not be of much significance. The performance of any one of such agreements may be quite irrelevant without the performance and fulfillment of the Principal or the Mother Agreement. Besides designing the corporate management to successfully complete the joint ventures, where the parties execute different agreements but all with one primary object in mind, the Court would normally hold the parties to the bargain of arbitration and not encourage its avoidance. In cases involving execution of such multiple

agreements, two essential features exist; firstly, all ancillary agreements are relatable to the mother agreement and secondly, performance of one is so intrinsically inter- linked with the other agreements that they are incapable of being beneficially performed without performance of the others or severed from the rest. The intention of the parties to refer all the disputes between all the parties to the arbitral tribunal is one of the determinative factor.

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

other.

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

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

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

108. In the present case, the corporate

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

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139. All the subsequent agreements were, therefore, ancillary or incidental agreements to the Principal Agreement. Thus, the joint venture entered between the parties had different facets. Its foundation was provided under the Principal Agreement but all the agreed terms could only be fulfilled by performance of the ancillary agreements. If one segregates the Principal Agreement from the rest, the subsequent agreements would be rendered ineffective. If the agreed goods were not manufactured in India with the technical know- how of the respondent No. 1 company and the joint venture company was not incorporated, the question of the Distribution Agreement, Managing Director Agreement, Financial and Technical Know-How License Agreement or the Export Sales Agreement would not have even arisen, in any event. Conversely, if the ancillary agreements were not performed in a collective manner, the Principal Agreement would be of no consequence. In other words, it was one composite transaction for attaining the purpose of business of the joint venture company. All these agreements are so intrinsically connected to each other that it is neither possible nor probable to imagine the execution and implementation of one without the collective performance of all the other agreements. The intention of the parties was clear that all these agreements were being executed as integral parts of a composite transaction. It can safely be covered under the principle of 'agreements within an agreement'. For instance, the Financial and Technical Know-How License Agreement not only finds a specific

mention in the Principal Agreement but its contents also are referable to the clauses of the Principal Agreement. The Financial and Technical Know- How License Agreement was Appendix III to the Principal Agreement and the details of the goods which were contemplated to be manufactured, distributed and sold under the Principal Agreement had been specified in Appendix I of the Financial and Technical Know-How Agreement. If the latter agreement was not there, the Principal Agreement between the parties would have remained incomplete and the parties would have been at a disadvantage to know as to what goods were to be manufactured and what goods could not have been manufactured. The Principal Agreement referred either specifically or by necessary implication to all other agreements. They were inter-dependent for their performance and one could not be read and understood completely without the aid of the other.

140. Having held that all these other agreements as well as the mother/ principal agreement were part of a composite transaction to facilitate implementation of the principal agreement and that was in reality the intention of the parties, now, we will deal with the question of parties to the principal agreement. When the mother agreement dated 16th November, 1995 was executed between the parties, presumably the Certificate of Incorporation of Capital Control India Private Ltd. had not been issued to the parties though it had been incorporated on 14th November, 1995. If the company had been duly incorporated and the Certificate of Incorporation was available to the parties, then there could be no reason for the parties to propose in the

Principal Agreement that the joint venture company would be in the name of Capital Controls India Private Ltd. or any other name which would be mutually agreed between the parties. The reference to joint venture company, thus, was not by a specific name. Both the parties have signed this agreement with the clear intention that the company, Capital Control India Pvt. Ltd., will be the joint venture company. Thus, non-mentioning of the name of the joint venture company in the principal agreement, though it had been incorporated on 14th November, 1995, is immaterial and inconsequential in face of intention of the parties appearing from the written documents on record. Once the Principal Agreement was signed, all other agreements had to be executed by or in favour of the joint venture company. That is how to all these other agreements the joint venture company i.e. Capital Control India Pvt. Ltd. is a party. It further completely supports the view that non-mentioning of the name of Capital Control India Pvt. Ltd. can hardly affect the findings of the Court. With regard to the management of the joint venture company and implementation of the Principal Agreement, the parties had entered into the Managing Director Agreement dated 16th November, 1995. This agreement was signed by each of the concerned partners i.e. by Capital Control India Pvt. Ltd., respondent No. 5 and the Kocha Group, respondent No. 9. This agreement provided as to how the Managing Directors were to be appointed or reappointed and how the meeting of the Board of Directors of the company were to be conducted in accordance with law and the terms of the Mother Agreement. This agreement came to be

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> signed between the joint venture company and the Kocha Group."

In the case of **M.V. Elisabeth & Ors.** (supra), it has been observed as under:-

> "44. The law of admiralty, or maritime law, ... (is the) corpus of rules, concepts, and legal practices governing ... the business of carrying goods and passengers by water." (Gilmore and Black, The Law of Admiralty, page (1). The vital significance and the distinguishing feature of an admiralty action in rem is that this jurisdiction can be assumed by the coastal authorities in respect of any maritime claim by arrest of the ship, irrespective of the nationality of the ship or that of its owners, or the place of business or domicile or residence of its owners or the place where the cause of action arose wholly or in part.
>
> "..... In admiralty the vessel has a juridicial personality, an almost corporate capacity, having not only rights but liabilities (sometimes distinct from those of the owner) which may be enforced by process and decree against the vessel, binding upon all interested in her and conclusive upon the world, for admiralty in appropriate cases administers remedies in rem, i.e., against the property, as well as remedies in personam, i.e., against the party personally...". Benedict, The Law of American Admiralty, 6th ed. Vol. I p.3.
>
> 45. Admiralty Law confers upon the

claimant a right in rem to proceed against the ship or cargo as distinguished from a right in personam to proceed against the owner. The arrest of the ship is regarded as a mere procedure to obtain security to satisfy judgment. A successful plaintiff in 1039 an action in rem has a right to recover damages against the property of the defendant. `The liability of the shipowner is not limited to the value of the res primarily proceeded against ... An action .... though originally commenced in rem, becomes a personal action against a defendant upon appearance, and he becomes liable for the full amount of a judgment unless protected by the statutory provisions for the limitation of liability'. (Roscoe's Admiralty Practice, 5th ed. p.29)

46. The foundation of an action in rem, which is a peculiarity of the Anglo-American law, arises from a maritime lien or claim imposing a personal liability upon the owner of the vessel. A defendant in an admiralty action in personam is liable for the full amount of the plaintiff's established claim. Likewise, a defendant acknowledging service in an action in rem is liable to be saddled with full liability even when the amount of the judgment exceeds the value of the res or of the bail provided. An action in rem lies in the English High Court in respect of matters regulated by the Supreme Court Act, 1981, and in relation to a number of claims the jurisdiction can be invoked not only against the offending ship in question but also against a `sistership' i.e., a ship in the same beneficial

ownership as the ship in regard to which the claim arose.

"The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner...." Per Justice Story, The United States v. The Big Malek Adhel, etc., [43 US (2 How.) 210, 233 (1844)]

47. Merchant ships of different nationalities travel from port to port carrying goods or passengers. They incur liabilities in the course of their voyage and they subject themselves to the jurisdiction of foreign States when they enter the waters of those States. They are liable to be arrested for the enforcement of maritime claims, or seized in execution or satisfaction of judgments in legal actions arising out of collisions, salvage, loss of life or personal injury, loss of or damage to goods and the like. They are liable to be detained or confiscated by the authorities of foreign States for violating their customs regulations, safety measures, rules of the road, health regulations, and for other causes. The coastal State may exercise 1040 its criminal jurisdiction on board the vessel for the purpose of arrest or investigation in connection with certain serious crimes. In the course of an international voyage, a vessel thus subjects itself to the public and private laws of various countries. A ship travelling from port to port stays very briefly in any one port. A plaintiff seeking to enforce his

maritime claim against a foreign ship has no effective remedy once it has sailed away and if the foreign owner has neither property nor residence within jurisdiction. The plaintiff may therefore detain the ship by obtaining an order of attachment whenever it is feared that the ship is likely to slip out of jurisdiction, thus leaving the plaintiff without any security.

48. A ship may be arrested (i) to acquire jurisdiction; or (ii) to obtain security for satisfaction of the claim when decreed; or (iii) in execution of a decree. In the first two cases, the court has the discretion to insist upon security being furnished by the plaintiff to compensate the defendant in the event of it being found that the arrest was wrongful and was sought and obtained maliciously or in bad faith. The claimant is liable in damages for wrongful arrest. This practice of insisting upon security being furnished by the party seeking arrest of the ship is followed in the United States, Japan and other countries. The reason for the rule is that a wrongful arrest can cause irreparable loss and damages to the shipowner; and he should in that event be compensated by the arresting party. (See Arrest of Ships by Hill, Soehring, Hosoi and Helmer, 1985).

49. The attachment by arrest is only provisional and its purpose is merely to detain the ship until the matter has been finally settled by a competent court. The attachment of the vessel brings it under the custody of the marshal or any other authorized officer. Any interference with his custody is

treated as a contempt of the court which has ordered the arrest. But the marshal's right under the attachment order is not one of possession, but only of custody. Although the custody of the vessel has passed from the defendant to the marshal, all the possessory rights which previously existed continue to exist, including all the remedies which are based on possession. The warrant usually contains a monition to all persons interested to appear before the court on a particular day and show cause why the property should not be condemned and sold to satisfy the claim of the plaintiff.

50. The attachment being only a method of safeguarding the interest of the plaintiff by providing him with a security, it is not likely to be ordered if the defendant or his lawyer agrees to "accept service and to put in bail or to pay money into court in lieu of bail". (See Halsbury's Laws of England, 4th edn. Vol. 1, p. 375 etc.).

51. The service of the warrant is usually effected by affixing it on the main mast or single mast of the ship. A ship which has been arrested under an order of attachment may be released by the court if sufficient bail is put in to cover the claim of the plaintiff as well as the costs of the action. The sureties are liable for the amount entered in the bail bond.

52. If the ship or cargo under arrest before judgment has not been released by the defendant by putting in sufficient bail and if the property is found

deteriorating, the court has the power to order the sale of the property after notice has been duly issued to the parties interested.

53. If the plaintiff has finally obtained a decree of condemnation and sale of the ship, the court will issue an order to the competent officer commanding him to sell the property, in execution of the decree, and to bring the proceeds into court. Thereupon the officer shall issue proper notice and arrange for the sale of the property by auction. The proceeds of the sale are paid into the registry of the court and shall be disposed of by the court according to law.

54. A personal action may be brought against the defendant if he is either present in the country or submits to jurisdiction. If the foreign owner of an arrested ship appears before the court and deposits security as bail for the release of his ship against which proceedings in rem have been instituted, he submits himself to jurisdiction.

55. An action in rem is directed against the ship itself to satisfy the claim of the plaintiff out of the res. The ship is for this purpose treated as a person. Such an action may constitute an inducement to the owner to submit to the jurisdiction of the court, thereby making himself liable to be proceeded against by the plaintiff in personam. It is, however, imperative in an action in rem that the ship should be within jurisdiction at the time the proceedings are started. A decree of the court in

such an action binds not merely the parties to the writ but everybody in the world who might dispute the plaintiff's claim.

56. It is by means of an action in rem that the arrest of a particular ship is secured by the plaintiff. He does not sue the owner directly and by name; but the owner or any one interested in the proceedings may appear and defend. The writ is issued to "owners and parties interested in the property proceeded against." The proceedings can be started in England or in the United States in respect of a maritime lien, and in England in respect of a statutory right in rem. A maritime lien is a privileged claim against the ship or a right to a part of the property in the ship, and it "travels" with the ship. Because the ship has to "pay for the wrong it has done", it can be compelled to do so by a forced sale. (See The Bold Buccleaugh, (1851) 7 Moo. PC 267). In addition to maritime liens, a ship is liable to be arrested in England in enforcement of statutory rights in rem (Supreme Court Act, 1981). If the owner does not submit to the jurisdiction and appear before the court to put in bail and release the ship, it is liable to be condemned and sold to satisfy the claims against her. If, however, the owner submits to jurisdiction and obtains the release of the ship by depositing security, he becomes personally liable to be proceeded against in personam in execution of the judgment if the amount decreed exceeds the amount of the bail. The arrest of the foreign ship by means of an action in rem is thus a means of assuming jurisdiction by the competent

court.

> 58. The real purpose of arrest in both the English and the Civil Law systems is to obtain security as a guarantee for satisfaction of the decree, although arrest in England is the basis of assumption of jurisdiction, unless the owner has submitted to jurisdiction. In any event, once the arrest is made and the owner has entered appearance, the proceedings continue in personam. All actions in the civil law - whether maritime or not - are in personam, and arrest of a vessel is permitted even in respect of non-maritime claims, and the vessel is treated as any other property of the owner, and its very presence within jurisdiction is sufficient to clothe the competent tribunal with jurisdiction over the owner in respect of any claim. (See D.C.Jackson, Enforcement of Maritime Claims, (1985) Appendix Admiralty actions in England, on the other hand, whether in rem or in personam, are confined to well defined maritime liens or claims and directed against the res(ship, cargo and freight) which is the subject-matter of the dispute or any other ship in the same beneficial ownership as the res in question."

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In light of the aforesaid, it was contended that the application deserves to be allowed.

9. Per contra, Mr. Devan Parikh, learned Senior Advocate for the opponent has opposed this application. Referring to the provisions of Section 7 of the Arbitration and Conciliation

Act, 1996 (Indian Act), it was contended that sub-section (4) of Section 7 clearly provides that the arbitration agreement should be in writing and signed. It should be between two parties and the agreement should be in writing. It was contended that purport is that it should be between the parties concerned and that there has to be some connection. It was further contended that the case has to fall either under (a), (b) or (c) to the written agreement. It was contended that the very essence is that it is between two parties and not third party and in the instant case, there is no written arbitration agreement between the opponent and the applicant. Referring to Section 7(5) of the Act, it was contended that mere incorporation of such a clause by referring to some third party agreement cannot impose contractual relationship between the parties to the basic contract with the parties to the contract whose arbitration clause is referred to. It was contended that even as provided under Section 7(5) of the Act, the incorporated arbitration clause would be the one enforceable between the parties to the main contract only and not with other party. It was contended that over and above the aforesaid contentions and without prejudice to the same, in the instant case, the bill of lading refers to the charter party dated 17.6.2014 entered into between Norvik

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Shipping North America Inc. and Dachex Shipping Private Limited, Singapore, for which, the learned counsel for the opponent has referred to the contents of the second charter party between Norvik Shipping North America Inc. and Dachex Shipping Private Limited, Singapore. On the basis of the aforesaid, it was contended that the fundamental question therefore would be the bill of lading would mean the first or the second charter party and the wordings of both the charter parties, the bill of lading and the clear intention of all parties concerned as demonstrated by their correspondence would show that the bill of lading refers to the second charter party and this was the only intention of the parties as can be gathered from communications and no where even by reference, it has come on record that it refers to the first charter party, nor the applicant and therefore, to say that there is an agreement with the opponent is unacceptable. It was contended that if the suit is decreed, the opponent has not to show that it has to contractually recover from the owner or not. Once the decree is passed, it can recover from the security and such relief can be granted in admiralty jurisdiction. It was contended that in an Admiralty Suit, any person can say that he is ready to give security and let the vessel sail. It was further contended

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that in the suit based on facts, one party comes to the Court and places the security and let the ship sail and then say that I am not liable is not permissible. It was contended that in a given case, owner itself is the shipper then, there may not be any problem. Relying upon the judgment of the Apex Court in the case of **M.V. Elisabeth** (supra), it was contended that the liability of the person who puts the bail may or may not be based on a contract. It was contended that in an Admiralty Suit therefore, as in the present case, the Court finds that cargo is short delivered, then, the claim would be against the applicant, the owner whether there may be any contract or not. It was contended that admiralty jurisdiction is basically an action in *rem* and then appearance on persona. It is not based on contract. It was contended that in the present case as well, as the security was given by the applicant, the Court has allowed the ship to sail and under such circumstances, what the opponent has claimed in the present Admiralty Suit is not based on straight contract. It was also contended that it is not open for the applicant to claim that he is not liable irrespective of any lack of contract the opponent has with the applicant. It was further contended that in the present proceedings, the opponent does not have any written agreement

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with the applicant and hence, the application is required to be rejected as provided under Section 7 of the Arbitration and Conciliation Act, 1996 (Indian Act). It was contended that the attempt on the part of the applicant is to show that the opponent is fifth down in the transaction and whose existence is not disclosed to the opponent or to even the person holding the bill of lading and then to say that there is a written contract. It was contended that it is sought to be linked that the opponent who has written contract with some party.

9.1 It was further contended that even assuming that there is an incorporation of an arbitration clause by reference, the opponent was not aware of the same and therefore, the same cannot bind the opponent. It was contended that even if one accepts that by incorporating arbitration clause by reference, it means that one has entered into agreement with third party even that fact demonstrates. However, the fact demonstrates that no written agreement is there between the opponent and the applicant. Relying upon the correspondences dated 12.6.2015 and emails dated 17.6.2014, 8.7.2014, 22.7.2014 and 18.7.2014, it was contended that the opponent was not actually aware of the clause and the reference is to the second charter party and

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not the first charter party by reference. Therefore clearly, the opponent, as far as the applicant is concerned, has no written arbitration agreement. It was contended that the date on which the present suit was filed i.e. on 18.4.2014, the opponent had no idea whatsoever about the existence of any charter party much less arbitration agreement. It was contended that merely because of the fact that the bill of lading or the charter party are GENCON documents, it cannot by implication mean that the opponent was aware of the arbitration clause. GENCON is only a format and not a binding law. It was contended that various clauses can be scratched out. Hence, there cannot be implied knowledge of actual arbitration clauses in charter party merely because the bill of lading is GENCON. It was next contended that the mention of arbitration clause in charter party in a bill of lading is a question of construction and reference made to a charter party in the bill of lading does not automatically bind the parties in absence of any written agreement. Referring to the facts of the case on hand, it was contended that the same would amount to written arbitration agreement between the parties. Relying upon the judgment of the Apex Court in the case of **British India Steam Navigation Co. Ltd.** (supra), more particularly Paragraph 47

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thereof, it was contended that the charter party has to be read and considered to give real effect to the intention of the parties and as already contended by the opponent, the opponent was not aware about the existence of charter party agreement between the applicant and Norvik Shipping North America Inc.

9.2 The learned counsel for the opponent is right in distinguishing the judgment of Baltic Confidence (supra) and referring to Paragraph 19 thereof, contended that whether the arbitration clause in a charter party agreement was incorporated by reference in the bill of lading or not, would be the question whereby the intention of the parties to bill of lading is to be established. It was contended that in case if the parties are aware about the arbitration clause, then, the intention of the parties would be clear and the parties would be bound by it. It was contended that thus, the intention and awareness are critical ingredients to determine as to whether the arbitration clause in a charter party was incorporated in a bill of lading. Referring to the facts of the case, it was contended that, under no circumstances, can it be inferred that the opponent had the intent to have a written arbitration agreement with an unknown person

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referred to in an unknown charter party.

9.3 Referring to the judgment in the case of **M V Vinalines Fortuna** (supra), it was contended that in the said case only one charter party agreement was there, whereas, in the instant case, two charter party agreements are there and therefore, the said judgment would not be applicable in the instant case.

9.4 It was contended that the judgments relied upon by the applicant permitting a party to demonstrate that incorporation of a particular arbitration clause in a particular charter party was not the intention of the parties. Moreover, the judgments clearly indicate that if a party is not aware or could not have known of the earlier charter party, it cannot be said that there is an incorporation of an unknown charter party with an unknown third person.

9.5 Referring to the judgment of the Apex Court in the case of **M. Dayanand Reddy v. A.P. Industrial Infrastructure Corporation Limited & Ors., (1993) 3 SCC 137**, it was contended that as held by the Apex Court, if anyone wants to incorporate any arbitration clause by reference, it cannot be done on the basis of a long drawn reasoning and such reference has to clear and specific in nature and not by

implication or long drawn reasoning. Referring to the case on hand, it was contended that when the bill of lading was sent to the opponent, there was no reference to any arbitration clause as only first page of bill of lading was sent. Secondly, even in the terms of shipment, there was no reference to any arbitration clause. Thirdly, by no stretch of imagination, it can be said that the bill of lading is said to incorporate the arbitration clause of an unknown charter party with an unknown person. It is submitted that at best, it refers to the arbitration clause of the second charter party. It is also contended that the judgment of **Chloro Controls India Private Limited** (supra) is not applicable in the present case and therefore, the applicant cannot, under any circumstances, compel the opponent to arbitrate on the strength of ratio of the aforesaid judgment. It was further contended that the chart provided by the applicant demonstrating relationship between various parties to the transaction is false and misleading and therefore, the same may be considered by this Court.

9.6 It was also contended that the Admiralty Suits are not arbitrable and therefore, there is no question for allowing the application for reference to arbitration. It was further

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contended that the opponent has filed the present Suit as an endorsee of the bill of lading and once the Admiralty Suit is filed, the plaintiff gets rights not on the basis of contract, but on the basis of very nature of the Suit. It was contended that thus, the opponent's right to claim from the applicant herein is not a contractual right. It was contended that as a matter of fact, there is no privity of contract between the opponent and the applicant. It was contended that the right of opponent is crystallized when the applicant furnished security for release of the ship.

9.7 It was contended that the Admiralty Suit is not like a normal Suit in the context of the manner in which it proceeds, both relief-wise and even in context of persons from whom it can be claimed. Arbitration cannot be a substitute for Admiralty Suit. It was contended that the Admiralty Suit can be equated to a mortgage proceeding. Just as in a mortgage proceeding, an Admiralty Suit proceeds in two stages – in *rem* and in personam. Relying upon the judgment of the **Booz Allen and Hamilton** (supra), it was contended that just as the Suit for mortgage is not arbitrable, since it involves rights in *rem*, which can be enforced only by a Court of law and not by arbitral Tribunals. It was contended that the Admiralty Suits also involve

rights in *rem* and therefore, cannot be made subject matter of arbitration. The opponent has also relied upon the judgment of the Bombay High Court in the case of **Osprey Underwriting Agencies Ltd. & Ors. v. Oil and Natural Gas Corporation Ltd. & Ors., AIR 1999 Bombay 173** in order to buttress the said argument.

9.8 It was reiterated and contended that the bill of lading, in the instant case, refers to the second charter party and not the first charter party and that there are many more additional facts to show the intent of the parties to incorporate the second charter party and not the first charter party.

9.9 It was also contended that the opponent is a Government Company and cannot go for international arbitration and if the application is allowed, the opponent shall loose the claim as well.

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9.10 Mr. Parikh, learned Senior Advocate for the opponent has relied upon the following judgments which are as under:-

In the case of **M V Vinalines Fortuna** (supra), it has been observed as under:-

> "22. In view of such rival submissions it becomes necessary to ascertain

whether arbitration clause is incorporated in the contract i.e. Bills of Lading or not and if it is incorporated by reference to a charter party agreement then from which charter party agreement.

24.4 Thus, the opponent i.e. the original plaintiff would contend that even if the principle of incorporation by reference is invoked and applied in this case and applicants' submissions are taken into account, then also the clause which would get incorporated is the arbitration clause No.41 of the charter party and the fact which would simultaneously, stare in the face is the fact that the opponent herein i.e. the buyer is not party to the said charter party agreement dated 9.5.2008.

24.5 When the court speaks about the intention of the parties then the reference to intention is restricted to the intention of the parties to resolve the dispute and differences through special mode of arbitration or to pursue ordinary civil remedy.

24.6 Once it becomes clear as to whether the parties to a contract intended to resolve dispute through arbitration, then everything else would fall in place because the scope and purview of arbitration and / or as to whether the particular dispute falls within the purview of the arbitration clause incorporated by reference or not and such other related or ancillary or collateral issues would be examined and decided by the arbitral tribunal.

24.11 Of course, in view of the fact that the said clause 1 of conditions of carriage employ the phrase the charter

party, dated as overleaf, which, in ordinary course, would indicate that the charter party is identified and specified either by name (of the owners / vessel) or by date of the charter party agreement and it would follow that the terms and conditions of the charter party agreement which is duly identified and specified are, by reference, incorporated. Whereas in present case the said identification is not made / is not complete and is missing.

24.12 However, the fact remains that the parties to the Bills of Lading have eloquently declared their intention which is made loud and clear by virtue of said clause 1 of Conditions of Carriage in the Bills of Lading wherein it is clearly mentioned that ..... all terms and conditions....including law and arbitration clause of the charter party are deemed to have been incorporated in the Bills of Lading which indicates that the intention of the parties to the Bills of Lading is to resolve the dispute and differences through arbitration process. Hence, the arbitration clause and the law applicable to arbitration proceedings which are mentioned in the charter party are deemed to have been incorporated in the Bills of Lading by reference.

When the parties to the agreement have in express terms (i.e. under clause 1 of the conditions of carriage or in the Bills of Lading) stipulated that all terms and conditions including the law and arbitration clause in the charter party is deemed to have been incorporated, then the parties to the

Bills of Lading can be said to have expressly chosen to take recourse of arbitration proceedings.

The said expression in clause 1 of condition of carriage also indicates and clarifies the intention of the parties to the Bills of Lading.

24.17 In this context the relevant aspect which comes out from the maze of the facts is that the opponent i.e. the plaintiff has not produced and not brought to the notice of the Court any other charter party agreement or name and details of any other vessel by which it received the cargo / consignment for which it entered into the contract dated 12.3.2008.

25.2 Above discussed similarities in the charter party agreement and the parent contract coupled with the fact that the buyer i.e. present opponent is party to the Bills of Lading, leave little room for doubt that the charter party which has referred to / mentioned in the Bills of Lading could be the charter party dated 9.5.2008 and not any other charter party.

25.4 When, in light of present opponents / original plaintiffs objection (to the effect that it is not party to the charter party and therefore it is not party to arbitration clause / agreement in the charter party consequently even if the said arbitration clause of charter party is read into, and even if by reference it is incorporated in the Bills of Lading, then also the said arbitration clause will not be binding to the plaintiff i.e. present opponent

because it is not party to the charter party) are examined in light of the aforesaid aspects then it emerges that the charter party agreement referred to in the Bills of Lading could be only charter party dated 9.5.2008 more particularly in light of the above mentioned similarities and also because there is no charter party agreement entered into and executed between the parties (to the Bills of Lading and / or between the seller and the applicants and / or between the buyer i.e. present opponent and the applicants) other than the said charter party dated 9.5.2008.

25.22 From the foregoing discussion as regards the relevant provisions in 3 contracts and from the observations by Hon'ble Apex Court it emerges that intention of parties is very significant feature and depending on, as well as subject to, the clear intention of parties, in exceptional cases a non-signatory third party also could be subjected to arbitration without prior consent.

25.23 In that view of the matter and having regard to clause-1 under conditions of carriage in Bills of Lading read with the provisions in the charter party agreement dated 9.5.2008, the intention of the parties to take recourse of arbitration in the event of dispute has become clear and for that purpose the parties clearly appear to have agreed to incorporate arbitration clause of charter party and in light of the diverse similarities mentioned hereinabove earlier e.g. the shipper whose name is mentioned in the Bills of Lading is the seller of the cargo /

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consignment for which the plaintiff entered into contract dated 12.3.2008 and the description of cargo / consignment in the Bills of Lading is also the same cargo / consignment for which the contact dated 12.3.2008 is executed between the plaintiff and the shipper named in the Bills of Lading is the seller of the said cargo as per the contract dated 12.3.2008 and the port of discharge mentioned in the Bills of Lading is also the same port which is mentioned in clause 9 of the contract dated 12.3.2008 between the shipper and the plaintiff (i.e. present opponent / buyer) and the details mentioned in clause 8 of the contract dated 12.3.2008 contemplate four Bills of Lading for 5000 mt. each and one for balance quantity and the five Bills of Lading which are issued / executed are on same lines and both i.e. the Bills of Lading as well as the charter party are executed / issued on 21.5.2008 and the charterer as well as the shipper as per the charter party and Bills of Lading respectively is the same party i..e M/s Mechel Trading Limited. Moreover, the load port as per clause 53 of the charter party and the Bills of Lading is also the same port i.e. port poyset, Russia and since the opponent has not entered into any charter party agreement other than the charter party dated 9.5.2008 for the cargo in question i.e. the cargo in relation to which dispute is raised and claim is made in the suit, the reference has to be of the charter party agreement dated 9.5.2008.

25.25 The Court, in view of such facts, has also found that in view of the arbitration clause, the dispute

between the parties is required to be resolved through the arbitration."

In the case of **M. Dayanand Reddy** (supra), it has been observed as under:-

"6. The learned Judge inter alia came to the finding that the original agreement dated December 11, 1986 executed between the parties in relation to the contract work did not contain any arbitration clause and the articles of the agreement only provided for various terms and conditions of the work and such agreement containing the aforesaid terms was also signed by both the parties. The learned Judge, however, held that conspicuously the agreement was silent about the mode of settlement of the disputes, if any, arising between the parties in respect of the work. Generally, every agreement of civil contract between the government and the contractors or between the local bodies and the contractors contains an arbitration clause for settling the disputes between the parties. In the copy of the agreement which was supplied to the appellant since marked as Ex. A-3, the clauses appearing in the agreement were similarly entered without variation. In the copy of agreement since furnished to the applicant, there was a clause being clause 3 which provided for reference to arbitration in accordance with the standard specifications. It was further held by the learned Judge that the copy since supplied to the applicant had the stamp of the respondent No.2 and the covering letter under which the copy of the

agreement was forwarded to the applicant also bore the seal and signature of the second respondent. Since the said copy of the agreement had not been fabricated by the applicant, the respondents were bound by the said 635 Clause (3) as referred to in the copy of the agreement' As, despite such agreement, the respondents failed and neglected to refer the matter for arbitration, the learned Judge was of the view that the application should be allowed. The learned Judge, therefore, appointed Sri J. VenuGopal Rao, a retired District Judge, as the sole arbitrator for adjudicating all the disputes and differences between the parties and for entering upon the reference and thereafter sip and pass the award in accordance with law.

7. The respondents being aggrieved by the aforesaid order of the learned Civil Additional Judge, moved the Andhra Pradesh High Court for revision. The learned Judge inter alia came to the finding that the original agreement Ex.B-1 since signed by the parties did not contain any arbitration clause at all. A copy of the agreement (Ex.A-3) was, however, for- warded to the applicant eleven days after the original agreement and the clause relating to arbitration as contained in Ex.A-3 was absent in the original agreement. The learned Judge was of the view that only the terms contained in original agreement since signed by the parties and not the terms contained in the copy forwarded to the applicant were binding between the parties. The learned Judge was also of the view. that as in the original agreement, (Ex.B-1) signed by both the parties, there was no

arbitration clause at all, it was not necessary to look into the other material or to consider other circumstances for the purpose of finding that the parties had also agreed for arbitration. The contention on behalf of the applicant that in the absence of any specific clause for reference of disputes to arbitration in the original agreement (Ex.B-1) the existence of such a clause should be assumed because the government contractors arc governed by the standard specifications, was not accepted by the High Court. In that view of the matter, the revision application was allowed by the High Court inter alia holding that the impugned order appointing an arbitrator was erroneous and not sustainable in law. As aforesaid, such order of the Andhra Pradesh High Court is impugned in the instant appeal.

8. Under the Arbitration Act, 1940, only an arbitration agreement in writing is recognised by the Act. In has been held by this Court in Jugal Kishore Rameshwardas v. Mrs. Goolbai Hormusji, [1955] 2 SCR 857 that it is not necessary that the contract between the parties should be signed by both the parties. But it is necessary that the terms should be reduced in writing and the agreement between the parties on such written terms is 636 established. It has also been held by this Court in Rallia Ram v. Union of India, [1964] 3 SCR 164 that it is not necessary that all the terms of the agreement should be contained in one document. Such terms may be ascertained from the correspondence consisting of number of letters. In Smt. Rukmanibai Gupta v. The Collector, Jabalpur & Ors., AIR 1981 SC

479 this Court has laid down that an arbitration clause is not required to be stated in any particular form. If the intention of the parties to refer the dispute to arbitration can be clearly ascertained from the terms of the agreement, it is immaterial whether or not the expression arbitration or 'arbitrator' or 'arbitrators' has been used in the agreement. It is also not necessary that agreement to arbitration should appear in the document containing the other terms of agreement between the parties. Law is well settled that arbitration clause may be incorporated by reference to a specific document which is in existence and whose terms are easily ascertainable. It is to be noted, however, that the question whether or not the arbitration clause contained in another document is incorporated in the contract, is always a question of construction. It should also be noted that the arbitration clause is quite distinct from the other clauses of the contract. Other clauses of agreement impose obligation which the parties undertake towards each other. But arbitration clause does not impose on any of the parties any obligation in favour of the other party. Such arbitration agreement embodies an agreement between the parties that in case of a dispute, such dispute shall be settled by arbitrator, or umpire of their own constitution or by an arbitrator to be appointed by the Court in an appropriate case. It is pertinent to mention that there is a material difference in an arbitration agreement inasmuch as in an ordinary contract the obligation of the parties to each other cannot, in general, be specifically enforced and breach of such terms of

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contract results only in damages. The arbitration clause however can be specifically enforced by the machinery of the Arbitration Act. The appropriate remedy for breach of an agreement to arbitrate is enforcement of the agreement to arbitrate and not to damage arising out of such breach. Moreover, there is a further significant difference between an ordinary agreement and an arbitration agreement. In An arbitration agreement, the Courts have discretionary power of dispensation of a valid arbitration agreement but the Courts have no such power of dispensation of other terms of contract entered between the parties. This very distinctive feature of an agreement for arbitration has been highlighted 637 in the decision in Heyman v. Damins Ltd., 1942 AC 356. It has been held in North Westen Rubber Company, 1908 2 KB 907 (over-ruled in (1961 (1) AC 1314) on other points), that an arbitration agreement in no way classifies the right of the parties under the Contract but it relates wholly to the mode of determining the rights. In the backdrop of such position in law relating to an agreement for arbitration, it is to be decided whether the existence of an agreement to refer the dispute to arbitration can be clearly ascertained in the facts and circumstances of the case. This, in turn, depends on the interaction of the parties to be gathered from the relevant documents and surrounding circumstances. In the instant case, it is the specific finding of the learned Judge of the City Civil Court, Hyderabad and also the Andhra Pradesh High Court that in the original agreement signed by the parties, there is no clause for referring the disputes

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to arbitration. The agreement between the parties in this case has been reduced in writing and has been signed by both the parties. It is therefore not necessary to make any effort for the purpose of finding out as to what were the terms agreed between the parties. The learned Judge, City Civil Court, allowed the application for appointment of arbitrator simply on the ground that a copy of the agreement was forwarded to the appellant with the seal and signature of a competent officer of the Corporation, namely, the respondent No.2 and in such copy, which was not fabricated by the applicant there was a reference for arbitration as contained in the standard specifications. The learned Judge, City Civil Court, also proceeded on the footing that usually in the agreements relating to the nature of the contract, a provision for arbitration is made. As in the original agreement signed between the parties there was no such provision and the agreement was silent on the question as to what would happen if the disputes would arise between the parties, it should be presumed that the parties had really intended to refer the dispute to arbitration in accordance with the standard specifications and in the copy of the agreement which was forwarded to the applicant the provision for arbitration was included. The High Court however, was not inclined to accept this view of the learned Judge of the City Civil Court. The High Court was of the view that it was the signed agreement between the parties which was binding on the parties and only such written terms in the original agreement signed by the parties should be taken into consideration and not the terms

> contained in the copy of the agreement which was forwarded to the applicant after some time."

In the case of **Sukanya Holdings (P) Ltd.** (supra), it has been observed as under:-

> "15. The relevant language used in Section 8 is "in a matter which is the subject matter of an arbitration agreement", Court is required to refer the parties to arbitration. Therefore, the suit should be in respect of 'a matter' which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced - "as to a matter" which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Section 8. The words 'a matter' indicates entire subject matter of the suit should be subject to arbitration agreement.
>
> 16. The next question which requires consideration is even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible under Section 8 of the Act? In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action that is to say the subject matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated

under the Act. If bifurcation of the subject matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject matter of an action brought before a judicial authority is not allowed.

17. Secondly, such bifurcation of suit in two parts, one to be decided by the arbitral tribunal and other to be decided by the civil court would inevitably delay the proceedings. The whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated by such procedure. It would also increase the cost of litigation and harassment to the parties and on occasions there is possibility of conflicting judgments and orders by two different forums."

In the case of **Osprey Underwriting Agencies Ltd.** (supra), it has been observed as under:-

"6. In view of the observations made and the law laid down by the Supreme Court, I find little justification in the prayers which have been made by the petitioners. Apart from this, it is to be noticed that in the earlier Admiralty Suit No. 61 of 1996, by consent of the parties, it had been agreed that the ownership of the vessel shall vest in Abhay Ocean Projects Limited. Clause 4 of the consent terms, emphatically states that all authorities concerned, shall be bound by the order. This clause specifically provides that "It is understood that a copy of this order

shall operate as a notice of transfer of ownership of the said vessel "Sindhu-VII" in favour of the plaintiffs via-a-vis all authorities concerned who shall be bound to act on it." A copy of this order was sent to the Bombay Port Trust authorities and the respondents herein, being Oil and Natural Gas Corporation Limited. The aforesaid clause clearly re-enforces the submission of Mr. Dada that the orders passed in Admiralty Suits are orders in rem and therefore, they are binding on all the authorities concerned. The submissions made by Mr. Dada, the learned Additional Solicitor General are fully supported by the judgments of the Supreme Court in M. V. Elisabeth (supra) and Chiranjilal (1993 AIR SCW 1439) (supra). In paragraph 45 of Elisabeth's case (supra), the Supreme Court observes as under :--

"45. ".....In admiralty the vessel has a juridical personality, an almost corporate capacity, having not only rights but liabilities (sometimes distinct from those of the owner) which may be enforced by process and decree against the vessel, binding upon all interested in her and conclusive upon the world, for admiralty in appropriate cases administers remedies in rem, i.e., against the property, as well as remedies in personam, i.e., against the party personally....." Benedict, The Law of American Admiralty, 6th ed. Vol. I p. 3."

Thus, it becomes quite clear that the proceedings in Admiralty Suit No. 110 of 1997 are proceedings in rem and any findings given therein will be conclusive upon the world. In Chiranjilal's case (1993 AIR SCW 1439)

(supra), the Supreme Court observes as follows in paragraphs 20 and 21 :--

"20. On a conspectus of the above legal scenario we conclude that the probate Court has been conferred with exclusive jurisdiction to grant probate of the will of the deceased annexed to the petition (suit); on grant or refusal thereof, it has to preserve the original will produced before it. The grant of probate is final subject to appeal, if any, or revocation if made in terms of the provisions of the Succession Act. It is a judgment in rem and conclusive and binds not only the parties but also the entire world."

"21. From this perspective, we are constrained to conclude that the arbitrator cannot proceed with the probate suit to decide the dispute in issues 1 and 2 framed by him. Under these circumstances the only course open in the case is that the High Court is requested to proceed with the probate suit No. 65 of 1985 pending on the probate jurisdiction of the High Court of Bombay and decide the same as expeditiously as possible."

In view of the law laid down in the aforesaid two judgments, it becomes clear that the disputes which have been raised in Admiralty Suit No. 110 of 1997 cannot be referred to arbitration."

In the case of **Booz Allen and Hamilton Inc.** (supra), it has been observed as under:-

"17. The appellant contends that the parties to the suit were all parties to the deposit agreement containing the

arbitration agreement. The claim of the SBI was for enforcement of the charge/mortgage over flat No.9A and realization of the sale proceeds therefrom, which was specifically mentioned as a dispute which was arbitrable. Having regard to the clear mandate under Section 8 of the Act, the court ought to have referred the parties to arbitration. SBI supported the order.

19. Where a suit is filed by one of the parties to an arbitration agreement against the other parties to the arbitration agreement, and if the defendants file an application under Section 8 stating that the parties should be referred to arbitration, the court (judicial authority) will have to decide:

(i) whether there is an arbitration agreement among the parties;

(ii) whether all parties to the suit are parties to the arbitration agreement;

(iii) whether the disputes which are the subject matter of the suit fall within the scope of arbitration agreement;

(iv) whether the defendant had applied under Section 8 of the Act before submitting his first statement on the substance of the dispute; and

(v) whether the reliefs sought in the suit are those that can be adjudicated and granted in an arbitration.

32. The nature and scope of issues arising for consideration in an application under Section 11 of the Act

for appointment of arbitrators, are far narrower than those arising in an application under Section 8 of the Act, seeking reference of the parties to a suit to arbitration. While considering an application under Section 11 of the Act, the Chief Justice or his designate would not embark upon an examination of the issue of `arbitrability' or appropriateness of adjudication by a private forum, once he finds that there was an arbitration agreement between or among the parties, and would leave the issue of arbitrability for the decision of the arbitral Tribunal. If the arbitrator wrongly holds that the dispute is arbitrable, the aggrieved party will have to challenge the award by filing an application under Section 34 of the Act, relying upon sub-section 2(b)(i) of that section.

33. But where the issue of `arbitrability' arises in the context of an application under Section 8 of the Act in a pending suit, all aspects of arbitrability have to be decided by the court seized of the suit, and cannot be left to the decision of the Arbitrator. Even if there is an arbitration agreement between the parties, and even if the dispute is covered by the arbitration agreement, the court where the civil suit is pending, will refuse an application under Section 8 of the Act, to refer the parties to arbitration, if the subject matter of the suit is capable of adjudication only by a public forum or the relief claimed can only be granted by a special court or Tribunal.

37. It may be noticed that the cases

referred to above relate to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and Judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself. (Vide : Black's Law Dictionary).

38. Generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to sub-ordinate rights in personam arising from rights in rem have always been considered to be arbitrable.

45. In Chiranjilal Shrilal Goenka vs. Jasjit Singh & Ors., 1993 (2) SCC 507 this court held that grant of probate is a judgment in rem and is conclusive and binding not only the parties but also the entire world; and therefore, courts

alone will have exclusive jurisdiction to grant probate and an arbitral tribunal will not have jurisdiction even if consented concluded to by the parties to adjudicate upon the proof or validity of the will.

46. An agreement to sell or an agreement to mortgage does not involve any transfer of right in rem but create only a personal obligation. Therefore if specific performance is sought either in regard to an agreement to sell or an agreement to mortgage, the claim for specific performance will be arbitrable. On the other hand, a mortgage is a transfer of a right in rem. A mortgage suit for sale of the mortgaged property is an action in rem, for enforcement of a right in rem. A suit on mortgage is not a mere suit for money. A suit for enforcement of a mortgage being the enforcement of a right in rem, will have to be decided by courts of law and not by arbitral tribunals.

48. The provisions of Transfer of Property Act read with Order 34 of the Code, relating to the procedure prescribed for adjudication of the mortgage suits, the rights of mortgagees and mortgagors, the parties to a mortgage suit, and the powers of a court adjudicating a mortgage suit, make it clear that such suits are intended to be decided by public fora (Courts) and therefore, impliedly barred from being referred to or decided by private fora (Arbitral Tribunals). We may briefly refer to some of the provisions which lead us to such a conclusion.

48.1 Rule (1) of Order 34 provides that

subject to the provisions of the Code, all persons having an interest either in the mortgage security or in the right of redemption shall have to be joined as parties to any suit relating to mortgage, whether they are parties to the mortgage or not. The object of this rule is to avoid multiplicity of suits and enable all interested persons, to raise their defences or claims, so that they could also be taken note of, while dealing with the claim in the mortgage suit and passing a preliminary decree. A person who has an interest in the mortgage security or right or redemption can therefore make an application for being impleaded in a mortgage suit, and is entitled to be made a party. But if a mortgage suit is referred to arbitration, a person who is not a party to the arbitration agreement, but having an interest in the mortgaged property or right of redemption, can not get himself impleaded as a party to the arbitration proceedings, nor get his claim dealt with in the arbitration proceedings relating to a dispute between the parties to the arbitration, thereby defeating the scheme relating to mortgages in the Transfer of Property Act and the Code. It will also lead to multiplicity of proceedings with likelihood of divergent results.

49. A decree for sale of a mortgaged property as in the case of a decree for order of winding up, requires the court to protect the interests of persons other than the parties to the suit/petition and empowers the court to entertain and adjudicate upon rights and liabilities of third parties (other than those who are parties to the arbitration

> agreement). Therefore, a suit for sale, foreclosure or redemption of a mortgaged property, should only be tried by a public forum, and not by an arbitral tribunal. Consequently, it follows that the court where the mortgage suit is pending, should not refer the parties to arbitration.
>
> 51. If the three issues referred by the appellant are the only disputes, it may be possible to refer them to arbitration. But a mortgage suit is not only about determination of the existence of the mortgage or determination of the amount due. It is about enforcement of the mortgage with reference to an immovable property and adjudicating upon the rights and obligations of several classes of persons (referred to in para 27 (ii) above), who have the right to participate in the proceedings relating to the enforcement of the mortgage, vis-`-vis the mortgagor and mortgagee. Even if some of the issues or questions in a mortgage suit (as pointed out by the appellant) are arbitrable or could be decided by a private forum, the issues in a mortgage suit cannot be divided."

It was contended that the application is misconceived, meritless and the same deserves to be dismissed.

10. Mr. Soparkar, referring to the bill of lading which is produced by the opponent as well as the bill of lading produced on record by the applicant, submitted that the bill of lading is

signed by master of the ship. It was contended that all contentions which are raised by the opponent would become irrelevant as the case is based on bill of lading produced by the opponent at Page 155 of the paper book. It was contended that all rights and liabilities are endorsed. Therefore, the test would be that once the bill of lading is endorsed, can the opponent claim ignorance and therefore, the fact that whether they were not aware of the terms and conditions is a subject matter which can be examined by the arbitrator. It was contended that in both the charter parties, there is arbitration clause and therefore, by incorporation, the same is binding on opponent as well. It was therefore reiterated that the application deserves to be allowed and the parties be relegated to arbitration as prayed for.

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11. No other or further contentions and/or submissions are made by the learned advocates appearing for the respective parties.

12. Before reverting to the submissions made by the learned advocates appearing for the respective parties, it would be appropriate to refer to the relevant sections of the Arbitration and Conciliation Act, 1996. Sections 7, 8 and 45 read as under:-

"Section 7 - Arbitration agreement.-

(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in—

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part

of the contract.

Section 8 – Power to refer parties to arbitration where there is an arbitration agreement -

(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.

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> (3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.
>
> **Section 45 — Power of judicial authority to refer parties to arbitration.-**
>
> Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

13. In order to cull out the real controversy, it is noteworthy that the opponent - original plaintiff placed the order with Kisan International Trading for purchase of 40-45 MTs of DAP for which the opponent entered into an agreement with Kisan International Trading on 12.6.2014. It appears from the record that in turn, Kisan International Trading entered into an agreement with Dreymoor Fertilizers, Singapore and the voyage in question was from Nantong, China to Kandla, India. Record indicates that the applicant being owner of the

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defendant vessel entered into a time charter with Norvik Shipping North America Inc. on 17.6.2014 at London which is at Annexure-C to the application. On bare reading of the said time charter, following noteworthy facts emerge. That, it is in a format with various clauses. The same is signed by the authorized signatories of the applicant as owners and Norvik Shipping North America Inc. as charterers. Clause 14 of the said time charter provides as under:-

> "Witnesseth, That the said Owners agree to let, and the said Charterers agree to hire the said vessel, from the time of delivery, **for one time charter trip of about 35-40 days without guarantee via China for loading to West Coast India–Pakistan range only for discharging and via Singapore for bunkers with bulk harmless DAP fertilizers only. Trading always via safe anchorages(s), safe port(s), safe berth(s) always afloat, always within Institute Warranty Limits."**

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14. Thus, this shows that Norvik Shipping North America Inc. as charterer hired the defendant vessel from its owner – the applicant for one time charter trip and the time was prescribed as 35 to 40 days. The route which is prescribed in the time charter and the specific purpose is also provided thereunder. Similarly, Clauses 16

and 17 of the time charter provide as under:-

> "Charterers to have liberty to sublet the vessel for all or any part of the time covered by this Charter, but Charterers remaining responsible for the fulfillment of this Charter Party."

15. Thus, by Clause 16, the charterers have had opportunity to subject the defendant vessel for all or any part of the time covered by this charter, but charterers remains responsible for fulfillment of this charter party and as per Clause 18 of the charter party, the defendant vessel was to be placed at the disposal of the charter. Similarly, Clause 51 under sub-clause (4) provides for the pay and use charges that the charterer was supposed to pay. Clauses 76(8), 77 and 78 provide as under:-

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> "That the Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with ship's crew and boats. The Captain (although appointed by the Owners), shall be under the orders, and directions of the Charterers as regards employment and agency; and Charterers are to load, stow, ~~and~~ ***tally***, trim, ***secure, unsecure, lash/unlash, chock and discharge*** the cargo at their expense under the supervision of the Captain, who is to sign Bills of Lading for cargo at

presented, in conformity with Mate's ~~or~~ ***and*** Tally Clerk's receipts."

Clause 109 provides as under:

> ***"English Law, General Average, Arbitration in London, BIMCO/LMAA 1998 Arbitration Clause to apply. See Clause 87."***

16. The record further indicates that the said time charter party has also rider clause to the charter party agreement dated 17.6.2014, wherein Clauses 46 and 49 provide as under:-

> **"Clause 46.**
> Full style of Charterers:
> *Norvik Shipping North America Inc.*
> *SSQ Place, 110 Sheppard Ave East,*
> *Suite 300, P.O.Box 6 Toronto,*
> *Ontario M2N 6Y8, Canada*
>
> **Clause 49. Capture, Seizure, Arrest**
> Should the vessel be captured or seized or detained or arrested by any authority or by any legal process during the currency of this Charter Party, the payment of hire shall be suspended for actual time lost only provided the full working of the vessel is prevented, unless such capture or seizure or detention or arrest is occasioned by any act or omission or fault of the Charterers or their agents and/or their servants or shippers or receivers or stevedores.
>
> **Clause 69. Letter of Indemnity**

Charterers are to endeavour best to present the original bills of lading for discharging cargo. If original bills of lading do not arrive at discharging port in time, Owners/Master to release entire cargo against Charterers issuing a letter of indemnity on Charterers letterhead with wording of Owners' P&I approved form signed by an authorized signatory of Charterers advising name and position. Owners are to be advised where the original bills of lading are. Owners to receive within office hours by fax or email the signed letter of indemnity plus copy bills of lading. The original letter of indemnity to be sent to Owners by DHL/similar courier. Upon receipt of faxed or emailed letter of indemnity with copy bills of lading Master will be instructed to release the cargo to the consignees named in the letter of indemnity.
Charterers hereby undertake to surrender the original bills of lading to Owners' agents at London or Piraeus' premises upon Charterers'/agents receipt of same.
Charterers hereby state that they indemnify Owners against all consequences arising from Owners conforming to Charterer's request in discharging cargo against the letter of indemnity, without production of the original bills of lading.

Clause 74. Governing Law
This Charter Party shall be governed by and construed in accordance with English Law.

Clause 76.

This contract shall be governed by and construed in accordance with English Law; Arbitration in London to take place in London as per clause 87; General Average shall be adjusted, stated and settled in London according to York Antwerp Rules 1994.
Cargo's contribution to General Average shall be paid to the Carrier even when such average is the result of a fault, neglect or error of the Master, Pilor or Crew.

It is expressly agreed that English law and London arbitration apply to the exclusion of all others and in particular Indian arbitration, Indian law and the Indian arbitration & conciliation act 1996. It is also agreed that Indian courts do not have any jurisdiction over this charter party.

Clause 87. BIMCO/LMAA ARBITRATION 1998 CLAUSE
The contract shall be governed by and construed in accordance with English Law and any dispute arising out of or in accordance with this contract shall be referred to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or re-enactments thereof save to the extent necessary to give effect to the provisions of this clause.

The arbitration shall be conduced in accordance with the London Maritime Arbitrators Association (LMAA) terms current at the time when the arbitration proceedings are commenced.

> Arbitrators to be full members of the LMAA, the reference shall be to three arbitrators. A party wishing to refer a dispute to arbitration shall appoint its arbitrator and send notice of such appointment in writing to the other party requiring the other party to appoint its own arbitrator within 14 calender days of that notice and stating that it will appoint its arbitrator as sole arbitrator unless the other party appoints its own arbitrator and gives notice that it has done so within the 14 days specified. If the other party does not appoint its own arbitrator and give notice that it has done so within the 14 days specified, the party referring a dispute to arbitration may, without the requirement of any further prior notice to the other party, appoint its arbitrator as sole arbitrator and shall advise the other party accordingly. The award of a sole arbitrator shall be binding on both parties as if he had been appointed by agreement.
>
> Nothing herein shall prevent the parties agreeing in writing to vary these provisions to provide for the appointment of a sole arbitrator."

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17. Thus, the charter party agreement dated 17.6.2014 between the applicant and Norvik Shipping North America Inc. clearly provides for an arbitration clause and under Clause 87 in particular, it provides for English law and BIMCO. It has also come on record that another charter party agreement on back to back basis

was entered into between Norvik Shipping North America Inc. and Dachex Shipping Private Limited, Singapore on 17.6.2014 for the very purpose which is brought on record by the opponent. Clause 10 of the said charter party mentions Nantong port, China as the bill of lading and Clause 11 provides for discharging port Kandla as well as Karanchi, Pakistan. It is also provided under Clause 11 that the exact discharge port shall be declared at the time of vessel passing Singapore. Clause 25 thereof provides for law and arbitration - London English law to apply.

> "10. Bills of Lading — (See Rider Clause No. 32,33)
> Bills of Lading shall be presented and signed by the Master as per the "Congenbill" Bill of Lading form, Edition 1994, without prejudice to this Charter Party, or by the Owners' agents provided written authority has been given by Owners to the agents, a copy of which is to be furnished to the Charterers. The Charterers shall indemnify the Owners against all consequences or liabilities that may arise from the signing of bills of lading as presented to the extent that the terms or contents of such bills of lading impose or result in the imposition of more onerous liabilities upon the Owners than those assumed by the Owners under this Charter Party.
>
> 19. Law and Arbitration — Bimco

Dispute Resolution Clause, English law

*(a) This Charter Party shall be governed by and construed in accordance with English law and any dispute rising out of this Charter Party shall be referred to arbitration in London in accordance with the Arbitration Acts 1950 and 1979 or any statutory modification or re-enactment thereof for the time being in force. Unless the parties agree upon a sole arbitrator, one arbitrator shall be appointed by each party and the arbitrators so appointed shall appoint a third arbitrator, the decision of the three-man tribunal thus constituted or any two of them, shall be final. On the receipt by one party of the nomination in writing of the other party's arbitrator, that party shall appoint their arbitrator within fourteen days, failing which the decision of the single arbitrator appointed shall be final.

For disputes where the total amount claimed by either party does not exceed the amount stated in Box 25** the arbitration shall be conducted in accordance with the Small Claims Procedure of the London Maritime Arbitrators Association.

~~*(b) This Charter Party shall be governed by and construed in accordance with Title 9 of the United States Code and the Maritime Law of the United States and should any dispute arise out of this Charter Party, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or~~

~~that of any two of them shall be final, and for purpose of enforcing any award, this agreement may be made a rule of the Court. The proceedings shall be conducted in accordance with the rules of the Society of Maritime Arbitrators, Inc.~~

~~For disputes where the total amount claimed by either party does not exceed the amount stated in Box 25** the arbitration shall be conducted in accordance with the Shortened Arbitration Procedure of the Society of Maritime Arbitrators, Inc.~~

~~(c) Any dispute arising out of this Charter Party shall be referred to arbitration at the place indicated in Box 25, subject to the procedures applicable there. The laws of the place indicated in Box 25 shall govern this Charter Party.~~

~~(d) If Box 25 in Part I is not filled in, sub-clause (a) of this Clause shall apply.~~

*(a), (b) and (c) are alternatives; indicate alternative agreed in Box 25.

**Where no figure is supplied in Box 25 in Part I, this provision only shall be void but the other provisions of this Clause shall have full force and remain in effect."

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18. Thus, if both the time charters are compared, at the first blush, it appears that as per first time charter party, the applicant is the owner of the defendant vessel and as per the second charter party, it appears that Norvik Shipping North America Inc. is claimed to be the owner of the defendant vessel. However, on

appreciating the provision of Clause 16, which is observed hereinabove for the first time charter, the same provides that charterers i.e. in the instant case, Norvik Shipping North America Inc. was at liberty to sublet the vessel for any time covered by the said time charter and on the basis of such liberty, Norvik Shipping North America Inc. entered into a separate charter on the same day i.e. 17.6.2014 with voyage charter. Thus, in opinion of this Court, charter executed between the applicant and Norvik Shipping North America Inc. for the defendant vessel is inter-linked with voyage charter and as per the time charter dated 17.6.2014, Norvik Shipping North America Inc. was only at liberty to have a voyage charter or sublet the defendant vessel.

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19. Now, reverting back to the case on hand, on basis of the bill of lading, the goods-DAP in bulk arrived at Kandla port and the same was endorsed by the opponent, wherein it is clearly mentioned (at Page-155) that the entire bill of lading in favour of IFFCO which is signed by Kisan International Trading's authorized person. Thus, in a way time charter party dated 17.6.2014 and voyage charter are back to back and thus, the facts establish that the opponent - original plaintiff became endorsee of the

bill of lading on the basis of which it also took delivery. Thus, the relationship of the applicant and the opponent both are linked and established because of endorsement made by the opponent on the bill of lading and the delivery having been taken. The bill of lading even produced by the opponent clearly shows that it is based on CONGEN Bill of Lading Edition 1994 which is in a prescribed format which clearly provides that English law and arbitration shall apply. As set out in the bill of lading even produced by the opponent before this Court, it is clearly mentioned that to be used with charter parties. It is also further mentioned that the freight payable as per charter party dated 17.6.2014. It also provides condition of carriage which is also provided on the overleaf page.

20. It is an admitted position that the Master of the vessel is that of the applicant and the Kisan International Trading has endorsed the bill of lading in favour of the opponent which is also signed by the Master. On the basis of such endorsement and the opponent being endorsee, the goods were delivered to the opponent. The first time charter dated 17.6.2014 is the first document of chartering the defendant vessel between the applicant and Norvik Shipping North America Inc. and back to

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back voyage charter between Norvik Shipping North America Inc. who is charterer in the first time charter party which is a time charter party who in turn entered into a voyage charter with Dachex Shipping Private Limited, Singapore. It is no doubt true that both the charter parties dated 17.6.2014 provide for arbitration clause and English law to apply and arbitration at London. It also provides for bill of lading clause which provides that bill of lading is in CONGEN Bill of Lading Edition 1994 format and therefore, bill of lading is the basis of the whole transaction in question backed by two charter parties; first being time charter and the second being voyage charter and the opponent being endorsee of the bill of lading is bound by the said covenants and conditions of the same. Section 7 of the Arbitration and Conciliation Act, 1996, more particularly, sub-section (5) thereof therefore stands read with Section 45 of the Act as it stands. Having taken delivery of goods on the basis of the very bill of lading, the opponent now cannot be permitted to say that it was alien to the agreements which are back to back in nature. Reading Section 8 with Section 45 of the Act, the endorsee is also governed by the same conditions. The opponent is not a small organization as it can be seen from the facts arising in this matter that the opponent had

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ordered for the total bulk to be carried by the defendant vessel of DAP. It is not the case of the opponent that it was its first bulk purchase. The opponent is a national level organization engaged in manufacturing of fertilizers and it can be very well be presumed looking to the structure of the opponent which is of a national level that it has experience in the field of bulk purchase of articles like DAP from world market. When the bill of lading clearly provides that it is in CONGEN Bill of Lading Edition 1994 format, the ignorance pleaded by the opponent that the overleaf paper was not sent by Kisan International Trading or Dachex Shipping Private Limited, Singapore is of no consequences. The opponent as importer of the goods with experience cannot plead ignorance that it was unaware about the conditions of the bill of lading as per CONGEN Bill of Lading Edition 1994, which also includes arbitration clause and English law to apply. Therefore, even if no reliance is placed for on the chart given by the learned counsel for the applicant considering the nature of transaction which has resulted into filing of suit clearly establishes that both the charter parties, first being time charter and the second being voyage charter were back to back in nature and the delivery having been taken by the opponent on the basis of the bill of lading

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as an endorsee would also entangled with the liability of all the conditions including the condition of arbitration clause and English law to apply and hence, the contentions raised by the learned counsel for the opponent that there is no written arbitration agreement and therefore, conditions of Section 7 of the Act are not fulfilled deserves to be negatived outright.

21. Similarly, learned counsel for the opponent has also tried to distinguish the applicability of the binding decisions of the Apex Court in the case of **Chloro Controls India Private Limited** (supra) as well as **British India Steam Navigation Co. Ltd.** (supra). However, the same are applicable even in the facts of the case and following the judgment of this Court in **M V Vinalines Fortuna** (supra), the opponent as endorsee of the bill of lading is covered by the arbitration clause provided in the bill of lading read with both the charter party agreements. Following the judgment of the Apex Court in the case of **M.V. Elisabeth** (supra), the applicant having given the security and having entered the appearance, the admiralty jurisdiction exercised by this Court which was originally action in *rem* would render itself as an action in personam and it cannot be said

that such action in personam is not arbitrable. Similarly, on examining the contention raised by the learned counsel for the opponent that there is no subsisting arbitration agreement on first impression would appear to be correct. However, on close scrutiny of the nature of charter party agreements entered into between the applicant and Norvik Shipping North America Inc. in almost back to back nature and the bill of lading which is on CONGEN Bill of Lading Edition 1994 and the opponent being endorsee of the same cannot contend that there is no arbitration agreement. By virtue of Sections 8 and 45 of the Act, the opponent would be bound by the same. It was also contended by the learned counsel for the opponent that even in case before this Court in **M V Vinalines Fortuna** (supra), there was only one charter party agreement and therefore, the judgment would also not be applicable also deserves to be negatived. Considering various clauses of both the time charter party agreements as well as considering the format of bill of lading and following the judgments of the Apex Court in the cases of **Chloro Controls India Private Limited** (supra), **British India Steam Navigation Co. Ltd.** (supra), **Owners and Parties Interested in the Vessel M.V. "BALTIC CONFIDENCE"**, (supra), **Bharat Aluminium Corporation Ltd.**

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(supra), **Chloro Controls India Private Limited** (supra), **M.V. Elisabeth** (supra) and **Booz Allen and Hamilton** (supra), in opinion of this Court, the opponent is bound by such arbitration clause by incorporation and as an endorsee as provided under Section 45 of the Act. As held by this Court in **M V Vinalines Fortuna** (supra), the intention of the parties is crystal clear in the bill of lading itself (Page-155 of the paper book), wherein in condition no.1 itself, it is mentioned that all terms and conditions, liberties and exception of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are hereby incorporated in view of such clear incorporation and the bill of lading having been endorsed by the opponent leaves no room of doubt that as an endorsee, the opponent is bound by the same. In light of the aforesaid therefore, the ratio laid down by the Apex Court in the case of **Sukanya Holdings Pvt. Ltd.** (supra) will not be applicable In the present case. The other conditions which are raised on merits of the issue which is involved in the suit can very well be taken before the arbitrator.

22. It was also contended by the learned counsel for the opponent that the opponent is an India based Company and therefore, it cannot afford

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to have arbitration at London. In light of the aforesaid and considering the relevant provisions of the Arbitration and Conciliation Act, 1996, it does not bifurcate the capability of a party. As observed hereinabove, the said contention also does not hold it good. The opponent is not a small party. It is a national level cooperation Company who even if the single transaction is considered as imported DAP in whole bulk which was carried by the defendant vessel only for the opponent and therefore, the said contention also fails. Following the ratio laid down by the Apex Court in the cases of **Chloro Controls India Private Limited** (supra), **British India Steam Navigation Co. Ltd.** (supra), **Owners and Parties Interested in the Vessel M.V. "BALTIC CONFIDENCE"**, (supra), **Bharat Aluminium Corporation Ltd.** (supra), **Chloro Controls India Private Limited** (supra), **M.V. Elisabeth** (supra) and **Booz Allen and Hamilton** (supra) and also the ratio laid down by the Apex Court in the case of **M V Vinalines Fortuna** (supra) and considering the facts of this case, on initiation of the first charter party agreement, it can definitely be ascertained that the intention on behalf of the parties was crystal clear from the beginning to resolve all disputes of arbitration. The Suit itself is based on the bill of lading and

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therefore, the opponent cannot be permitted to argue that only few conditions would apply and the arbitration clause is to be refrained on the reasons which are put forward by the opponent. Thus, considering the facts of the case and as per Section 45 of the Arbitration and Conciliation Act, 1996, as the opponent is the endorsee of the bill of lading, the dispute arising in this Suit and the applicant as owner of the defendant vessel having entered the appearance and have provided bank guarantee as the action in personam, the same has to be referred to arbitration as per the arbitration clause at London and English law to apply and such intention is conclusively reached between the parties on the basis of the documents on record. In light of the aforesaid therefore, the dispute between the parties is required to be resolved through arbitration in London and English law to apply.

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23. In light of the aforesaid therefore, the proceedings of Admiralty Suit no.19 of 2014 deserves to be stayed. The said Suit filed by the present opponent is stayed and the relief prayed for in Paragraph 10(A) is granted. Prayers prayed for in Paragraphs 10(B) and (C) are not granted. However, it is provided that the same would be subject to orders that may be passed by the Arbitral Tribunal/learned

arbitrator in arbitration proceedings that may be commenced. Until then, letter of undertaking and the security shall be continued and shall be kept alive by the applicant.

24. Accordingly, the application is partly allowed.

(R.M.CHHAYA, J.)

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