

T.S. – 3/2019(CC)

T.S. – 659/2018

**Present :: Neyaz Alam
Judge Commercial Court at Rajarhat
North 24 Parganas**

**CNR:WBNP19-000004-2019
J.O Code – WB01398**

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30.08.2022

Both parties file hazira.

The record is taken up for passing order in respect of an application u/s 45 dated 29.11.2019 filed by the applicant/defendant. No. 3.

Plaintiff filed the suit for Declaration, Permanent Injunction and for Recovery of money.

The Defendant appeared and contested the suit by filing written statement and in the suit filed an application under Section 45 of Arbitration & Conciliation Act, 1996 praying for referring the Applicant, the Plaintiff and the Defendant No.5 be referred to arbitration under the SHA.

Plaintiff is a company incorporated under the Companies Act, 1956 with its object of carrying on business of construction and allied infrastructural activities.

Defendant No.1, Sun-Apollo Real Estate Advisors Private Limited now known as Sun-Ares Indian Real Estate Private Limited, incorporated in India is an advisor in the real estate services and is advisor to the Defendant Nos.2 & 3. The Defendant No.2, Sun-Apollo India Real Estate Fund Limited Liability Company, is the holding company of Defendant No.3.

Defendant No.3 is Rishima SA Investments LLC which is the overseas investor in Proforma Defendant No.5. Defendant No.4 is Mr. Prakash Kalothia is presently the Director of Defendant No.1 and was designated as Managing Director earlier. Proforma Defendant No.5 was the company set up by the Plaintiff and Defendant No.3 to construct a 5 Star Hotel in Rajarhat, Kolkata.

Brief fact of the suit is that the Applicant / Defendant No. 3 is Rishima SA Investments LLC, a company incorporated under the laws of Mauritius. The Applicant holds 35 (thirty five) per cent of the paid up share capital of Defendant No. 5 on a fully diluted basis. The balance 65 (sixty five) per cent shares in SHPL are held by the Plaintiff, who is the promoter of SHPL.

The Applicant is not submitting to the jurisdiction of this Learned Court in light of the valid, subsisting and binding Arbitration Agreement between the parties.

It is alleged that the Applicant invested a sum of INR 80,00,00,000 (Rupees eighty crore) in SHPL, as foreign direct investment, by purchasing shares of SHPL, under a Share Subscription and Shareholders' Agreement dated August 7, 2008 as "SHA". The SHA and the Addendum were executed by and in between the Applicant, SIDCL and SHPL.

Defendant No. 3's investment was sought by SIDCL and SHPL because SHPL required funding to set up a hotel to be classified as a five-star hotel by the Ministry of Tourism, Government of India.

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Under the SHA, parties have undertaken to resolve through arbitration, any dispute, controversy, claim or disagreement of any kind whatsoever between or among the parties to the SHA.

Owing to SIDCL and SHPL's continuous and repeated breaches of the Transaction Documents, the Applicant was in fact constrained to commence arbitration against them on February 11, 2016.

The said arbitration was conducted over a period of 3 years under the Rules of the International Chamber of Commerce, 2012 being ICC Case No. 21674/CYK/PTA/ASB/HTG before a Tribunal comprising the Hon'ble Lord Collins of Mapesbury (as the chairman), Mr. Harish Salve, Senior Advocate (as the nominee arbitrator of SIDCL and SHPL) and Mr. Nigel Fleming, Senior Advocate (as the Applicant's nominee arbitrator). Mr. Salve has since voluntarily resigned from the ICC Tribunal with effect from September 5, 2019, following allegations from the very parties who nominated him (SIDCL and SHPL) that circumstances arose giving justifiable doubts as to his partiality. Justice Dipak Misra has now been nominated by SIDCL and SHPL in place of Mr. Salve, on the ICC Tribunal.

On April 30, 2019, the ICC Tribunal issued a unanimous final partial award in the Applicant's favour. Under the Award, the ICC Tribunal inter-alia (i) awarded the Applicant payment under the said clauses 14 and 17 of the SHA, in the manner set out Award and (ii) directing SIDCL, and SHPL to honour the Protective Rights promised to the Applicant, until such time as the Applicant continued to hold shares in SHPL. The ICC Tribunal has deferred certain matters such as costs, interest, etc. to a future award.

It is submitted, the subject-matter of the Suit is already squarely covered in the Award which has disposed of the same. Despite this, SIDCL has approached this Learned Court with broadly, the very same set of facts and requested relief. SIDCL has taken stands in the Suit which are completely contradictory, inconsistent with and belied by its pleadings, evidence and written submissions before the ICC Tribunal. SIDCL has tried to contrive a better case as an afterthought because during the oral hearings before the ICC Tribunal, SIDCL's personnel who were deposing have admitted to being dishonest in their commercial dealings including lying to the Indian Government. Further, the Suit is nothing but an abuse of process, since SIDCL chose not to make any counter claims in the Arbitration despite having ample opportunity to do so. Instead SIDCL has sought to circumvent the same, and has made claims arising out of the same subject-matter before this Learned Court.

Further the Applicant's submission that the subject-matter of the suit is already comprised in and dealt with in the Award, the suit deals with/raises issues which are clearly and unequivocally within the ambit of the Arbitration Agreement. Therefore, as a matter of statutory requirement, this Learned Court ought to refer parties to arbitration.

From a perusal of the Complaint, it is evident that SIDCL's alleged causes of action relate to the SIDCL obtained a No Objection Certificate from the Airport Authority of India dated July 26, 2006 which was valid for three years ("NOC"). After the NOC expired, SIDCL has alleged

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that thereafter, owing to a subsequent No-Objection Certificate issued on December 13, 2010, SIDCL accepted a reduction of height in the Serviced Apartment Project.

SIDCL has made no effort to explain what representations were made by any party to the Suit, including the Applicant, in connection with the NOC Issue. This is because there were no such representations made at all. There is no evidence to support the claims made by SIDCL in the Suit and their entire case in this regard is manufactured and an afterthought. The Applicant and its nominee directors have acted only in accordance with the SHA any suggestions to the contrary in the Suit, are false and fabricated.

Any dispute concerning arising out of in relation to the NOC would be covered by the terms of the Arbitration Agreement, the issuance of the NOC was relevant to the Arbitration, because SIDCL claimed that it was excused from complying with its obligations under Clause 17 because of a delay in renewal of the NOC. Therefore, the ICC Tribunal was required to consider the pleaded facts and evidence regarding the NOC, the impact of the same, and its renewal, during the course of adjudicating upon the Applicant's claims.

SIDCL and SHPL had pleaded in their Statement of Defence filed in the Arbitration that it sacrificed its own right to maximize the height of the Serviced Apartment Project to its own detriment, and for the benefit of Defendant No. 3.

It is contended that in the Statement of Defence and the Rejoinder, SIDCL and SHPL have also made detailed averments as to (i) the issuance of the NOC on July 26, 2006 (ii) the issuance of Notification No. S. O. 84(E) dated January 14, 2010 limiting the height of the Hotel Project and the Serviced Apartment Project. (iii) the alleged attempts by SIDCL and SHPL to appeal to the Appeals Committee of the AAI seeking issuance of a fresh NOC for the full heights of the Hotel Project and the Serviced Apartment Project, and (iv) the issuance of the revised NOC for the Serviced Apartment Project limiting its height to 105 meters.

Further contends that the Arbitration which culminated in the Award has already taken place on the basis of the very same set of facts which SIDCL and SHPL has mischievously placed before this Learned Court. However, in the Arbitration, SIDCL and SHPL made no averment submission/ pleading as to any representation by any of the Defendants on the basis of which SIDCL "jeopardised" the Serviced Apartment Project. These false statements are being made before this Learned Court by SIDCL in an attempt to belatedly improve its case and to escape its obligations under the Award. These averments are contrary to and inconsistent with the stand taken by SIDCL and SHPL in the Arbitration before the ICC Tribunal, and are false and fabricated.

SIDCL has falsely stated on oath in the Complaint that it decided to jeopardize the Serviced Apartment Project for the benefit of the Hotel Project, by accepting the 2014 NOC by which the Serviced Apartment Project's height was reduced to 105 meters so that the Hotel Project could be expedited. It emerged in evidence before the ICC Tribunal that despite the expiry of the NOC and the 2010 Notification. SIDCL nonetheless continued to construct the Serviced Apartment

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Project illegally, without approval from the Government, and beyond the revised height restrictions :

SIDCL has never contemporaneously or in legal proceedings directly on this point, attributed any blame to the Applicant, its personnel or related entities. The finding of the Award in this regard has therefore disposed of the NOC Issue which has been brought by SIDCL before the Learned Court by way of the Plaint. The Award in this regard is final and binding and has not been challenged on this aspect. Therefore, the allegations made in this Suit are false, made with an intent to defraud this Learned Court and ought not to be entertained by this Learned Court.

SIDCL has set out in the Plaint instances whereby the nominee directors of the Applicant allegedly prevented SHPL from availing loans from Axis Bank and Yes Bank, claiming these acts to be the breach of certain representations made to SIDCL. At the outset, it has not been explained what connection exists between the said proposed loans and the NOC Issue, particularly when it is apparent that (i) SIDCL and SHPL forgot to renew the NOC in a timely manner and (ii) continued to voluntarily illegally construct the Serviced Apartment Project beyond the sanctioned height and therefore never acted to their detriment.

In or around March 2017, SIDCL filed Company Petition No. 149 of 2017 before the Learned NCLT ("Company Petition") against the Applicant. SIDCL made allegations of various acts of oppression by the Applicant in the Company Petition. Whilst denying the said acts, the Applicant filed an application under Section 45 of the Arbitration Act, being 1. A. 181/KB/2017 in the Company Petition. In the NCLT Application, the Applicant pointed out that the Company Petition was mala fide and filed as a tactic to undermine the Arbitration and that the subject-matter thereof was virtually identical to that in the Arbitration. The company Petition, the NCLT Application, SIDCL's reply thereto, SIDCL's Supplementary Affidavit filed before the Learned NCLT dated May 20, 2017, the Supplementary Affidavit of the Applicant dated August 9, 2017 filed before the Learned NCLT, and written submissions filed by SIDCL.

After considering parties' argument and written submissions, the Learned NCLT found that all disputes in the Company Petition were liable to be referred to be to the Arbitration, including the Loans Issue which was covered in the Company Petition as set out above. The NCLT in its Order dated November 23, 2017, while referring the disputes in the Company Petition to the Arbitration, held that "[the Company Petition] is only dressed up with a purpose to bypass the Arbitration Agreement".

Further state it was always open to SIDCL to make a counter-claim in relation to the Loans Issue before the ICC Tribunal in the Arbitration. This was the clear direction of the Learned NCLT. Further, the Applicant had already sought injunctive relief from the ICC Tribunal due to SIDCL and SHPL's violations of the Applicant's Protective Rights, including in relation to the Loans Issue. Despite the clear reference to the Arbitration, SIDCL and SHPL chose not to make any counter-claim in the Arbitration, including in relation to the Loans Issue. Instead, several months after final arguments in the Arbitration concluded, in clear bypass of the Learned NCLT's order dated November 23, 2017, SIDCL has re-agitated the Loans Issue before

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yet another judicial forum i.e. this Learned Court, after having been rejected by the Learned NCLT.

From the above narration of events, it is apparent that the Suit has been filed vexatiously, as an abuse of process, fraudulently and with the sole intent of frustrating and undermining the arbitral process agreed between the parties. The subject-matter of the Suit is squarely covered by the Arbitration Agreement and was in fact in large part, raised before the ICC Tribunal. The NOC, the failure to renew the same in the timely manner, the 2010 Notification, the 2014 NOC, the 2010 loan from Axis Bank, the 2013 loan from Axis Bank, the October 2015 loan from Axis Bank and the loan from Yes Bank were all within the parties' pleadings and submissions before the ICC Tribunal in the Arbitration, and were adjudicated upon by the ICC Tribunal. It is shocking that just a little over one month following the conclusion of the oral hearings in the Arbitration, SIDCL has filed the Suit in relation to the very same subject-matter.

Accordingly, it is submitted that the subject-matter of the Suit cannot be entertained in view of the Arbitration Agreement, the Arbitration and the Award, if SIDCL wishes to pursue the subject matter of the Suit, it must do so in arbitration, in accordance with the Arbitration Agreement. This submission is made without prejudice to the Applicant's rights as to the propriety and correctness of any such arbitral proceeding.

The applicant in support of his contentions relied on the following decisions :-

- (a) (2016) 10 SCC 813 ; Sasan Power Ltd. -vs- North American Coal Corp. (India) Pvt.. Ltd.
- (b) (2013) 1 SCC 641 ; Chloro Controls India Pvt. Ltd. -vs- Severn Trent Water Purification INC. and others.
- (c) (2005) 7 SCC 234 ; Shin-Etsu Chemical Co. Ltd. -vs- Aksh Optefibre Ltd. and Ano.
- (d) (2016) 10 SCC 386 ; A. Ayyasamy -vs- A. Paramasivam and Ors.
- (e) (2011) 8 SCC 333; Fuerst Day Lawson Ltd. -vs- Jindal Exports Ltd.
- (f) (2014) 11 SCC 639 ; World Sport Group (Mauritius) Ltd. -vs- MSM Satiellite (Singapore)PTE Ltd.
- (g) (2019) 7 SCC 62 ; Reckitt Benckiser (India) Pvt. Ltd. -vs- Reynders Label Printing India Pvt. Ltd. and Anr.
- (h) (2010) 3 SCC 267 ; Dolphin Drilling Ltd.-vs- Oil and natural Gas Corp. Ltd.
- (i) 2020(3) ARBLR536 (Delhi) ; Parsvnath Developers Ltd. and Ors. vs- Rail land Development Authority
- (j) 2016 SCC Online Del 3949 ; Mcdonald's India Pvt. Ltd. -vs- Vikram Bakshi & Ors.
- (k) AIR 2014 Cal 148 ; ABG Infralogistics Ltd. vs- PSA India Pte Ltd. & Ors.

Per contra it is submitted by the Plaintiff that the suit against the Defendant Nos. 1, 2, 3 and 4 to the suit, the role of each of such defendants has categorically been spelt out in the suit and how and in what capacity were each one of such defendants involved in the transaction. It is a matter of records that the Defendant Nos. 1, 2 and 4 were in no manner connected with or concerned with the proceedings having stood instituted before the ICC Tribunal or the Award having been obtained by the Applicant on the strength of which the Applicant is seeking to sustain the purported application filed under Section 45 of the Arbitration Act. Save and except the Applicant, the other Respondents to the suit are not bound by the SHA or the AOA of the

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Applicant as has been alleged by the Applicant that reliefs have been sought against the Applicant being the Defendant No.3 to the suit as well as the other defendants could not have been granted before the ICC Tribunal in as much since the other Defendants were not privy to the Arbitration proceedings. The arbitration clause to the Agreement cannot bind other entities which were not privy to the SHA or the arbitration clause. The suit has been filed separately against each of the Defendants thereby bringing forth a cause of action separately qua each of the Defendants, thus making them independently liable. It is stated that the Defendant No. 3 cannot be permitted to espouse the cause of the other Defendants to the suit.

It is contended that it is a matter of undisputed reports that the Share subscription and Shareholders Agreement were executed and entered into between the Applicant, Shristi Infrastructure Development Corporation Limited as 'SIDCL' and Shristi Hotels Private Limited as 'SHPL' and the Defendants Nos. 1, 2 and 4 were in not a party to the Share Subscription and Shareholders Agreement entered into between the Applicant and the Respondent. Plaintiff denies that the SIDCL required funding to set up a hotel to be classified as a five star hotel by the Ministry of Tourism, Government of India as alleged or at all rather it was the Applicant who had expressed its interest in investing funds and had rather approached the Plaintiff for entering into an arrangement for investment of funds.

It is stated that arbitration proceedings were conducted over a period of three years or the fact that Mr. Salve had since voluntarily resigned from the ICC Tribunal or the engagement of Mr. Dipak Misra are immaterial for the purpose of adjudication of the dispute between the parties to the instant suit. The fact that the Applicant has obtained an award in its favour does not absolve the parties to the suit, including the Applicant from the object and reliefs as have been sought for in the instant proceedings. It is submitted that the real purpose of Section 45 of the Act is to ensure, whether pre-award, post award or both, a judicial authority is required to decide on the validity, operation, capability of the performance of the Arbitration Agreement vis-à-vis the instant suit on merits which shall be final and binding upon the parties to the suit.

Plaintiff denied that the subject matter of the suit is already squarely covered in the award as alleged or at all.

It is denied that, therefore, the Arbitration culminated in the Award has already taken place on the basis of the very same set of facts which SIDCL and SHPL has mysteriously pleaded before the Learned Court as alleged or at all.

Plaintiff lastly submits that the finding of the award in this regard has therefore disposed of the NOC issue which has been brought by SIDCL before this Learned Court by way of a plaint as alleged and denied that the award in this regard is final and binding and has not been challenged on this aspect as alleged or at all. It is denied that it has not been explained as to what connections exists between the said proposed loans and the NOC issue particularly when it is apparent that (i) SIDCL and SHPL forgot to renew the NOC in a timely manner and (ii) continued to voluntarily illegally construct the serviced apartment project beyond the sanctioned height and therefore never acted to their detriment as alleged or at all.

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Finally the plaintiff states that the Applicant is making an attempt to draw parallels between I.A. No. 181 /KB/2017 in C.P. No. 149 of 2017 filed before NCLT, Kolkata Bench under Section 45 of the Arbitration Act as well as the instant application under consideration before this Hon'ble Court. However, the reliefs, as have been sought for in the instant proceedings to that with the proceedings before the NCLT, Kolkata Bench are different and issues involved and distinct and separate from the other.

The plaintiff in support of his contentions relied on the following decisions :-

- (a) (2011) 8 SCC 333; **Fuerst Day Lawson Ltd. -vs- Jindal Exports Ltd.**
- (b) (2019) 7 SCC 62 ; **Reckitt Benckiser (India) Pvt. Ltd. -vs- Reynders Label Printing India Pvt. Ltd. and Ano.**
- (c) **2016 SCC Online Del 3949 ; Mcdonald's India Pvt. Ltd. -vs- Vikram Bakshi & Ors.**
- (d) (2014) 11 SCC 639 ; **World Sport Group (Mauritius) Ltd. -vs- MSM Satellite (Singapore)PTE Ltd.**

:: Findings of the court ::

Deducing the factual matrix, it transpires that Plaintiff filed the suit for Declaration, Permanent Injunction and for Recovery of money.

The Defendant appeared and contested the suit filed written statement and in the suit filed an application under Section 45 of Arbitration & Conciliation Act, 1996 praying for referring the Applicant, the Plaintiff and the Defendant No.5 to arbitration as per the SHA.

Plaintiff is a company incorporated under the Companies Act, 1956 with its object of carrying on business of construction and allied infrastructural activities.

Defendant No. 1 is an advisor to the defendant No. 2 & 3 and the defendant No. 2 is the holding company of the defendant No. 3. The defendant No. 3 is the overseas investor in the Proforma Defendant No. 5 and that the defendant No. 4 is the Director. Further defendant No. 5 was the company set up by the plaintiff and the defendant No. 3 to construct a 5 Star Hotel in Rajarhat, Kolkata.

The applicant/defendant no.3 invested a sum of Rs. 80.00 crores in SHPL, proforma defendant No. 5 as foreign direct investment, by purchasing shares of SHPL under a share subscription and shareholders agreement(SHA) dated 07.08.2008 for the purpose of funding to set-up a hotel to be classified as 5-star hotel by Ministry of Tourism, Govt. of India. However, dispute cropped up between the plaintiff (SIDCL), SHPL and the applicant against breaches over transaction document and at the initiation of the applicant Arbitration commenced. Thereafter after contested hearing partial award followed by final award had been passed by a Foreign seated three member arbitral tribunal at Singapore.

Subsequently, the plaintiff instituted the instant suit claiming relief arising out of the transaction document(SHA) making the applicant and those associated and/or connected with the applicant as parties to the suit.

The applicant made application u/s 45 of the A & C Act, 1996 urging reference of the dispute to the arbitral tribunal.

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In support of his contentions, the applicant stated it is not in dispute there existed substantive agreement containing arbitral clause and further Arbitration was held and final award had been made. The plaintiff subsequently raised self same issue by craftly drafting which can only be dealt by referring the matter to the Arbitration and not by a separate suit and lead to another round of litigation. Pertinently pointed out multiple reference cases can be made if there exists Arbitration Agreement and the said agreement if prima facie not null and void, inoperative or incapable of being performed. The judicial mandate is to refer the parties to Arbitration and the issue of res judicata and /or validity or operation of the Arbitration Agreement has to be decided in Arbitration not at prima facie stage. Further stated, since the plaintiff contended issues in the suit are completely different from those in the arbitration. Therefore, the plaintiff cannot contend that there has already been an arbitral award or a court with res judicata effect covering the same subject matter and parties. Finally pointed out that the claim of res judicata will have to be examined by the arbitral tribunal and lastly stated Arbitration Agreement can be invoked a number of times and does not cease to exist only with the invocation for the first time.

On the other hand, the plaintiff admits the existence of Arbitration Agreement and neither alleges element of fraud but states prima facie the Arbitration Agreement is inoperative with the passing of final arbitral award and the arbitrators/arbitral tribunal became functus-officio. Further stated except the applicant other defendants were not privy to the contract as such the suit cannot be bifurcated and referred to the Arbitration. It is stated in an application under Section 45, the Learned Court has to only see whether there exists an Arbitration Agreement that is not null and void, inoperative or incapable of being performed. The applicant/defendant No.3 has impressed upon the Learned Court that the issues raised in the suit have been raised before an arbitrator and that an award has been passed on the said issues and as such the suit is barred by principle of constructive res judicata. Plaintiff has submitted that res judicata is a general provision of civil code which has no applicability under Section 45 of the Arbitration & Conciliation Act, 1996. Further submitted it is also an admitted fact that that the Defendant No.3 put the Award into execution. In such situation is imperative to determine whether the Arbitration Agreement can be invoked again or not. The Arbitration Agreement relied upon by Defendant No.3 is an inoperative agreement in as much since the same has been invoked and award had been passed.

Also contented the word 'inoperative' is concerned, it is said to cover those cases where the Arbitration Agreement has ceased to have effect, such as the case of revocation by the parties. Another instance of the agreement having become inoperative is where it ceases to have effect because an arbitral award has already been made.

Lastly, the share subscription and shareholders agreement dated 7th August 2008 executed between the Plaintiff and the Defendant No.3. Defendant Nos.1, 2 and 4 are admittedly not parties to the said agreement. Furthermore, the Defendant No.3 in its prayers has specifically prayed that the said Defendant No.3, the Plaintiff and Defendant No.5 be referred to arbitration. It is stated that in the absence of any Arbitration Agreement with the Defendant Nos. 1, 2 and 3, the said parties cannot be referred to arbitration and as such the present suit in its entirety cannot

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be referred to arbitration under Section 45 when specific allegations is made against the Defendant Nos.1, 2 and 4.

Finally emphasized that a non-signatory to be made party to arbitration proceeding, the said non-signatory must assent to be party to the arbitration. Neither the Defendant Nos.1,2 and 4 have approached this Learned Court claiming that they are claiming through or under the Defendant No.3 nor have they given assent to be bound by the Arbitration Agreement.

Carefully analyzing both sides contentions, the short question that fall for consideration as to whether a matter before the judicial authority can be referred to the Arbitration where already final arbitral award had been made or court should rely on the theory of multiple references arising from single agreement.

From the perusal of the plaint and the application, the germane to the dispute is a dispute arising out of a transaction document dated 07.08.2008 executed between the plaintiff and the applicant. The instant suit in its cause title are mostly have defendants who are mostly connected or related to the applicant and essentially the relief is mainly sought founded on the agreement (SHA) dated 07.08.2008 against the applicant and his associates.

Between the two rival contentions, the court has to choose either to refer the dispute to the arbitration on the theory of multiple references or to hold after final award the arbitral tribunal becomes functus-officio and consequently the arbitration clause becomes inoperative.

Since there existed arbitral agreement/clause which is not in dispute and further applicant making request being one of the parties covered by Section 45, the court is inclined in the reasoning of multiple invocation as covered by the judgement stated hereinbelow.

Relying upon the reported decision which is still holding the ground in **(2010) 3 SCC 267; Dolphin Drilling Ltd. -vs- Oil and Natural Gas Corp. Ltd. [(2010) 2 SCC 267]**

Para – 8 : “The plea of the respondent is based on the words “all disputes” occurring in Para 28.3 of the agreement. It was submitted that the two words must be understood to mean “ all disputes under the agreement” that might arise between the parties throughout the period of its subsistence. However, there was no answer as to what would happen to such disputes that might arise in the earlier period of the contract and get bared by limitation till the time comes to refer “all disputes” at the conclusion of the contract. The words “ all disputes” in Clause 28.3 of the agreement can only mean “all disputes” that might be in existence when the arbitration clause is invoked and one of the parties to the agreement gives the arbitration notice to the other. In its present form Clause 28 of the agreement cannot be said to be a one-time measure and it cannot be held that once the arbitration clause is invoked the remedy of arbitration is no longer available in regard to other disputes that might arise in future.” and further in **2020(3) ARBLR536 (Delhi) ; Parsvnath Developers Ltd. and Ors. vs- Rail Land Development Authority: ;**

Para – 37 : “At this stage, it is also important to note that in Arbitration petition 724/2018 between the same parties, the Respondent had raised similar objections to the disputes being referred to Arbitration such as bar under Order II Rule 2 CPC , waiver, estoppel etc. The Coordinate Bench of this Court had observed that the Arbitration Agreement had been invoked by

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the petitioners and its existence was not in question. The issues of res judicata or estoppel or claims being barred under the principles of Order II Rule 2 CPC touch upon the merits of the claim and can be decided only by the Tribunal. The Court also held that an Arbitration Agreement can be invoked any number of times as held by the Supreme Court in Dolphin Drilling Ltd. vs. Oil and Natural Gas Corporation Ltd.”.

In conclusion, it is noticed that there has been a series of changes in the enactment and amendments, with sole object of minimizing the time of litigation and cause speedy justice giving message to the business community especially to the Foreign Investor about efficacy of justice delivery in India which has wider economic implications. Hence, in view of the stated object of the commercial litigation, I find the logic and reasoning averred, placed and relied by the applicant more acceptable.

Therefore, in light of the aforesaid observation, I am inclined to allow the petition filed the applicant/defendant No. 3.

Hence, it is,

Ordered

“the petition under Section 45 of the Arbitration and Conciliation Act, 1996 dated 29.11.2019 is hereby allowed on contest without cost”.

Meanwhile, the instant suit shall be stayed awaiting the result of the Arbitration.

Fix **30.11.2022** for further order.

Sd/- Neyaz Alam
Judge
Commercial Court,
Rajarhat, North 24 Parganas