THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 21.07.2016

\+ **FAO (OS) 9/2015 and CM No. 326/2015**

MCDONALD'S INDIA PRIVATE LIMITED ... Appellant

versus

VIKRAM BAKSHI & ORS ... Respondents

Advocates who appeared in this case:-

For the Appellant : Mr Harish Salve & Mr Rajiv Nayar, Sr Advocates, Mr Rahul P. Dave, Mr Amit Dhingra, Mr Sumit Chopra, Mr Sahil Dhawan, Mr Rahul Narayan and Mr Rohit Tripathy

For the Respondent Nos. 1&2: Mr C. A. Sundaram & Mr A.S. Chandhiok, Senior Advocates with Mr Rishi Sood

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

BADAR DURREZ AHMED, J

1. The present appeal has been preferred against the judgment dated 22.12.2014 delivered by a learned Single Judge of this Court in IA 6207/2014 which was an application under Order 39 Rules 1 and 2 of the Code of Civil Procedure, 1908. In the said application, the respondent Nos. 1 and 2 (plaintiffs) had prayed for an ad interim injunction against the arbitration proceedings initiated by the appellant (defendant No.1) before the London Court of International Arbitration at London, U.K. The said

application had been filed in CS(OS) 962/2014 in which the respondent Nos. 1 and 2 (plaintiffs) had sought, *inter alia*, a declaration that there is no arbitration agreement between the plaintiffs (respondent Nos. 1 and 2) and the defendant No.1 (appellant) and an injunction restraining the appellant (defendant No.1) and the London Court of International Arbitration (defendant No.3) from proceeding with any arbitration. A declaration was also sought that the arbitration agreement contained in the Joint Venture Agreement (JVA) was illegal and/ or void and /or inoperative or incapable of performance.

2. By virtue of the impugned judgment, the learned Single Judge has restrained the appellant from pursuing the arbitration proceedings before the said Arbitral Tribunal till the disposal of the suit or alternatively till the *status quo* order, which was granted by the Company Law Board on 16.09.2013 and continued till further orders on 04.10.2013 in Company Petition No. 110/ND/2013, is not vacated. The learned Single Judge came to the conclusion that the plaintiffs (respondent Nos. 1 and 2) had been able to show *prima facie* that the arbitration agreement between the parties was inoperative or incapable of performance on account of the fact that the plaintiffs had already filed a petition for oppression and mismanagement

before the Company Law Board in India which had directed the appellant to maintain *status quo* with regard to the shareholding pattern of the respondent No.3 during the pendency of the petition. The learned single Judge also observed that the dispute which was pending between the parties before the Company Law Board with regard to oppression and mismanagement would overlap the disputes sought to be raised by the appellant in the arbitral proceedings on the assertion that the appellant was well within its right to terminate the Joint Venture Agreement and refer the dispute for adjudication before the Arbitral Tribunal. The learned Single Judge was also of the opinion that the London Court of International Arbitration was a *forum non-conveniens* particularly on account of the fact that the parties, except one of the defendants, were carrying on business in India, the cause of action had accrued in India, the governing law between the parties was the law of India and in case the Award was passed in favour of the defendants, it had to be enforced in India according to Indian laws. The learned Single Judge was of the opinion that simply by having the Arbitral Tribunal located at London, it became *forum non-conveniens* and, therefore, the carrying on of the arbitration proceedings by the defendants, when the company petition was pending before the Company Law Board, was oppressive and vexatious.

3. The appellant has challenged the impugned judgment by way of this appeal. At the outset, we may point out that the observations of the learned Single Judge with regard to the *forum non-conveniens* argument are not correct in law. When we posed this question before Mr Aryama Sundaram, the learned senior counsel who appeared on behalf of the respondents, he submitted that he is not pressing the case on the basis of the submissions made on *forum non-conveniens* and would not rely on the observations of the learned Single Judge with regard to the *forum non-conveniens* argument. We are making it clear that the *forum non-conveniens* argument was, therefore, not stressed before us by the respondents nor could they have because the observations of the learned Single Judge on this aspect of the matter are contrary to law and, therefore, would not hold good. In order to substantiate this, some comment on the *forum non conveniens* principle would be necessary.

Forum non conveniens

4. To clarify the position with regard to *forum non conveniens*, a slight digression would be in order. Black's Law Dictionary, 5th Edition, defines the phrase "forum non conveniens" as follows:-

> "Term refers to discretionary power of court to decline jurisdiction when convenience of parties and of justice would be better served if action were brought and tried in another forum. Johnson v. Spider Staging Corp., 87 Wash.2d 577, 555 P.2d 997, 999, 1000."

And further as:-

> "The doctrine is patterned upon the right of the court in the exercise of its powers to refuse the imposition upon its jurisdiction of the trial of cases even though the venue is properly laid if it appears that for the convenience of litigants and witnesses and in the interest of justice the action should be instituted in another forum where the action might have been brought. Hayes v. Chicago, R.I. & P. R. Co., D.C. Minn., 79 F. Supp. 821, 824. The doctrine presupposes at least two forums in which the defendant is amenable to process and furnishes criteria for choice between such forums. Wilson v. Seas Shipping Co., D.C.N.Y., 77 F.Supp. 423,424. ……."
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> "The rule is an equitable one embracing the discretionary power of a court to decline to exercise jurisdiction which it has over a transitory cause of action when it believes that the action may be more appropriately and justly tried elsewhere. Leet v. Union Pac. R. Co., 25 Cal.2d 605, 155 P.2d 42, 44……"
>
> (underlining added)

The principle was stated by Lord Kinnear in ***Sim v. Robinow:*** ***(1892) 19 K. 665*** thus:

> "The general rule was stated by the late Lord President in Clements v. Macaulay 4 Macph. 593, in the following terms: 'In cases in which jurisdiction is competently founded, a court has no discretion whether it shall exercise its jurisdiction or

not, but is bound to award the justice which a suitor comes to ask. Judex tenetur impertiri judicium suum {a judge must exercise jurisdiction in every case in which he is seized of it} and the plea under consideration must not be stretched so as to interfere with the general principle of jurisprudence.' And Therefore the plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice... In all these cases there was one indispensable element present when the court gave effect to the plea of *forum non conveniens*, namely, that the court was satisfied that there was another court in which the action ought to be tried as being more convenient for all the parties, and more suitable for the ends of justice."

(underlining added)

5. In ***Mayar (H.K.) Ltd v. Owners & Parties, Vessel M.V. Fortune Express: (2006) 3 SCC 100***, the Supreme Court quoted with approval the explanation of the ambit of the principle of *forum non conveniens* for issuing an order of stay as given by the House of Lords in ***Spiliada Maritime Corpn. V. Cansulex Ltd: (1986) All ER 843*** which was to the following effect:

> "(*1*) The fundamental principle applicable to both the stay of English proceedings on the ground that some other forum was the appropriate forum and also the grant of leave to serve proceedings out of the jurisdiction was that the court would choose that forum in which the case could be tried more suitably for the interests of all the parties and for the ends of justice….

(*2*) In the case of an application for a stay of English proceedings the burden of proof lay on the defendant to show that the court should exercise its discretion to grant a stay. Moreover, the defendant was required to show not merely that England was not the natural or appropriate forum for the trial but that there was another available forum which was clearly or distinctly more appropriate than the English forum. In considering whether there was another forum which was more appropriate the court would look for that forum with which the action had the most real and substantial connection e.g. in terms of convenience or expense, availability of witnesses, the law governing the relevant transaction, and the places where the parties resided or carried on business. If the court concluded that there was no other available forum which was more appropriate than the English Court it would normally refuse a stay. If, however, the court concluded that there was another forum which was prima facie more appropriate the court would normally grant a stay unless there were circumstances militating against a stay e.g. if the plaintiff would not obtain justice in the foreign jurisdiction…."

6. In a more recent decision of the House of Lords [***Tehrani v. Secy of State for the Home Department: [2006] UKHL 47***] it was observed:-

"The doctrine of *forum non conveniens* is a good example of a reason, established by judicial authority, why a court should not exercise a jurisdiction that (in the strict sense) it possesses. Issues of *forum non conveniens* do not arise unless there are competing courts each of which has jurisdiction (in the strict sense) to deal with the subject matter of the dispute. It seems to me plain that if one of the two competing courts lacks jurisdiction (in the strict sense) a plea of *forum non conveniens*

> could never be a bar to the exercise by the other court of its jurisdiction."
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> (underlining added)

7. Thus, the doctrine of *forum non conveniens* can only be invoked where the court deciding not to exercise jurisdiction, has jurisdiction to decide the case. The U.S. Supreme Court also held in ***Gulf Oil Corp. v. Gilbert: 330 U.S. 501*** that "*[I]ndeed, the doctrine of forum non conveniens can never apply if there is absence of jurisdiction or mistake of venue*".

8. In this very decision (viz. Gulf Oil Corp.) the doctrine is stated as follows:

> "The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even where jurisdiction is authorised by the letter of a general venue statute. These statutes are drawn with a necessary generality and usually give a plaintiff a choice of courts, so that he may be quite sure of some place in which to pursue his remedy. But the open door may admit those who seek not simply justice but perhaps justice blended with some harassment. A plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself."

9. From the above discussion, it is clear that the doctrine of *forum non conveniens* can only be invoked where the court deciding not to exercise

jurisdiction, has jurisdiction in the strict sense, but comes to the conclusion that some other court, which also has jurisdiction, would be the more convenient forum. It must also be kept in mind that the doctrine of *forum non conveniens* is essentially a common law doctrine originating from admiralty cases having trans-national implications. It is clear that the doctrine of *forum non conveniens* is only available when a Court has the jurisdiction but the respondent is able to establish the existence of another competent court.

10. Clearly, the principle applies when there are competing courts, each of which has jurisdiction to deal with the subject matter of the dispute. This principle would have no application to the case at hand. First of all, there is no competing court. Here we have a court and an arbitral tribunal (which is certainly not a court). Secondly, the subject matter of dispute before this court is different from that before the arbitral tribunal. The subject matter before this court is the plea of an anti-arbitration injunction and the subject matter before the arbitral tribunal is the substantive dispute under the JVA. Thirdly, the forum of arbitration consciously chosen by the parties as an alternative forum of dispute resolution, alternative to the forum of a court, cannot be regarded as an inconvenient forum. Fourthly,

the place of arbitration chosen by the parties cannot be regarded as an 'inconvenient place'.

11. As a rule, the plea of *forum non conveniens* can only be raised by a defendant or respondent. But, in India, there is an exception to this rule that the principle of *forum non conveniens* can only be invoked by a defendant. And, that is the case of an anti-suit action which is different and distinct from an anti-arbitration action. But, even an anti-suit injunction cannot be granted against a defendant where parties have agreed to submit to the exclusive jurisdiction of a court including a foreign court save in exceptional circumstances such as (1) which permit a contracting party to be relieved of the burden of the contract; or (2) where, after the date of the contract, subsequent events have made it impossible, for the party seeking injunction, to prosecute the case in the court of choice because the essence of the jurisdiction of the court does not exist; or (3) because of a vis major or force majeure and the like (see: ***Modi Entertainment Network and Another v. W.S.G. Cricket PTE Ltd*: (2003) 4 SCC 341, 360)**.

12. There is yet another aspect upon which some comment is required. The principle of *forum non conveniens* is essentially an equitable common law principle giving a court the discretion to not exercise a jurisdiction

which it has on the ground that there exists another court which also has jurisdiction but which is more convenient to the parties and for the trial of the suit. But, in India, within India, a court at place 'A' which has jurisdiction cannot say that it shall not exercise that jurisdiction because there is another court at place 'B' which also has jurisdiction and would be more convenient. The Code of Civil Procedure, 1908 does not permit it. The court in which a suit is initiated, if it has jurisdiction, has to proceed with the suit even if there is another court where also the suit could have been instituted. The provision of stay of suit under Section 10 CPC also does not contemplate a *forum non conveniens* situation. Neither does the provision of Order 7 Rule 10 (Return of the plaint) where the court returns a plaint for want of jurisdiction. But, if there are two courts of competent jurisdiction, then, if the suit is instituted in one court, which is inconvenient to the defendant, the latter could invoke the provisions of Section 24 CPC or Section 25 CPC as the case may be. Therefore, in India, the statute provides for situations where the common law equitable principles of *forum non conveniens* and the like would be applicable.

13. Thus, the arguments addressed before us proceeded on aspects other than the *forum non-conveniens* argument. Principally, the arguments were

on the issues as to whether the court could at all interfere in the course of an arbitral proceeding and whether the arbitral proceedings could be regarded as vexatious or oppressive and whether the arbitration agreement was null and void and/ or incapable of performance and whether there was waiver of the arbitration clause on the part of the appellant because of its withdrawal of a petition under Section 45 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the said Act') which had been filed before the Company Law Board in the said Company Petition. Before we embark upon a discussion of the rival arguments, it would be necessary to set out the facts leading to the present appeal.

Facts:

14. On 31.03.1995, the appellant (McDonald's India Private Limited) (MIPL), Mr Vikram Bakshi (VB) (respondent No.1) and McDonald's Corporation, USA entered into a Joint Venture Agreement (JVA) for the purposes of setting up and operating McDonald's restaurants initially within the National Capital Region of Delhi on a non-exclusive basis. Essentially, the agreement was between MIPL and VB and, McDonald's Corporation, USA was a confirming party. The JVA stipulated that promptly after the execution of the agreement and receipt of all necessary

governmental approvals, MIPL and VB shall form a JV Company in which MIPL and VB were to have 50% shares each which would be paid up in full when issued. The relevant clauses of the JVA are set out herein under:-

> "7. **Managing Director**. The JV Parties shall promptly cause the nomination and election of Partner as the sole Managing Director of JV Company.
>
> a) **Acceptance**. Partner agrees to accept the office of Managing Director, to maintain his residence in the National Capital Region of Delhi, and to devote his full business time and best efforts to the promotion and development of the McDonald's Restaurants operated by the JV Company.
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> xxxx xxxx xxxx xxxx
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> (e) **Re-election of Managing Director** The Managing Director shall be elected every two (2) years. McDonald's agrees to vote for the re-election of Partner as Managing Director for so long as:
>
> (1) he resides in the National Capital Region of Delhi and spends substantially all of his business time in the performance of his obligations under this Agreement and the Operating License Agreements executed hereunder;
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> (2) he and the Investing Company (as defined below), in combination, own at least 50% of the equity shares of JV Company;
>
> (3) he discharges the responsibilities of management of JV Company in a competent and faithful manner;

(4) he is not in breach of any term of this Agreement or any other agreement between the JV Parties or their affiliates or subsidiaries."

xxxx xxxx xxxx xxxx

"32. **McDonald's Option to Purchase Shares.** McDonald's, any of its wholly-owned subsidiaries or affiliates as designated by McDonald's, or any person or entity designated by McDonald's, may purchase all of the shares of JV Company owned or controlled by Partner at a purchase price determined in accordance with Paragraph 26 above if any of the following events shall occur:

(a) Partner personally fails to maintain his principal residence in the National Capital Region of Delhi or fails to devote his full business time and best efforts to JV Company;

(b) Partner terminates or suffers the termination of his relationship as Managing Director of JV Company, other than by reason of his death or incapacity. In the event of Partner's death or incapacity, Paragraph 29(d) shall govern; or

(c) upon expiration or termination of this Agreement."

xxxx xxxx xxxx xxxx

"35. **Termination by Non-Defaulting Party**. The Parties agree that any of the following events constitutes material default of this Agreement:

(a) failure to make the investment required by Paragraph 3;

(b) failure of the other JV Party to vote shares in JV Company for the election of Directors and/or the Managing Director in accordance with Paragraphs 6

and 7, or to otherwise vote in a Shareholders meeting in accordance with Paragraph 4;

(c) the transfer of shares in JV Company or encumbrance of shares in JV Company by the other JV Party in violation of Paragraphs 4, 27, 28, 29 or 30;

(d) JV Company or the other JV Party shall enter bankruptcy, composition, reorganisation, liquidation, or arrangement proceedings or shall become insolvent due to its or his inability to pay its or his debts as they become due;

(e) JV Company shall have a negative net worth (as calculated on a historical basis, in accordance with generally accepted accounting principles in the United States) as of the end of any fiscal quarter exceeding the Indian Rupee equivalent of US $1,000,000;

(f) All required governmental approvals to consummate this Agreement are not received within twelve (12) months after the date of this Agreement.

(g) All required governmental approvals to consummate the Operating License Agreements executed hereunder are not received within twelve (12) months after the date of such Agreements.

In the event of such material default, the non-defaulting Party shall give written notice of default to the defaulting Party, and may terminate this Agreement if the event of default remains unremedied sixty (60) days after the date of such notice; provided, however, that no such remedy period shall be required if the default involves Paragraph 35(c), (f) or (g).

36. **Termination by McDonald's.** The Parties further agree that the any of following events constitutes material default of this Agreement:

(a) Partner shall fail to serve as Managing Director in accordance with Paragraph 7;

(b) Partner or JV Company shall use the Property in violation of Paragraph 23;

(c) Partner shall knowingly or intentionally violate the covenants respecting competition and conflicts of interest contained in Paragraphs 24 and 25;

(d) Partner shall assign any interest of this Agreement in violation of Paragraph 40(e);

(e) Partner breaches covenants contained in Paragraphs 10, 13, 45 or 46 or representations or warranties therein are found to be untrue;

(f) Repeated delays or failures to make delivery of the reports required by Paragraph 14;

(g) Any Operating License Agreement shall be terminated by reason of default by JV Company.

In the event of such material default, McDonald's shall give written notice of default to Partner, and may terminate this Agreement if the event of default remains unremedied sixty (60) days after the date of such notice; provided, however, that no such remedy period shall be required if the default involves Paragraph 36 (d).

37. Effect of Termination. Upon termination of this Agreement:

(a) McDonald's or a designee may elect either to purchase all shares owned and controlled by Partner in JV Company at a purchase price determined as of the date of notice of termination in accordance with Paragraph 26 above or,

(b) McDonald's may elect not to purchase all shares owned by Partner in JV Company, and in that event, the JV Parties agree that:

(i) the Operating License Agreements shall be terminated or assigned as directed by McDonald's;

(ii) the JV Parties agree to vote promptly in a General Meeting of Shareholders for dissolution and liquidation of JV Company;

(iii) the JV Parties shall cause JV Company to discontinue use of and return all Property, information and materials to McDonald's;

(iv) The JV Parties agree that in liquidating JV Company and in turn in disposing of existing leaseholds, freeholds and other assets, McDonald's or a company designated by it shall have a right of first refusal to acquire any such leasehold, freehold or other asset.

(v) The JV Parties shall cause JV Company to cease the production of McDonald's food products and the operation of McDonald's Restaurants."

xxxx xxxx xxxx xxxx

"**40. <u>Miscellaneous</u>-**

a. <u>Governing Law</u>. This Agreement shall be construed in accordance with and governed by the laws of India and

will be subject to the jurisdiction of the courts in New Delhi, India, except for any Indian choice of law or conflicts of law rules which might direct the application of the laws of any other jurisdiction.

b. Arbitration. On demand of either JV Party, any unresolved dispute which may arise in connection with Paragraphs 35, 36, 37, 38 or 39 of this Agreement shall be submitted for arbitration to be administered by the London Court of International Arbitration (the "LCIA"). Such arbitration proceedings shall be conducted in London, England and shall be conducted before a panel of three (3) arbitrators and shall be conducted in accordance with the then current commercial arbitration rules of the LCIA for international arbitrations. Partner and McDonald's shall each appoint one arbitrator and the two arbitrators so appointed shall appoint a third arbitrator to act as Chairman of the tribunal. If a JV Party fails to nominate an arbitrator within thirty (30) days from the date when the claimant's request for arbitration has been communicated to the other JV Party, such appointment shall be made by the LCIA. The two arbitrators thus appointed shall attempt to agree upon the third arbitrator to act as Chairman. If the two arbitrators fail to nominate the Chairman within thirty (30) days from the date of appointment of the second arbitrator to be appointed, the Chairman shall be appointed by the LCIA. The JV Parties shall have the right to the broadest investigation of the facts surrounding the dispute, provided that any dispute between the parties relating to such investigation shall be submitted to the arbitral tribunal for resolution. The arbitrators shall have the right to award or include in their award any relief which they deem proper in the circumstances, including without

> limitation, money damages (with interest on unpaid amounts from date due), specific performance, injunctive relief, legal fees and costs. The award and decision of the arbitrators shall be conclusive and binding upon the JV Parties and judgment upon the award may be entered in any court of competent jurisdiction. Partner and McDonald's waive any right to contest the validity or enforceability of such award. The JV Parties further agree to be bound by the provisions of any applicable limitation on the period of time in which claims must be brought.
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> xxxx xxxx xxxx xxxx"

15. Thereafter, on 29.06.1995, the respondent No.3 (Connaught Plaza Restaurants Private Limited) was incorporated pursuant to the JVA to operate McDonald's restaurants on a non-exclusive basis in the NCR of Delhi. In the respondent No.3 company, MIPL held Rs 14.56 crores equity share capital. In addition, MIPL also held preference share capital to the extent of Rs 177.30 crores and also licensed the respondent No.3 to use the McDonald's brand. In effect, MIPL held 92.95% of the total issued and paid up share capital (ordinary + preference shares). VB also invested Rs 14.56 crores towards the equity share capital, thereby both MIPL and VB held 50% each of the ordinary shares of the respondent No.3 company.

16. On 11.12.1998, a supplemental agreement, supplementary to the JVA, was entered into by virtue of which the respondent No.2 (Bakshi Holdings Private Limited) also became bound by the JVA as if it was an original party.

17. On 17.07.2013, the agreement for appointment of VB as the Managing Director of the respondent No.3 expired by afflux of time. On 06.08.2013, at a meeting of the Board of Directors of the respondent No.3, VB was not re-elected as its Managing Director.

18. On 16.08.2013, the appellant issued a notice to VB and the respondent No. 2, electing to exercise the option to purchase the shares of the respondent No.3 company held by VB and the respondent No.2 and for determination of the fair market value of such shares in terms of paragraph 33 read with paragraphs 32 and 26 of the JVA. The call option was exercised on the purported ground that VB had ceased to be the Managing Director of the respondent No.3 as the term of his office had expired on 17.07.2013 and he was not re-elected in the Board meeting held on 06.08.2013. It was the case of the appellant that it could exercise the said call option because of the provision of paragraph 32(b) of the JVA which stipulated that the appellant (MIPL) could opt to purchase all the shares

owned or controlled by VB if VB suffered the termination of his relationship as a Managing Director of the respondent No. 3 company.

19. VB and the respondent No.2 filed a Company Petition, being CP 110/ND/2013 before the Company Law Board alleging oppression and mismanagement against the appellant (MIPL) and sought reinstatement of VB as the Managing Director of the respondent No. 3. On 16.09.2013, the Company Law Board passed an order directing, *inter alia*, MIPL to maintain *status quo* over the share holding, board pattern and right of call option until the next date of hearing which was to be on 25.09.2013. This *status quo* order was continued by the Company Law Board until further orders by another order dated 04.10.2013 and is still in operation.

20. In the meanwhile, on 22.09.2013, MIPL filed an application (CA No. 94/2013) in the said Company Petition under Section 45 of the said Act seeking a reference of the respondent Nos. 1 and 2's claims to arbitration in view of the arbitration agreement contained in the JVA.

21. On 28.11.2013, MIPL terminated the JVA by a notice of termination in which it, *inter alia*, alleged that covenants contained in the JVA had been broken by VB and that the good faith and mutual confidence between

MIPL and VB had been irrevocably lost. It was also alleged that VB through his express words and conduct had also repudiated the JVA. MIPL also elected, in view of paragraph 37(a) of the JVA, to purchase all the shares held by VB, directly or indirectly through the respondent No. 2, in the respondent No. 3 company upon the termination of the JVA.

22. On the very next day, that is, on 29.11.2013, MIPL invoked the arbitration agreement by its request for arbitration and instituted arbitration proceedings in the London Court of International Arbitration. Shortly thereafter, on 02.12.2013, MIPL filed a petition under Section 9 of the said Act before this Court seeking interim reliefs in aid of the arbitration proceedings. By an order dated 02.12.2013 passed in the said Section 9 application (OMP 1196/2013), the same was disposed of, but after recording the following:-

> "7. Both Mr. Kaul, learned counsel for Respondent No.1 and Mr. Mukherjee; learned counsel for Respondent No.2 state on instructions and, without prejudice to the contentions of the Respondents in the CLB regarding the arbitrability of the disputes, that status quo will be maintained as regards the shareholding of Respondents 1 and 2 in CPRL, as well as in the shareholding pattern of Respondent No.2, till such time, interim directions/orders are issued in the arbitral proceedings, if any.

> 8. The above statement of the Respondents is taken on record and will bind them. However, it is clarified that this order is without prejudice to the contentions of the Respondents regarding the arbitrability of the disputes."
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> (underlining added)

23. On 02.12.2013 itself, MIPL filed an application (CA No. 153/2013) before the Company Law Board bringing to its notice the subsequent events as also the termination of the JVA and the factum of initiation of arbitration proceedings and prayed for vacation of the *status quo* order. On 13.12.2013, VB and the respondent No. 2 filed an application (CA No. 164/2014) before the Company Law Board, *inter alia*, challenging the termination of the JVA and seeking stay of the arbitral proceedings on the ground that the application under Section 45 was still pending. On 30.12.2013, the Company Law Board declined stay of arbitration by virtue of a reasoned order.

24. On 30.12.2013 itself, VB and the respondent No.2 appointed their nominee arbitrator in the arbitration proceedings, of course, without prejudice to their jurisdictional objections. On 30.01.2014, MIPL withdrew its application under Section 45 of the said Act (CA No. 94/2013) on the ground that due to the termination of the JVA, the Company Petition itself

became infructuous and seeking a reference of VB's and the respondent No.2's claims in the Company Petition to arbitration would be an exercise in futility. It may be pointed out at this juncture itself that although an appeal against the order declining stay of arbitration dated 30.12.2013 had been filed by VB and the respondent No. 2 before this Court, the same was not pursued. According to VB and the respondent No. 2, the appeal was not pursued because MIPL had withdrawn its application under Section 45 of the said Act.

25. On 29.03.2014, approximately four months after the arbitration proceedings had commenced, VB and the respondent No. 2 filed the said suit [CS(OS) 962/2014] before this Court. Along with the said suit, the said IA 6207/2014 under Order 39 Rules 1 and 2 seeking ad interim stay of the arbitration proceedings was also filed.

26. On 03.04.2014, VB and the respondent No. 2 deposited an amount of GBP 30,000 with the London Court of International Arbitration by way of an initial advance towards the expenses of the arbitration proceedings. On 30.04.2014, after hearing detailed submissions on IA 6207/2014, the learned Single Judge reserved orders. On 18.07.2014, MIPL filed its written statement in the suit without prejudice to its application seeking

rejection of the plaint which it had filed on 14.04.2014 under Order 7 Rule 11 CPC. On 09.06.2014, MIPL filed its statement of case before the London Court of International Arbitration setting out its separate and distinct claims relating to the termination of the JVA. This was followed, on 04.08.2014 by the statement of defence filed by VB and the respondent No.2 in the said arbitration proceedings subject to its jurisdictional objections.

27. On 29.10.2014, MIPL filed its statement of reply and response to the jurisdictional objections taken by VB and the respondent No. 2 in the arbitration proceedings and on 05.12.2014, VB and the respondent No. 2 filed their statement of rejoinder and reply to the response with regard to the jurisdictional objections before the London Court of International arbitration.

28. Thereafter, on 22.12.2014, the learned Single Judge delivered the impugned judgment restraining MIPL from pursuing the arbitration proceedings until the disposal of the suit or until the *status quo* order passed by the Company Law Board was vacated. Being aggrieved by the impugned judgment, the present appeal has been filed.

Summary of facts:

From the above narration of facts, the following points emerge:-

1) The company petition pending before the Company Law Board is on account of MIPL not re-electing VB as the Managing Director of the respondent No.3 and, consequent thereupon, in MIPL exercising its call option. This conduct on the part of MIPL has been challenged in the Company Law Board by VB and respondent No.2 under sections 397 and 398 of the Companies Act, 1956 as amounting to oppression and mismanagement. An order has been passed in those proceedings whereby MIPL has been directed to maintain status quo with regard to share holding, board pattern and the right of call option. That order has been continued and is still operating;

2) When this company petition was filed, MIPL filed an application under Section 45 of the said Act seeking a reference of the claims raised by VB and respondent No.2 in the company petition to arbitration. That application has subsequently been withdrawn on 30.01.2014;

3) After the filing of the company petition, the JVA was terminated by MIPL through a notice dated 28.11.2013 and MIPL also elected to purchase all the shares of VB and respondent No.2 in respondent No.3;

4) Immediately after the termination of the JVA, MIPL invoked the arbitration clause in respect of their purported rights leading to and flowing from the termination of the JVA. Shortly, thereafter, on 02.12.2013, MIPL filed a petition under Section 9 of the said Act, which was disposed of by a learned single Judge of this court on 02.12.2013 after recording the statement made on behalf of VB and Respondent No.2 that they shall maintain *status quo* with regard to their share-holding in respondent No.3 till such time interim directions / orders are issued in the arbitral proceedings. This was, however, without prejudice to the issue of arbitrability which had been raised by VB and Respondent No.2 before the Arbitral Tribunal. The order clearly records that the statement of the said respondents was taken on record and that they would be bound by it. From this, it appears that VB and respondent No.2 conceded that the question of arbitrability as also the competence of the arbitral tribunal was to be decided by the

arbitral tribunal itself and that the interim order passed by the learned single Judge would continue to operate till other or further directions / orders were issued in the arbitral proceedings.

5) VB and Respondent No.2 sought to challenge the termination of the JVA in the pending company petition before the Company Law Board and sought stay of the arbitral proceedings. This was declined by the Company Law Board by a reasoned order. Apparently, an appeal was filed against the order declining stay, but the same was not pursued by VB and Respondent No.2 on the purported ground that since the Section 45 application had been withdrawn by MIPL, there was no occasion to take the appeal any further;

6) Thereafter, VB and Respondent No.2 participated in various steps before the arbitral tribunal. Of course, without prejudice to their objection to the competence of the arbitral tribunal and the issue of the arbitrability which was to be decided by the arbitral tribunal itself;

7) After all this, VB and Respondent No.2 filed the suit [CS(OS) 962/2014] seeking an injunction of the arbitration proceedings. In the application under Order 39 Rules 1 and 2 filed in the said suit, the learned single Judge has restrained MIPL by the impugned judgment

dated 22.12.2014 from pursuing the arbitration proceedings until the disposal of the suit or until the *status quo* order passed by the Company Law Board was vacated.

The Law:

29. In ***Naviera Amazonica Peruana S.A. v. Compania Internacional De Seguros Del Peru****: (1988) 1 Lloyd's Rep 116 (CA)*, the Court of Appeal in England observed as under:-

> "All contracts which provide for arbitration and contain a foreign element may involve three potentially relevant systems of law: (1) the law governing the substantive contract; (2) the law governing the agreement to arbitrate and the performance of that agreement; (3) the law governing the conduct of the arbitration. In the majority of cases all three will be the same. But (1) will often be different from (2) and (3). And occasionally, but rarely, (2) may also differ from (3)."

30. Several decisions were cited with regard to the issue of grant of an anti-arbitration injunction or an injunction order granted in a suit restraining arbitration proceedings. The decision in ***V.O. Tractoroexport, Moscow v. Tarapore & Company and Another*****: 1969 (3) SCC 562** was relied upon by the learned counsel for the respondents. In that case, one of the questions related to the jurisdiction of the courts in India to grant an injunction restraining a party which, in that case, was a Moscow firm, to proceed with

the conduct of an arbitration before a tribunal there. The High Court had granted an interim injunction restraining the Russian firm from proceeding with the arbitration at Moscow. The Supreme Court noted the rule as stated in Halsbury's Laws of England, Volume 21 at page 407, with regard to foreign proceedings. It noted that the court would restrain a person within its jurisdiction from instituting or prosecuting suits in a foreign court whenever the circumstances of the case make such an interposition necessary or proper. Specifically, it was noted that the jurisdiction would be exercised whenever there is vexation or oppression. The Supreme Court observed and held as under:-

> "27. If the venue of the arbitration proceedings had been in India and if the provisions of the Arbitration Act of 1940, had been applicable, the suit and the arbitration proceedings could not have been allowed to go on simultaneously and either the suit would have been stayed under Section 34 or if it was not stayed, and the arbitrators were notified about the pendency of the suit, they would have had to stay the arbitration proceedings because under Section 35 such proceedings would become invalid if there was identity between the subject-matter of the reference and the suit. In the present case, when the suit is not being stayed under Section 34 of the Act it would be contrary to the principle underlying Section 35 not to grant an injunction restraining the Russian Firm from proceeding with the arbitration at Moscow. The principle essentially is that the arbitrators should not proceed with the arbitration side by side in rivalry or in competition as if it were a Civil Court."
>
> (underlining added)

31. It would be clear from the above extract that the observations of the Supreme Court were in the context of the Arbitration Act, 1940 and, particularly, with reference to Section 35 and the principles embodied in Sections 34 and 35 of that Act. Sections 34 and 35 of the Arbitration Act, 1940 read as under:-

> "**34. Power to stay legal proceedings where there is an arbitration agreement**.– Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings ; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings.
>
> **35. Effect of legal proceedings on arbitration.**– (1) No reference nor award shall be rendered invalid by reason only of the commencement of legal proceedings upon the subject-matter of the reference, but when legal proceedings upon the whole of the subject-matter of the reference have been commenced between all the parties to the reference and notice thereof has been given to the arbitrators or umpire, all further proceedings in a pending reference shall, unless a stay of proceedings is granted under Sec. 34, be invalid.
>
> (2) In this section the expression "parties to the reference" includes any persons claiming under any of the parties and litigating under the same title."

32. Based on these two provisions, the Supreme Court was of the view that a suit and an arbitration proceeding cannot go on simultaneously and that either the suit would have to be stayed under Section 34 or, if it was not so stayed by the court before which the suit is filed, the arbitrator, if notified about the pendency of the suit, would have to stay the arbitration proceedings because, otherwise under Section 35 of the 1940 Act, such proceedings before the arbitrators would become invalid if there was identity between the subject matter of the reference and the suit. The Supreme Court clearly spelt out the applicable principle in terms of the provisions of the 1940 Act to be that the arbitrator should not proceed with the arbitration side by side in rivalry or in competition as if it were a civil court. This pronouncement of the Supreme Court was based, as already mentioned above, on the provisions of the 1940 Act and, in particular, the interplay between the provisions of Sections 34 and 35 thereof. But, in the present case, we are concerned with the Arbitration and Conciliation Act, 1996 and not the Arbitration Act, 1940, which stands repealed. Under the 1996 Act, whether Part I thereof or Part II is applicable, the focus seems to have shifted towards directing the parties to arbitration rather than deciding the same subject matter as a civil suit. This is clearly discernible from

Section 8 of the 1996 Act as also Section 45 thereof. In both eventualities, in an action which is brought before a court and which also happens to be the subject of an arbitration agreement, on the request made by one of the parties, the court is duty bound to refer the parties to arbitration. Unless, of course, in a case where Section 45 of the 1996 Act applies, the arbitration agreement is null and void, inoperative or incapable of being performed. It is clear that the principles applicable under the 1940 Act and those under the 1996 Act with regard to such references are entirely different.

33. Therefore, we are of the view that this decision would not be of any help to the respondents in support of the impugned judgment whereby an anti-arbitration injunction has been granted.

34. The decision in ***Oil and Natural Gas Commission v. Western Company of North America*****: 1987 (1) SCC 496**, which was also sought to be pressed into service by the respondents, was, like the ***Tractoroexport*** case *(supra)*, a pre-1996 Act decision and, which followed ***Tractoroexport*** *(supra)*. Therefore, the decision in ***ONGC*** *(supra)* would also be of no assistance to the respondents.

35. The decision in ***Union of India v. Dabhol Power Company***: *[Suit No.1268/2003, decided on 05.05.2004]* is, in any event, not binding on us because it is a decision of a learned single Judge of this court. In this case, reliance was placed on ***Tractoroexport*** *(supra)* and ***ONGC*** *(supra),* which, we have pointed out, would really not be of help in the backdrop of the 1996 Act. Furthermore, in the said decision, the learned single Judge observed that Section 5 as well as Section 45 of the 1996 Act do not stand in the way of this court while invoking inherent powers and that the inherent jurisdiction can be exercised whenever there is vexation of oppression. We do not agree with this proposition and that would be clear from the discussion below.

36. A reference was also made to ***LMJ International Limited v. Sleepwell Industries Co. Limited & Another*****: 2014 (1) Arb. LR 227 (Calcutta) (DB)**. The question in that case was with regard to the power and jurisdiction of a civil court to restrain a party from making a reference to an international commercial arbitration and to have the said dispute resolved by such international arbitration. While discussing the said question, a Division Bench of the Calcutta High Court referred to the Supreme Court decision in ***Modi Entertainment Network and Another v.***

W.S.G. Cricket Pte. Ltd*: 2003 (1) Arb. LR 533 (SC)**, which was essentially a decision pertaining to anti-suit injunctions. The Supreme Court, in ***Modi Entertainment Network *(supra)*, laid down the following principles governing an anti-suit injunction:-

> "1. In exercising discretion to grant an anti-suit injunction the court must be satisfied of the following aspects:-
>
> (a) the defendant, against whom injunction is sought, is amenable to the personal jurisdiction of the court;
>
> (b) if the injunction is declined the ends of justice will be defeated and injustice will be perpetuated; and
>
> (c) the principle of comity - respect for the court in which the commencement or continuance of action / proceeding is sought to be restrained - must be borne in mind;
>
> 2. In a case where more forums than one are available, the Court in exercise of its discretion to grant anti-suit injunction will examine as to which is the appropriate forum (Forum conveniens) having regard to the convenience of the parties and may grant anti-suit injunction in regard to proceedings which are oppressive or vexations or in a forum non-conveniens;
>
> 3. Where a jurisdiction of a Court is invoked on the basis of jurisdiction clause in a contract, the recitals therein in regard to exclusive or nonexclusive jurisdiction of the court of choice of the parties are not determinative but are relevant factors and when a question arises as to the nature of jurisdiction agreed to between the parties the court has to decide the same on a true interpretation of

the contract on the facts and in the circumstances of each case;

4. A court of natural jurisdiction will not normally grant anti-suit injunction against a defendant before it where parties have agreed to submit to the exclusive jurisdiction of a court including a foreign court, a forum of their choice in regard to the commencement or continuance of proceedings in the court of choice, save in an exceptional case for good and sufficient reasons, with a view to prevent injustice in circumstances such as which permit a contracting party to be relieved of the burden of the contract; or since the date for the contract the circumstances or subsequent events have made it impossible for the party seeking injunction to prosecute the case in the court of choice because the essence of the jurisdiction of the court does not exist or because of a vis major or force majeure and the like;

5. Where parties have agreed, under a non-exclusive jurisdiction clause, to approach a neutral foreign forum and be governed by the law applicable to it for the resolution of their disputes arising under the contract, ordinarily no anti-suit injunction will be granted in regard to proceedings in such a forum conveniens and favoured forum as it shall be presumed that the parties have thought over their convenience and all other relevant factors before submitting to non-exclusive jurisdiction of the court of their choice which cannot be treated just an alternative forum;

6. A party to the contract containing jurisdiction clause cannot normally be prevented from approaching the court of choice of the parties as it would amount to aiding breach of the contract; yet when one of the parties to the jurisdiction clause approaches the court of choice in which exclusive or non-exclusive jurisdiction is created, the proceedings in that court cannot per se be treated as

vexatious or oppressive nor can the court be said to be forum non-conveniens;

7. The burden of establishing that the forum of the choice is a *forum non-conveniens* or the proceedings therein are oppressive or vexatious would be on the party so contending to aver and prove the same."

37. It is important to note that the present case pertains to an anti-arbitration injunction and the principles governing the present case cannot be the same as one governing a case of an anti-suit injunction. This is so because of the principles of autonomy of arbitration and the competence-competence (Kompetenz-kompetenz) principle. For the present, it is necessary to note point numbers 6 and 7 in the extract from the Supreme Court decision in ***Modi Entertainment Network*** *(supra)*. It has been observed that when one of the parties to a contract containing a jurisdiction clause approaches the court of choice in which exclusive or non-exclusive jurisdiction is created, the proceedings in that court cannot per se be treated as vexatious or oppressive. Furthermore, the burden of establishing that the proceedings in the forum of choice are oppressive or vexatious would be on the party so contending to aver and prove the same.

38. The only principle on which the respondents' case is based is that the arbitration proceedings at London would be vexatious or oppressive. But,

as pointed out in ***Modi Entertainment Network*** *(supra)*, merely because an arbitration is proceeded with at the place of choice (London), would not, *per se* amount to a vexatious or oppressive proceeding. The onus would be on the respondents to establish that the arbitration proceedings are oppressive or vexatious. We may also note that the learned counsel for the respondents had categorically stated that it is not the place of arbitration or the expenses which would be incurred for the conduct of arbitration proceedings at London, which is the objection on their part. The objection is to the forum of arbitration itself being vexatious. In other words, the grievance of the respondents is not with regard to the place of arbitration, but to the arbitration proceedings itself !

39. Coming back to the decision of the Calcutta High Court in ***LMJ International Limited*** *(supra)*, we find that on the facts of the case, the court decided that there was no demonstrable injustice or harassment caused by the reason of initiation of arbitral proceedings and, therefore, the plaintiff therein was not entitled to an order of injunction. A reference in that case was also made to a decision of the Court of Appeal in England in the case of ***Albon (T/A NA Carriage Co.) v. Naza Motor Training SDN***

***BHD*: *2008 (1) Lloyds Law Reports 1*,** to which we shall specifically refer later in this judgment.

40. Another decision on which reliance was placed by the learned counsel for the respondents was that of a Division Bench of the Madras High Court in ***PPN Power Generating Company Limited v. PPN (Mauritius) Co. and Others*: 2006 (129) Comp Cas 849 (Mad)**. One of the questions which arose for consideration before the Division Bench of the Madras High Court was whether the Company Law Board had inherent powers to grant an anti-suit injunction and, if so, whether such power had not been properly exercised in the case at hand. That case was entirely on the principles of an anti-suit injunction and did not have the trappings of an anti-arbitration injunction. The said case was decided on the basis of Regulation 44 and Section 402(g) of the Companies Act, 1956 with regard to the inherent powers of the Company Law Board. References were made to the Supreme Court decision in ***Modi Entertainment Network*** *(supra)* and ***Tractoroexport*** *(supra)*, which we have already discussed above. In the facts of the case, the Madras High Court did not find it fit to issue an injunction as the proceedings complained were neither vexatious nor

oppressive. In any event, this decision is not of any help to the respondents as it does not deal with the case of an anti-arbitration injunction.

41. In another decision referred to by the respondents, which was of a learned single Judge of the High Court in Calcutta in the case of the ***Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS & Others*****: G.A. No.1997/2014 in CS No.220/2014**, the circumstances under which an anti-arbitration injunction could be granted were summarised as under:-

> "(i) If an issue is raised whether there is any valid arbitration agreement between the parties and the Court is of the view that no agreement exists between the parties.
>
> (ii) If the arbitration agreement is null and void, inoperative or incapable of being performed.
>
> (iii) Continuation of foreign arbitration proceeding might be oppressive or vexatious or unconscionable."

42. It would be noticed straightaway that the points (i) and (ii) extracted above are essentially taken from Section 45 of the 1996 Act. The only addition being point No. (iii) where it was submitted that an anti-arbitration injunction could be granted if the continuation of 'foreign' arbitration proceedings were to be oppressive, vexatious or unconscionable.

43. In ***Essel Sports Pvt. Ltd. v. Board of Control for Cricket in India & Others*****: ILR (2011) V Delhi 585**, the plaintiff (BCCI) had prayed for a perpetual injunction against ESPL from initiating any action against BCCI in any other judicial forum in respect of the allegations, subject matter and reliefs contained and covered in an earlier suit which was pending before the Delhi High Court. The Division Bench observed, after examining the claims and contentions of the parties, that the causes of action in the two proceedings in India and in England were substantially and materially the same. Reliance was thereafter placed on ***Modi Entertainment Network*** *(supra)* to observe that a subsequent suit, if held to be vexatious and oppressive could be injuncted by the Indian courts provided other necessary ingredients were also satisfied. It was observed that if a party endeavoured to invoke the jurisdiction of a foreign court to a cause of action already being prosecuted in the national forum, it would amount to vexatious litigation. It also sounded a note of caution that the courts have to be circumspect in exercising their power to issue an anti-suit injunction. But, it must do so where the ends of justice would otherwise be defeated. In conclusion, the Division Bench in ***ESSEL Sports Pvt Ltd*** *(supra)* held that BCCI had been able to establish the vexatious and oppressive nature of the U.K. action which ESPL was pursuing and, therefore, passed an interim

injunction against ESPL from proceeding with the U.K. action to the extent the U.K. action contained allegations against BCCI or that the adjudication of that action overlapped the pending suit in India. It goes without saying that the said decision of the Division Bench in ***ESSL Sports Pvt Ltd*** *(supra)* was also a case of an anti-suit injunction and was not concerned with an anti-arbitration injunction. It applied the principles for an anti-suit injunction laid down in ***Modi Entertainment Network*** *(supra)*.

44. We had noted, while discussing ***LMJ International Limited*** *(supra)*, that the decision of the Court of Appeal in England in the case of ***Albon v. Naza Motor Training SDN BHD*** *(supra)* would be specifically referred to. That was a case where arbitration proceedings had been injuncted. There was an arbitration clause in a written document called the Joint Venture Agreement. A dispute had been raised with regard to the JVA being a forgery. The court below had granted an injunction mainly because there would be limited scope for the arbitrators to proceed with the arbitration till the authenticity of the JVA had been decided and it would be oppressive for Mr Albon who had limited funds to be required to fight a battle on two fronts and it would not be long before the question of authenticity would be decided by the court. It was also noted in paragraph 2 of the said decision

that it had been agreed that the question of authenticity was to be determined finally by the English Courts. The Court of Appeal noted, inter alia, that there was a good arguable case that not only Mr Albon's signature on the JVA had been forged but that the forgery was brought into existence after Mr Albon issued his proceedings and in order to stop the English proceedings in their tracks. It was further noted that the English Court was to be the final Judge on the question of authenticity of the JVA and that as such the question of authenticity could not be determined by the Arbitrators. It is in these circumstances that it was observed that the immediate and co-extensive continuance of arbitration proceedings was unconscionable (in the sense of being oppressive) for very much the same reason which the court below gave. It was considered to be a needless expense and that it would be difficult to avoid over-proliferation of pleadings and disclosure, if the parties did not know whether it would be ultimately determined that the JVA was genuine or not. Paras 16 and 17 of the said decision of the Court of Appeal are relevant. They are extracted below:-

> "16. That leaves for consideration the argument relating to the autonomy of the arbitration tribunal. It is said that the caution exercised by the court relating to anti-suit injunctions should be increased or even re-doubled in the case of an anti-arbitration injunction. It is further said that the judge is effectively case

managing the arbitration and that it should be for the arbitrators, not the English Court, to decide whether the arbitration should proceed pending resolution of the genuineness of the JVA.

17. In the ordinary case there would be much to be said for this argument. But this is not an ordinary case because of the features set out in paragraph 13 above. It is properly arguable that the agreement to arbitrate has been forged in order to defeat proceedings properly brought in England and, in addition to this, it is at present agreed that the English Court will determine that question. The autonomy of the arbitrators has thus already been undermined because they are, in any event, precluded for the present from determining that question. In these circumstances it is not right to say that the judge is attempting to case-manage the arbitration. It would be more accurate to say that he is case-managing the application before him which will determine in England the question whether the JHVA is authentic or not."

(underlining added)

45. It is thus clear that the anti-arbitration injunction was granted in the extreme circumstances as referred to above. The existence of the arbitration clause was in peril because of the "properly arguable" case that the agreement to arbitrate had been forged in order to defeat the proceedings properly brought in England. The main ground for the grant of an anti-arbitration injunction was that the arbitration agreement itself was suspect and was introduced only to defeat the proceedings which had already been properly brought in England. The case at hand is entirely different.

46. The decision in ***Excalibur Venture LLC v. Texas Keystone Inc & Others*****: 2011 EWHC 1624 (Comm)** was also referred to by the learned counsel for the respondents as another instance of an anti-arbitration injunction. One of the issues, which arose for consideration in ***Excalibur*** *(supra)* was whether the court had jurisdiction to grant an injunction restraining ***Excalibur*** *(supra)* from proceeding with the arbitration proceedings against the Gulf defendants. It was observed in paragraph 54 of the said decision that English Courts clearly had jurisdiction under Section 37 of the Senior Courts Act, 1981 (more or less equivalent to Section 151 of the Code of Civil Procedure 1908) to grant injunctions restraining arbitrations where the seat of arbitration is in a foreign jurisdiction, although that power is only to be exercised in exceptional cases and with caution. In paragraph 55, it was noted that an English court would be particularly slow to restrain arbitration proceedings where there is an agreement for the arbitration to have its seat in a foreign jurisdiction and the parties have "unquestionably agreed" to the foreign arbitration clause. That is because given the priority to be accorded to the parties choice of arbitration and the limited nature of the court's power to intervene under the provisions of the Arbitration Act 1996 (the English Act) the court

should not simply apply the same approach as for the grant of a normal anti-suit injunction. It was also observed that questions relating to arbitrability or jurisdiction, or to staying the arbitration, may in appropriate circumstances better be left to the foreign courts having supervisory jurisdiction over the arbitration.

47. Paragraphs 56 and 57 of the said decision are relevant and they are set out hereinbelow:-

> "56. Nonetheless, in exceptional cases, for example where the continuation of the foreign arbitration proceedings may be oppressive or unconscionable so far as the applicant is concerned, the court may exercise its power under s37 to grant such an injunction. Those circumstances include the situation where the very issue is whether or not the parties consented to a foreign arbitration, or where, for example, there is an allegation that the arbitration agreement is a forgery. See also: *Dicey, Morris & Collins: The Conflict of Laws*, 14th Edition, 4th Cumulative Supplement at 16–0-88.
>
> 57. Moreover, it is clear from the decision of the Supreme Court in Dallah Real Estate and Tourism v Ministry of Religious Affairs of the Government of Pakistan [2010] UKSC 46 that, despite the doctrine of *"Kompetenz-kompetenz"* or "competence-competence" (i.e. the ability of an arbitral tribunal to determine its own jurisdiction even where challenged), the English court retains the jurisdiction to determine the issue as to whether there was ever an agreement to arbitrate; see *ibid* per Lord Mance at paragraphs 26 — 30; Lord Collins at paragraphs 84, 93-98, 105–106. The question is whether it is appropriate to do so in the particular circumstances of the case."
>
> (underlining added)

48. It is pertinent to note that this case, that is, ***Excalibur*** *(supra)* stresses upon the difference of approach between a normal anti-suit injunction and an injunction restraining arbitration proceedings. We are also in agreement with this view. There must be a distinction between an anti-suit injunction and an anti-arbitration injunction. The principles which apply to an anti-suit injunction will not necessarily apply to an anti-arbitration injunction. It is further important to note that the exceptional cases where arbitrations could be injuncted upon holding that the arbitration proceedings would be oppressive or unconscionable were regarded as those circumstances which would include the situation where the very issue was whether or not the parties had consented to the arbitration or where there was an allegation that the arbitration agreement was a forgery just as in the case of ***Albon*** *(supra)*. It is clear that none of these exceptional circumstances arise in the present case.

49. It is also important to note that although the competence-competence principle was applicable and the arbitral tribunal had the requisite competence to determine its own jurisdiction, the courts in England retained the jurisdiction to determine the issue as to whether there was ever an agreement to arbitrate. In our view, the same principle would apply

insofar as the courts in India are concerned. The courts in India would certainly have the jurisdiction to determine the question as to whether an arbitration agreement was void or a nullity. But, that is not the case here.

Jurisdiction of the Civil Court

50. It was argued before the learned single Judge that the civil court does not have any jurisdiction to entertain a suit, the subject matter of which is also covered by an arbitration agreement. References were made to Sections 9 and 20 of the Code of Civil Procedure, 1908 as also to Sections 5 and 45 of the 1996 Act. On the one hand, it was argued on behalf of the appellant (defendant) that because of the provisions of Sections 5 and 45 of the 1996 Act, a civil court did not have jurisdiction to intervene in a matter which was the subject of arbitration and, therefore, the suit was not maintainable. On the other hand, it was argued on behalf of the respondent (plaintiff) that there was no absolute bar to a suit being filed before a civil court to seek an injunction against an arbitration proceeding. In this context, there was a debate with regard to the impact of the decisions of the Supreme Court in the case of ***Chatterjee Petrochem Coompany v. Haldia Petrochemicals Limited*****: 2014 (14) SCC 574** and ***World Sport Group (Mauritious) Limited v. MSM Satellite (Singapore) Pte. Ltd: 2014 (11)***

SCC 639. The appellant had relied on ***Chatterjee Petrochem*** *(supra)* to submit that Section 5 of the 1996 Act, which bars judicial intervention by judicial authorities in respect of arbitration agreements would also be applicable to international agreements. In ***Chatterjee Petrochem*** *(supra)*, reliance was, in turn, placed on ***Venture Global Engineering v. Satyam Computer Services Limited and Another*****: 2008 (4) SCC 190** (this decision has, of course, been overruled in ***Bharat Aluminium Company and Others v. Kaiser Aluminium Technical Service, Inc. & Others*****: 2012 (9) SCC 552** but only with respect to arbitration agreements entered into on or after 06.09.2012). In ***Venture Global*** *(supra)*, which would apply to the present case inasmuch as the agreement was prior to 06.09.2012, it was held that the scheme of the Act is such that the general provisions of Part I, including Section 5, will apply to all chapters or parts of the Act. Reliance was placed on ***World Sport Group*** *(supra)* to contend that a suit of the present nature would be maintainable in certain circumstances, such as where the arbitration agreement was null and void, inoperative or incapable of being performed. The learned single Judge, in our view, fell into an unnecessary tangle in coming to the conclusion that the decisions in ***Chatterjee Petrochem*** *(supra)* and ***World Sport Group*** *(supra)* were diametrically opposed to each other. We do not think that that is the correct view. In any

event, the decision in ***World Sport Group*** *(supra)*, which was also relied upon by the appellant, does not, in any manner, hamper the case of the appellant or advance the case of the respondents. The decision in ***World Sport Group*** *(supra)* was clearly dealing with an agreement for arbitration to which the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 applied. Consequently, sections 44 and 45 of the 1996 Act were referred to and relied upon. The said provisions read as under:-

> "**44. Definition.**–In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960—
>
> (a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and
>
> (b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.
>
> **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."

51. The Supreme Court in ***World Sport Group*** *(supra)* observed that Section 45 made it clear that notwithstanding anything contained in Part I or in the Code of Civil Procedure, 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. It is evident from the said decision that even if, under Section 9 CPC read with Section 20 CPC, this court had jurisdiction to entertain a suit, once a request is made by one of the parties or any person claiming through or under him to refer the parties to arbitration, this court would be obliged to refer the parties to arbitration unless it found that the agreement was null and void, inoperative or incapable of being performed. Importantly, the Supreme Court also noted that even if no formal application to refer the parties to arbitration is made and an objection is filed to the effect that the arbitration has already been invoked and arbitration proceedings have commenced, that would itself amount to a request made by a party to refer the parties to arbitration which had already

commenced. It was clarified that no formal application was necessary for invoking the provisions of Section 45 of the 1996 Act. The Supreme Court decision in ***World Sport Group*** *(supra)* also noted that the provisions of Article II of the New York Convention and, in particular, paragraph 3 thereof, was mirrored in Section 45 of the 1996 Act. The Supreme Court referred to various authorities in order to ascertain the meaning of the expressions 'null and void', 'inoperative' and 'incapable of being performed'. The relevant paragraphs of the said decision are set out hereinbelow:-

> "33. Mr. Gopal Subramanium's contention, however, is also that the arbitration agreement was inoperative or incapable of being performed as allegations of fraud could be enquired into by the court and not by the arbitrator. The authorities on the meaning of the words "*inoperative or incapable of being performed*" do not support this contention of Mr. Subramanium. The words "*inoperative or incapable of being performed*" in Section 45 of the Act have been taken from Article II (3) of the New York Convention as set out in para 22 of this judgment. Redfern and Hunter on International Arbitration (5th Ed.) published by the Oxford University Press has explained the meaning of these words "*inoperative or incapable of being performed*" used in the New York Convention at page 148, thus:
>
> > "At first sight it is difficult to see a distinction between the terms 'inoperative' and 'incapable of being performed'. However, an arbitration clause is inoperative where it has ceased to have effect as a result, for example, of a failure by the parties to comply with a time-limit, or where the parties have

by their conduct impliedly revoked the arbitration agreement. By contrast, the expression 'incapable of being performed' appears to refer to more practical aspects of the prospective arbitration proceedings. It applies, for example, if for some reason it is impossible to establish the arbitral tribunal."

34. Albert Jan Van Den Berg in an article titled "The New York Convention, 1958—An Overview" published in the website of ICCA [www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of-1958_overview.pdf], referring to Article II(3) of the New York Convention, states:

> "The words "*null and void*" may be interpreted as referring to those cases where the arbitration agreement is affected by some invalidity right from the beginning, such as lack of consent due to misrepresentation, duress, fraud or undue influence.
>
> The word "*inoperative*" can be said to cover those cases where the arbitration agreement has ceased to have effect, such as revocation by the parties.
>
> The words "*incapable of being performed*" would seem to apply to those cases where the arbitration cannot be effectively set into motion. This may happen where the arbitration clause is too vaguely worded, or other terms of the contract contradict the parties' intention to arbitrate, as in the case of the so-called co-equal forum selection clauses. Even in these cases, the courts interpret the contract provisions in favour of arbitration."
>
> (emphasis in original)

35. The book '*Recognition and Conferment of Foreign Arbitral Awards: A Global Commentary on the New York*

Convention' by Kronke, Nacimiento, et al.(ed.) (2010) at page 82 says:-

> "Most authorities hold that the same schools of thought and approaches regarding the term null and void also apply to the terms *inoperative* and *incapable of being performed*. Consequently, the majority of authorities do not interpret these terms uniformly, resulting in an unfortunate lack of uniformity. With that caveat, we shall give an overview of typical examples where arbitration agreements were held to be (or not to be) inoperative or incapable of being performed.
>
> The terms *inoperative* refers to cases where the arbitration agreement has ceased to have effect by the time the court is asked to refer the parties to arbitration. For example, the arbitration agreement ceases to have effect if there has already been an arbitral award or a court decision with *res judicata* effect concerning the same subject matter and parties. However, the mere existence of multiple proceedings is not sufficient to render the arbitration agreement inoperative. Additionally, the arbitration agreement can cease to have effect if the time limit for initiating the arbitration or rendering the award has expired, provided that it was the parties' intent no longer to be bound by the arbitration agreement due to the expiration of this time-limit.
>
> Finally, several authorities have held that the arbitration agreement ceases to have effect if the parties waive arbitration. There are many possible ways of waiving a right to arbitrate. Most commonly, a party will waive the right to arbitrate if, in a court proceeding, it fails to properly invoke the arbitration agreement or if it actively pursues claims covered by the arbitration agreement." (emphasis in original)

36. Thus, the arbitration agreement does not become "inoperative or incapable of being performed" where allegations

> of fraud have to be inquired into and the court cannot refuse to refer the parties to arbitration as provided in Section 45 of the Act on the ground that allegations of fraud have been made by the party which can only be inquired into by the court and not by the arbitrator. *N. Radhakrishnan v. Maestro Engineers: 2010 (1) SCC 72 and Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak*: AIR 1962 SC 406 were decisions rendered in the context of domestic arbitration and not in the context of arbitrations under the New York Convention to which Section 45 of the Act applies. In the case of such arbitrations covered by the New York Convention, the Court can decline to make a reference of a dispute covered by the arbitration agreement only if it comes to the conclusion that the arbitration agreement is null and void, inoperative or incapable of being performed, and not on the ground that allegations of fraud or misrepresentation have to be inquired into while deciding the disputes between the parties."

52. One of the meanings of the expression 'null and void' which was considered by the Supreme Court, was where the arbitration agreement is affected by some invalidity right from the beginning, such as lack of consent due to misrepresentation, duress, fraud or undue influence. This is clearly not the case in the present proceedings. Insofar as 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 or there is a court decision with res judicata

effect concerning the same subject matter and parties. Importantly, it has been expressed that the mere existence of multiple proceedings is not sufficient to render the arbitration agreement inoperative. Thus, the mere existence of the proceedings before the Company Law Board would not amount to rendering the arbitration agreement as being inoperative. Furthermore, the Supreme Court observed that an arbitration agreement would not become inoperative or incapable of being performed where allegations of fraud have to be enquired into and the court cannot refuse to refer the parties to arbitration as provided in Section 45 of the 1996 Act on the ground that the allegations of fraud have been made by the parties which can only be enquired into by the court and not by the arbitrator. Clearly, the Supreme Court held that in the case of arbitrations covered by the New York Convention, the court could decline to make a reference of a dispute covered by the arbitration agreement only if it came to the conclusion that the arbitration agreement was null and void, inoperative or incapable of being performed and not on the ground that the allegations of fraud or misrepresentation had to be enquired into while deciding the dispute between the parties. It is, therefore, clear from the observations of the Supreme Court in ***World Sport Group*** *(supra)* that the rule is for a reference to arbitration under Section 45 unless the court comes to the clear

conclusion that the arbitration agreement is null and void, inoperative or incapable of being performed. This principle would also apply in the case of a party seeking an anti-arbitration injunction in respect of an agreement under the New York Convention. In other words, unless and until a party seeking an anti-arbitration injunction can demonstrably show that the arbitration agreement is null and void, inoperative or incapable of being performed, no such relief can be granted in the suit or as an interim measure therein.

53. The finding of the learned single Judge that the arbitration agreement in the present case is incapable of performance or inoperative because of the pendency of the proceedings in the Company Law Board is clearly out of line. As pointed out above, while discussing the ***World Sport Group*** *(supra)* decision, it was specifically noted that the mere existence of the multiple proceedings (proceedings before the Company Law Board and those before the arbitral tribunal) is not sufficient to render the arbitration agreement inoperative or incapable of being performed. In any event, the subject matter of the proceedings before the Company Law Board fell within the ambit of the alleged oppression and mismanagement whereas the

subject matter of the dispute before the arbitral tribunal related to the termination of the JVA and the rights flowing therefrom.

Waiver of the arbitration clause

54. The learned single Judge was of the view that there was a waiver or abandonment of the arbitration clause by the parties. This finding is clearly erroneous. The learned single Judge was of the view that merely because the appellant withdrew its application under Section 45 which it had challenged before the Company Law Board, the appellant had abandoned the arbitration agreement. We do not see how such a conclusion can be arrived at, particularly, in view of the explanation given by the appellant that the said application had been withdrawn because, in the meanwhile, after the filing of the said application, the JVA had been terminated and arbitration proceedings had been initiated and, therefore, in the opinion of the appellant, the said application, which was one seeking a reference to arbitration, had become infructuous. The learned single Judge lost sight of the fact that, while through the application under Section 45, the appellant had sought a reference to arbitration of the claims of the respondents before the Company Law Board, it had subsequently directly invoked the arbitration agreement which had also been set in motion and, therefore, by

no stretch of imagination could it have been concluded that the appellant had abandoned and / or waived the arbitration agreement.

55. The learned single Judge has also committed an error in observing that the application filed under Section 9 of the 1996 Act by the appellant was also not pressed. This is clearly not correct. We have already referred to the order passed on the Section 9 application (OMP 1196/2013) by a learned single Judge of this court on 02.12.2013 where, clearly, the learned counsel for VB and Respondent No.2 had stated, on instructions, though without prejudice to their contentions in the Company Law Board regarding the arbitrability of the disputes, that status quo would be maintained as regards the share-holding of the said respondents in Respondent No.3 as well as in the share-holding pattern of respondent No.2, till such time, interim directions / orders are issued in the arbitral proceedings, if any. The order passed by the learned single Judge specifically indicated that the said statement of the respondents was taken on record and would bind them. Thus, as an interim measure, the appellant had succeeded in getting a limited protection in the said Section 9 application. Therefore, the finding of the learned single Judge that the application was not pressed is contrary to the record. The observations of the learned single Judge contained in

paragraph 68 to the effect that because of the withdrawal of the application under Section 45 and because of not taking the Section 9 application to its logical conclusion, the appellant had indicated its intention that it was submitting to the jurisdiction of the Company Law Board and of the Indian courts and had abandoned the arbitration clause, is clearly erroneous.

Conclusion

56. We may point out that the question as to whether Part I or Part II of the 1996 Act would apply has not been determined by us. There was some debate and discussion that the 'place of arbitration' was not London in terms of the arbitration agreement and, therefore, Part I would not apply. On the one hand, it was contended on the part of the respondents that London was only a venue and not the 'place of arbitration', which, according to them, was New Delhi. Thus, their arguments and counter-arguments as to whether Part I applied or Part II applied were based on the difference of opinion with regard to the 'place of arbitration'. There appears to be confusion even in the minds of the parties as, on the one hand, the appellant had filed an application under Section 45 of the 1996 Act (which falls in Part II) before the Company Law Board and, on the other hand, the very same appellant filed an application under Section 9 (which

falls in Part I) of the 1996 Act. Of course, the appellant took the plea that because the agreement was prior to 06.09.2012, the decision in ***Bhatia International*** would apply and, therefore, Part I would be applicable even in respect of arbitration agreements referred to in Section 44 of the 1996 Act. Be that as it may, we are not entering into this controversy.

57. Our focus is on the question whether an anti-arbitration injunction could at all have been granted in the facts and circumstances of the present case. We have already explained as to how, if the arbitration agreement was taken to be one which was covered under Section 44 of the 1996 Act, the arbitration proceedings could not be injuncted because the same was neither null or void, inoperative or incapable or being performed. Even if we assume that Part I of the 1996 Act was to apply, then also, because of the provisions of Section 8, the judicial authority would be obliged to refer the parties to arbitration. We may point out that Section 8 and, in particular, sub-section (1) thereof has been recently amended with retrospective effect from 23.10.2015 to read as under:-

> "**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.
>
> xxxx xxxx xxxx xxxx xxxx"

58. Thus, there is now a mandate to refer the parties to arbitration unless the court finds that *prima faice* no valid arbitration agreement exists. This is clearly not the case here. Therefore, in any eventuality, in the facts and circumstances of the case and applying the principles, as indicated above, the learned single Judge could not have restrained the appellant from pursuing the arbitration proceedings before the arbitral tribunal.

59. There is a very interesting observation in paragraph 7.01 of ***Redfern and Hunter on International Arbitration***: *Sixth Edition: Oxford University Press*. The observation is as follows:-

> "The relationship between national courts and arbitral tribunals swings between forced cohabitation and true partnership. Arbitration is dependent on the underlying support of the courts, which alone have the power to rescue the system when one party seeks to sabotage it. …"

Courts need to remind themselves that the trend is to minimize interference with arbitration process as that is the forum of choice. That is also the

policy discernible from the 1996 Act. Courts must be extremely circumspect and, indeed, reluctant to thwart arbitration proceedings. Thus, while courts in India may have the power to injunct arbitration proceedings, they must exercise that power rarely and only on principles analogous to those found in sections 8 and 45, as the case may be, of the 1996 Act. We have already indicated that the circumstances of invalidity of the arbitration agreement or it being inoperative or incapable of being performed do not exist in this case.

60. Consequently, the impugned judgment is set aside.

BADAR DURREZ AHMED, J

July 21, 2016 **SANJEEV SACHDEVA, J**
SR/dutt