

IN THE HIGH COURT OF DELHI AT NEW DELHI

CS(OS) 1417/2009 & IA 9891/2009

Reserved on : 12th August 2009

Decision on : 18th August 2009

M/S OVAL INVESTMENT PVT LTD & ORS Plaintiffs
Through Mr. C.A. Sundram, Senior Advocate and
Mr. Arun Bhardwaj, Senior Advocate with
Mr. Manish Sharma & Ms. Rohini Musa, Advocates

versus

M/S INDIABULLS FINANCIAL SERVICES
LTD & ORS Defendants
Through Mr. Mukul Rohtagi, Senior Advocate and
Mr. Rajiv Nayar, Senior Advocate with
Mr. Rishi Agrawala, Mr. Mahesh Agarwal and
Mr. Akshay Ringe, Advocate for Defendant No.1.
Ms. Neelima Tripathi, Advocate for
Defendant Nos. 2 to 19.

CORAM:
HON'BLE DR. JUSTICE S. MURALIDHAR

1. Whether reporters of the local news papers
be allowed to see the judgment? No
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

JUDGMENT
18.08.2009

S. Muralidhar, J.

1. This suit for declaration and perpetual injunction is by seven plaintiffs. There are nineteen defendants in the suit. Defendant No.1 as well as Defendants 2 to 19 entered appearance through counsel at the first hearing of the suit. Defendants 2 to 19 support the Plaintiff. Defendant No.1 opposed even the issuance of summons. It was submitted on behalf of Defendant No.1 that its plea for the rejection of

the plaint should be considered as being under Order VII Rule 11 of the Code of Civil Procedure 1908 (CPC).

Background Facts

2. The background to the present suit is that the Plaintiff Companies borrowed loans from Defendant No.1 on various dates between 13th June 2005 and 4th May 2007. Each entered into a separate agreement with Defendant No.1. Each of the Plaintiff companies provided security by way of deposit of shares including shares of Gujarat Heavy Chemicals Ltd. (GHCL) and Golden Tobacco Ltd. (GTL). The seven agreements by the Plaintiff Companies with Defendant No.1 contained an identical clause concerning jurisdiction and arbitration which reads as under:

“Clause 57 Jurisdiction and Arbitration

Any dispute of difference arising under, or in connection with, this agreement, or any breach thereof, which cannot be settled by friendly negotiation and agreement between the parties, shall be referred to sole arbitration at (New) Delhi, conducted in accordance with the provisions of Arbitration and Conciliation Act, 1996. The decision of the sole arbitrator, to be appointed by the lender, shall be final and binding on the parties.”

3. According to the Plaintiffs, they serviced the loans without default and periodically repaid Defendant No.1. It is claimed that between October 2005 and March 2008 approximately Rs.125 crores was paid by the Plaintiffs to Defendant No.1. It is alleged that without informing the Plaintiffs or giving them notice of recall of the loans, Defendant

No.1 sold 136.52 lakh shares of GHCL to the tune of around Rs.155 crores. It is mentioned that in this interregnum, seven other companies not concerned with the loan agreement provided the security to Defendant No.1 by mortgage of title documents in relation to immoveable properties in Village Bijwasan, Tehsil Mehrauli, New Delhi and at Connaught Place, New Delhi. On 18th July 2008, Defendant No.1 wrote a letter seeking recall of the loan amounting to Rs.225.45 crores within two days. It is alleged that within two days thereafter Defendant No.1 requested the Plaintiffs to enter into a joint development agreement for a property in Mumbai. The Plaintiffs state that they were coerced into signing a letter dated 24th July 2008 agreeing that a joint development agreement with the developer would be entered into and that the money earned thereby would be paid to Defendant No.1.

4. According to the Plaintiffs, they came to know through Defendants 2 to 19 companies on one of whom a copy of a claim petition was served that Defendant No.1 had by a letter dated 17th July 2009 addressed to the Plaintiffs as well as Defendant Nos.2 to 19 invoked the arbitration clause and initiated proceedings against them by appointing Justice (Retd.) R.C. Chopra as the Sole Arbitrator. A copy of the said letter was also sent to Justice R.C. Chopra. The Plaintiffs claim that they never received the said letter dated 17th July 2009. A letter dated 20th July 2009 stated to have been written by Defendant No.1 to Justice R.C. Chopra informing him of his appointment as Sole Arbitrator for adjudication of the disputes between Defendant No.1 on the one hand

and the Plaintiffs and Defendant Nos.2 to 19 on the other. By a letter dated 22nd July 2009, Justice R.C. Chopra issued a notice to the Plaintiffs as well as Defendants 2 to 19 informing them of his appointment as Sole Arbitrator and calling upon them to enter appearance through counsel or an authorized representative on 24th August 2009 at 4.30 pm.

5. The Plaintiffs state that while they never received the letters dated 17th July 2009 or 20th July 2009, they received the notice dated 22nd July 2009 from the Sole Arbitrator on 27th July 2009.

6. It is stated that thereafter the Plaintiffs received a letter dated 24th July 2009 from the Advocates for Defendant No.1 informing them that in an application filed under Section 17 of the Arbitration and Conciliation Act, 1996 ('Act'), Justice R.C. Chopra had passed an interim order on 23rd July 2009, restraining the Plaintiffs and Defendants 2 to 19 from selling, transferring or creating third party interest in any manner in the shares of GHCL and GTL, and in the properties at Village Bijwasan and Connaught Place. The Plaintiffs state that one of the Defendants 2 to 19 companies was served with the copy of the claim petition filed by Defendant No.1 before the Arbitrator. It was then that the Plaintiffs realized that such a claim had been filed on 23rd July 2009 which included the application under Section 17 of the Act. It also included various documents by way of proof of service in so far as sending of the notice dated 17th July 2009 by Defendant No.1 to the Plaintiffs invoking the arbitration clause was

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concerned.

7. According to the Plaintiffs, from the copies of the claim petitions and proof of service of dispatch of notice dated 17th July 2009 appended thereto, the Plaintiffs noticed that the said notice dated 17th July 2009 was claimed by the Defendant No.1 to have been sent by three modes, viz., Under Certificate of Posting (UPC), by Registered Post with acknowledgment due and by courier. It is claimed that the Plaintiffs found the postal receipts of dispatch through Regd. AD and UPC purportedly issued by a post office at Indraprastha to be “suspicious”. Accordingly, the Plaintiffs through their counsel wrote a letter dated 29th July 2009 to the Post Master Indraprastha Post Office. The request in the letter was that the Post Master should inform the Plaintiffs the dates on which the Regd. A/D covers and UPCs were served on the addressees. By a letter dated 4th August 2009, the Senior Post Master, Indraprastha Head Office wrote to the counsel for the Plaintiffs stating that “the scrutiny of documents reveals that neither above Regd Letters were booked in this office nor dispatched to such destinations. This office is fully computerized and not even a single Regd Letter was booked manually on 17-07-09”. As regards the UPC, the information regarding service was declined stating: “As regard UPC is concerned no record of unregd mail is kept in this office”.

8. The case of the Plaintiff is that very invocation of arbitration by notice dated 17th July 2009 was fraudulent since no such notice was dispatched to any of the Plaintiffs much less received by them by either

Regd. A/D or UPC as claimed by Defendant No.1. It is accordingly submitted that the mandatory statutory condition precedent to the commencement of arbitral proceedings in terms of Section 21 of the Act, i.e., the receipt by the Respondents against whom the proceedings were sought to be initiated of notice of such invocation by the claimant, was not fulfilled.

9. It is stated that in view of the letter dated 4th August 2009 issued by the Senior Post Master, Indraprastha Head Office, the Plaintiffs filed complaints with the Station House Officer (SHO), IP Estate Police Station for registration of an FIR in regard to the fraud and forgery committed by Defendant No.1 and its officials as well as the other persons involved in the conspiracy on 4th August 2009 itself. It is claimed that an investigation is being sought against the courier company, Blaze Flash since it is inconceivable that the letter dated 17th July 2009, if any sent by courier to any of the of the Plaintiff companies in Delhi or Kolkatta would not be received either on the immediate next date or on the following day. It is pointed out that the claim petition filed by Defendant No.1 before the learned Arbitrator contains only proof if any of the dispatch of notices by courier and not their receipt by any of the Plaintiffs.

10. It is further contended that the procedure adopted by the learned Arbitrator was improper. In any event the learned Arbitrator ought not to have entertained, much less passed an ex parte interim order on the

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application filed on 23rd July 2009 by Defendant No.1 for interim relief, particularly when only on the previous day i.e. 22nd July 2009 a notice had had been dispatched to the Plaintiffs indicating 24th August 2009 as the returnable date.

11. It is further submitted that the procedure for appointment of an Arbitrator in terms of the loan agreements was not followed inasmuch as it was incumbent in terms of Clause 57 of the loan agreement that the disputes should first be attempted to be settled by friendly negotiations. For all of the above reasons, it is claimed that the entire proceedings before the learned Arbitrator was a nullity.

12. In paras 39 and 40 of the plaint, it is stated as under:

“39. That the plaintiff companies have approached this Hon’ble Court having no other equally efficacious remedy as the defendant No.1 company by employing illegal means has sought to initiate arbitration proceedings at the back of the plaintiff companies. In doing so the defendant No.1 has also sought to rope in the defendants No.2 to 19 even though there is no contract pertaining to arbitration between the said defendants and the defendant No.1.

40. That the reference to arbitration is absolutely illegal and based on fraud and therefore is a complete nullity without any sanction and therefore without any consequence. It is as if no reference to arbitration has taken place at all. It is submitted that the arbitration proceedings themselves are liable to be stopped immediately as otherwise immense damage, injury and

loss is being caused to the plaintiff companies.”

13. The Plaintiffs wrote to the learned Arbitrator on 29th July 2009 bringing the above facts to his notice and requesting him to keep the arbitration proceedings in abeyance. The cause of action paragraph of the plaint reads thus:

“45. That the cause of action for filing the present suit arose on 17.07.2009 when the defendant No.1 allegedly issued a notice invoking arbitration without following the set down procedure in this regard. The cause of action further arose when a copy of the notice dated 17.07.2009 was received by one of the defendant companies. The cause of action arose on 20.07.2009 when the defendant No.1 wrote a letter to the Hon’ble Arbitrator without a copy to the plaintiff companies. The cause of action arose on 22.07.2009 when the Hon’ble Arbitrator issued notice of arbitration to the plaintiff companies. The cause of action arose on 23.07.2009 when the defendant No.1 filed written statement of claim showing fraud and fraudulent receipts of service. The cause of action arose on 23.07.2009 when the Hon’ble Arbitrator passed the interim orders. The cause of action is a continuing one as the plaintiff companies have till date not been served with the notice dated 17.07.2009.”

14. The prayers in the suit are as under:

“a) pass a decree of declaration in favour of the plaintiff companies and against the defendant No.1 company that the invocation of arbitration/reference to arbitration in terms of letter dated 17.07.2009 of the defendant No.1 company is vitiated and liable to be struck down on account of it being improper

and based on fraud, forgery and illegality.

- b) pass a decree of perpetual injunction restraining the defendant No.1 from invoking the arbitration clause qua the plaintiff companies without following the due process mentioned in the said clause and as per law.
- c) pass a decree of perpetual injunction restraining the defendant No.1 from selling, transferring, alienating or in any manner creating a third party interest in relation to shares of M/s GHCL and GTL as mentioned in para No.27 of the suit and further in relation to property No.F7/1 to F7/4 and F7/8 to F7/11, F Block, Connaught Place, New Delhi and Khasra No.352/2, 563 (0-9) min and 564 (0-11) min Village Bijwasan Tehsil Mehrauli, New Delhi.
- d) Pass such order(s) as this Hon'ble Court may deem fit and appropriate in the facts and circumstances of the case.”

Submissions on behalf of Defendant No.1

15. Mr. Mukul Rohatgi, the learned Senior Counsel, appearing for Defendant No.1 seriously opposes the issuance of summons in the suit. He points out that this is not a case where the existence of an arbitration agreement between the parties is questioned by the Plaintiffs on any ground whatsoever. The grievance of the Plaintiffs is that the procedure for appointing the learned Arbitrator has not been followed by first serving upon the Plaintiffs notice of invocation of the arbitration proceedings. It is submitted that this question also ought to be examined only by the learned Arbitrator in terms of Section 16 of the Act as it touches upon the jurisdiction of the learned Arbitrator to enter upon the reference. It is submitted that the Act is a complete code as regards

arbitration proceedings. Under Section 5, there is a complete bar on courts interfering with arbitration proceedings except in a very limited context, of passing interim orders under Section 9 of the Act even prior to the commencement of arbitral proceedings. Barring this, all other questions pertaining to the arbitration proceedings, including whether the procedure for invoking the arbitration proceedings has been duly followed, had to be agitated only in a manner contemplated by the Act. It is submitted that if the learned Arbitrator ruled against the Plaintiffs by holding that he does have jurisdiction, the only remedy available to the Plaintiffs was to challenge the final Award under Section 34 of the Act. This was consistent with the scheme of the 1996 Act which makes a clear departure from the erstwhile Arbitration Act, 1940 (the '1940 Act') and is intended to minimize interference by court. It is submitted that as long as the existence or validity of the arbitration clause is not in dispute, a court which is approached directly by one of the parties without invoking such clause, will refuse to entertain the suit or proceedings and will send the party to arbitration. In effect this is what the court would in any event do under Section 8 of the Act. Reliance is placed on the judgments in *Secur Industries Ltd. v. Godrej & Boyce Mfg. Co. Ltd.* (2004) 3 SCC 447; *Milkfood Ltd. v. GMC Ice Cream (P) Ltd.* (2004) 7 SCC 288; *Singhal & Brothers v. Mahanagar Telephone Nigam Ltd.* 2005(5) Bom CR 261 and *SBP & Co. v. Patel Engineering Ltd.* (2005) 8 SCC 618.

16. Referring to the prayers in the suit, Mr. Rohtagi points out that prayer (a) is for a bare declaration that the letter dated 17th July 2009

issued by Defendant No.1 Company is invalid being based on fraud, forgery and illegality and inasmuch as it is not accompanied by a prayer for consequential relief, it is barred under Section 34 of the Specific Relief Act 1963 (SRA). He submits that prayer (b) is incapable of being granted because it seeks a perpetual injunction restraining the Defendant No.1 from invoking the arbitration clause, the existence or validity of which is not questioned. This is in the teeth of Section 5 of the Act and therefore cannot be granted by the court. In any event, it is not a relief consequential to the declaratory relief sought under prayer (a). Likewise, prayer (c) is for a perpetual injunction restraining Defendant No.1 from selling, transferring or creating third party interest in the Bijwasan and Connaught Place properties as well as the shares of the GHCL and GTL. Apart from the fact that this injunction is also not consequential upon the declaration sought under prayer (a), this in any event forms the subject matter of the arbitration proceedings, and is therefore barred under Section 5. Consequently it is submitted that the three prayers set up in the suit are barred by law and therefore in terms of Order VII Rule 11 CPC, the plaint ought to be rejected.

17. Lastly, it is submitted that a reading of the plaint itself shows that the Plaintiffs wrote to the learned Arbitrator on 29th July 2009 thus submitting to the jurisdiction of the learned Arbitrator. Having done so, it was not open to the Plaintiffs to also file the present suit which is in restraint of the arbitration proceedings and barred under Section 5 of the Act.

Submissions on behalf of the Plaintiffs

18. Mr. C.A. Sundram, the learned Senior Counsel, appearing for the Plaintiffs submits that there was no other efficacious remedy available to the Plaintiffs than filing the present suit. According to him, the question of going before the learned Arbitrator would arise only if there was in place an arbitral tribunal validly constituted. According to him, no arbitral tribunal comes into being till the claimant complies with the mandatory step under Section 21 of the Act, viz., ensuring the receipt by the Respondents to the claim (the Plaintiffs herein) of the notice of invocation of the arbitration clause and of the appointment of the learned Arbitrator. Mr. Sundaram draws comparison with Section 33 of the 1940 Act to emphasize that in the 1996 Act there was a clear departure made. Under the 1940 Act it was enough to serve a notice upon the Respondents in a claim petition before approaching the Arbitrator. However, Section 21 of the 1996 Act insists on receipt of such notice by the respondent in the claim. He accordingly distinguishes the judgment of the Supreme Court in ***Milkfood Ltd. v. GMC Ice Cream (P) Ltd.***, by submitting that that the said decision dealt with the question of the continuation under the 1996 Act of arbitration proceedings which had commenced under the 1940 Act. The judgment in ***Secur Industries Ltd. v. Godrej & Boyce Mfg. Co. Ltd.*** is also sought to be distinguished as in the said case there was no doubt concerning the existence of an arbitral tribunal, which in any event was named in the statute governing the transaction.

19. It is submitted that the letter from the Indraprastha Post Office prima facie points to the fact that the postal receipts enclosed with the claim petition filed before the learned Arbitrator were fabricated documents. Unaware of this, the learned Arbitrator had perhaps proceeded on the footing that the mandatory requirement of Section 21 of the Act had been complied with by Defendant No.1 when in fact it had not. Based on such documents, the learned Arbitrator had been misled into entering upon the reference and issuing the notice dated 22nd July 2009 to the Plaintiffs. Therefore the entire proceedings beginning with the entering upon reference by the learned Arbitrator stood vitiated and were therefore void. He refers to the definition of 'jurisdiction' as contained in Black's Law Dictionary (6th Edition p.853) and submits that the term is defined to mean "the power of the court to decide a matter in controversy" and "presupposes the existence of a duly constituted court with control over the subject matter and the parties". If, in fact there was no arbitral tribunal in place in the manner contemplated by law, then it would be futile to require the Plaintiffs to go before the learned Arbitrator to argue that he has no jurisdiction. A distinction is sought to be drawn between an arbitral tribunal which is validly constituted but does not have jurisdiction to adjudicate the claims and an arbitral tribunal which is not validly constituted and has therefore not come into existence. According to Mr. Sundaram, the present case falls in the latter category. Therefore Section 5 of the Act will not apply and therefore there is neither an implied nor an express bar in terms of Section 9 CPC on this court entertaining the suit.

20. It is submitted that the fraud vitiates all actions and, therefore, when the Plaintiffs are able to prima facie show the commission of a fraud by Defendant No.1, which has resulted in the learned Arbitrator wrongly entering upon the reference, then the civil court would interfere to nullify the entire arbitration proceedings. Mr. Sundram relies upon the judgment in *India Household & Healthcare Ltd. v. LG Household & Healthcare Ltd. (2007) 5 SCC 510*. He distinguishes the judgment of the Bombay High Court in *Singhal & Brothers v. MTNL* on the ground that it does not notice the correct position in law.

21. It is further submitted that under Section 37 of the Act, no appeal is available to a person who does not succeed in persuading the arbitrator that he has no jurisdiction. Such a person would have to await the final Award and then challenge it under Section 34 of the Act. Such remedy, according to Mr. Sundram, is not efficacious.

22. As regards the relief of declaration sought in prayer (a) of the plaint, it is submitted that the prayer (b) should be read as consequential to prayer (a). Viewed as such the suit is not for a bare declaration and will, therefore, not be hit by Section 34 SRA. While it is conceded that the prayer (c) is a stand-alone prayer, it is submitted that this by itself need not prevent the court even issuing summons in the suit on the basis of the prayers (a) and (b).

Scope of the Arbitrator's powers under the 1996 Act

23. In order to appreciate the above submissions, reference may be

made to the provisions of the 1996 Act. The Act is no doubt a departure from the scheme of the 1940 Act. Section 5 of the 1996 Act makes it clear that “notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part”. Barring Section 9 under which the Court may pass an interim order even before commencement of arbitral proceedings, the Court’s power to interfere with arbitration proceedings, is indeed very limited. Where a party chooses to go straightway to a court notwithstanding the existence of arbitration agreement, then notwithstanding that the court may have initially entertained the petition or suit, when its attention is drawn to the existence of an arbitration agreement, then notwithstanding the fact that the issue is pending before the Court, under Section 8(3) the Court can direct that “an arbitration may be commenced or continued and an arbitral award made”. Under Section 11 of the Act, the Court can be approached in the event of failure by one of the parties to appoint an arbitrator as contemplated by the agreement.

24. It appears that the Court comes into picture thereafter only at two stages. Under Section 37 (2) (a) of the 1996 Act, an appeal can be filed to a court against an order passed by an Arbitrator either accepting the plea of lack of jurisdiction or of exceeding the scope of authority. Under Section 37(2) (b) an appeal can also be filed against an interim order passed by the Arbitrator under Section 17 of the 1996 Act either granting or refusing interim measure. If the Arbitrator under Section 16

(1) overrules the plea of an objector and rules that he has jurisdiction or that there does exist a valid arbitration agreement then the aggrieved party has to wait for the final Award and thereafter challenge it under Section 34 of the Act. Section 34(2) sets out the grounds on which the Award can be challenged. Among these grounds is that the arbitration agreement is not a valid one or that the award deals with the disputes not contemplated or not falling within the terms submitted to the arbitrator or it contains the decision on matters beyond the scope of the submission to arbitrator. One other ground is that the composition of the tribunal or the arbitral tribunal was not in accordance with the agreement between the parties. The scheme of the Act appears to be restrict interdiction by the court of arbitral proceedings except to the limited extent indicated hereinbefore.

25. Under Section 33 of the 1940 Act, the Arbitrator could examine the question of the existence or validity of the arbitration agreement. Section 16 of the Act not only preserves this power of the arbitrator but in fact expands it. The wording of Section 16(1) indicates that the arbitrator could rule on his own jurisdiction “**including** ruling on any objections with respect to the existence or validity of the arbitration agreement”. The word “including” shows that the scope of the examination of the questions concerning the jurisdiction of the arbitral tribunal is not limited to the existence of the arbitration agreement itself. Therefore, it is inconceivable that where there is a violation of mandatory requirement like Section 21 of the Act, the arbitrator cannot examine that question as well. If the existence of the arbitration

agreement is a *sine qua non* for commencement of arbitration proceedings and if such a question is to be examined only by the arbitrator, it is difficult to accept the proposition that the question whether a valid notice under Section 21 has been received by the respondent in a claim petition, cannot be gone into by the arbitrator. The question really is not so much whether the requirement under Section 21 of the Act is mandatory or not. This Court is of the view that such a requirement is indeed mandatory for without the notice of invocation being received by the respondent no arbitral proceedings can commence. The question really, therefore, is whether the arbitrator has the power to decide where this procedure under Section 21 of the Act has been complied with. In the considered view of the Court, given the scheme of the Act and the minimal scope of the interference by the civil courts, it must be held that this question can and should be examined by the arbitrator himself.

Applicability of the cited case law

26. With respect the decisions of the Supreme Court cited by the learned counsel do not provide a clear-cut answer to the question. The Supreme Court in para 14 of its decision in ***Secur Industries Ltd. v. Godrej & Boyce Mfg. Co. Ltd.***, observed: “Whether the notice was a notice under Section 21 and whether the giving of notice under Section 21 is to be construed as a precondition to the exercise of jurisdiction by the Council are questions which the Council will have to decide.”

Although the learned Senior counsel for Defendant No.1 relied on the above observations in support of his submission, it appears from the

facts narrated in the said decision that those observations were made in the context of there already being in place an arbitral tribunal, i.e. the Industry Facilitation Council, in terms of Section 6(2) of the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993, the statutory provision governing the transaction. There a demand notice had in fact been sent to the Respondent calling upon it to repay the amounts. In the said notice, it was mentioned that “failure or non-payment will force us to move our claims as mentioned above to the appropriate authorities for recovery of our dues as mentioned above”. The question which arose was whether this by itself constituted notice of invocation of the arbitration agreement and whether a further notice was required under Section 21 of the 1996 Act. The question in the instant case is whether the notice dated 17th July 2009, which is the only notice claimed by Defendant No.1 to have been dispatched to the Plaintiffs, was in fact so dispatched and whether it was “received” by them. In the considered view of the Court, therefore, the judgment in *Secur Industries Ltd. v. Godrej & Boyce Mfg. Co. Ltd.*, did not consider or answer such a question.

27. Turning to the decision in *Milkfood Ltd. v. GMC Ice Cream (P) Ltd.*, it appears from the narration of facts that the parties had entered into an agreement on or about 7th April 1992 which contained an arbitration clause. When a dispute arose between the parties, the Respondent filed a suit in the civil court for a permanent injunction to restrain the appellant from causing any disturbance in manufacture and

supply of ice cream according to the specifications as given by the appellant. The appellant filed an application under Section 34 of the 1940 Act for stay of the suit. The civil court stayed the suit. The appellant then sent a notice on 14th September 1995 to the Respondent appointing an arbitrator. The appeal filed against the order of the civil court was dismissed by the first Appellate Court. When the matter came in revision before the High Court, the parties agreed that the disputes would be referred to the arbitrators chosen by the parties. A consent order was accordingly passed referring the disputes to arbitrators. The appellant realised that the arbitrators were proceeding under the 1996 Act. It filed an application before the arbitrators Court seeking a clarification that the provisions of the 1940 Act alone would apply. The majority of the arbitrators held that the 1940 Act would apply. Thereafter questioning the order of the arbitrators, an application was filed under Section 33 of the 1940 Act before the High Court. A Single Judge upheld the majority view of the arbitrators. An appeal was thereafter dismissed by a Five Judge Bench of the High Court as not being maintainable. The appellant then approached the Supreme Court which by a majority of 2:1 overturned the judgment of the High Court. It was held that it was the 1940 Act which should govern the proceedings and not the 1996 Act.

28. In para 24 of the majority judgment in *Milkfood Ltd. v. GMC Ice Cream (P) Ltd.*, it was observed thus (SCC @ p. 300):

“Both the 1940 Act and the English Arbitration Act place

emphasis on service of the notice by one party on the other party or parties requiring him or them to submit the matter to arbitration rather than receipt of the request by the respondent by the respondent from the claimant to refer the dispute to arbitration”.

29. In para 27 in *Milkfood Ltd. v. GMC Ice Cream (P) Ltd.*, it was noticed that Article 21 of the UNCITRAL Model Law had been adopted for the purposes of drafting Section 21 of the 1996 Act. It was then observed that “thus, whether for the purpose of applying the provisions of Chapter II of the 1940 Act or for the purpose of Section 21 of the 1996 Act, what is necessary is to issue/serve a request/notice to the respondent indicating that the claimant seeks arbitration of the dispute”. From these observations it does appear that the Supreme Court acknowledged that the requirement of service of notice on the respondent under Section 21 of the 1996 Act was mandatory. In para 46 of the judgment in *Milkfood Ltd.* (supra) it was observed “having regard to the provisions contained in Section 21 of the 1996 Act as also the common-parlance meaning given to the expression “commencement of an arbitration” which, admittedly, for certain purpose starts with a notice of arbitration, is required to be interpreted which would be determinative as regards the procedure under the one Act or the other required to be followed”. Thereafter the Court examined the position of Section 21 vis-à-vis the repeals and savings provision of the 1996 Act, i.e., Section 85(2)(a). It then observed as under in para 49 (SCC @ p. 307):

“Section 21 of the 1996 Act, as noticed hereinbefore,

provides as to when the arbitral proceedings would be deemed to have commenced. Section 21 although may be construed to be laying down a provision for the purpose of the said Act but the same must be given its full effect having regard to the fact that the repeal and saving clause is also contained therein. Section 21 of the Act must, therefore, be construed having regard to Section 85(2)(a) of the 1996 Act. Once it is so construed, indisputably the service of notice and/or issuance of request for appointment of an arbitrator in terms of the arbitration agreement must be held to be determinative of the commencement of the arbitral proceeding.”

30. In para 69 of the judgment in *Milkfood Ltd.* (supra), the Supreme Court proceeded to observe as under (SCC @ p. 314-15):

“THE UNCITRAL Model Rules of Arbitration vis-à-vis provision of Section 14 of the English Arbitration Act, 1996 must be construed having regard to the decisions of the English courts as also this Court which addressed the form of notice to be given in order to commence the arbitration for the purpose of Section 34(3) of the Limitation Act. By reason of Section 14, merely the form of notice and strict adherence thereto has become redundant, as now in terms of Section 14 of the Arbitration Act there is otherwise no specific requirement as to the form of notice subject to any contract operating in the field. (See Paras 5-020, 5-027 and 5-028 of *Russel on Arbitration*, 22nd Edn.). Section 21 of the 1996 Act must be construed accordingly. It defines the moment of the commencement of arbitral proceedings. In Rao, P. Chandrasekhara: *The Arbitration and Conciliation Act, 1996*, it is stated:

"Section 21 defines the moment of the commencement of arbitral proceedings. It gives freedom to the parties to agree on the date of commencement of arbitral proceedings. For instance, in the case of arbitration administered by an arbitration institution, they may agree to abide by the arbitration rules of that institution for determining the point of time at which the arbitral proceedings can be said to have commenced. Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. Section 3 is relevant on the question as to when a request can be said to have been received by the respondent. The request made to the respondent should clearly indicate that the claimant seeks arbitration of the dispute.

Section 21 is of direct relevance in connection with the running of periods of limitation under Section 43 and the savings provision in Section 85(2)(a)."

31. After the above discussion, it was held by the Supreme Court in the context of the expression "commencement of the arbitral proceeding" in Section 21 of the 1996 Act, that having regard to Section 85(2) (a) thereof, "service of a notice for appointment of an arbitrator would be the relevant date for the purpose of commencement of the arbitration proceeding".

32. Although considerable reliance was placed by Mr. Rohtagi on the observations in para 49 of *Milkfood Ltd.* that the mere service of notice or issuance of request for appointment of an arbitrator should be determinative of commencement of the arbitration proceedings for the

purposes of Section 21 of the 1996 Act, it appears that the above observations were made in the context of Section 21 of the 1996 Act as interpreted in light of the Section 85(2) (a) thereof. In other words, what seems to have been weighed with the Supreme Court in the above decision is the fact that the issuance of notice under the 1940 Act should be taken to be sufficient for construing whether arbitral proceedings had commenced notwithstanding the fact that the requirement under Section 21 of the 1996 Act may not have been complied with. Consequently, it cannot be said that the decision in *Milkfood* is an authority for the proposition that the mere issuance of a notice to the Respondent will be sufficient compliance with the requirement of Section 21 of the 1996 Act. In the considered view of this Court, the requirement of receipt of notice by the Respondent in terms of Section 21 of the Act is a condition precedent to the commencement of arbitral proceedings.

33. Having said that, it must be observed that neither *Secur Industries Ltd.* (supra) nor *Milkfood Ltd.* (supra) is determinative of the issue whether it is the arbitrator alone who has to examine such a question if raised or whether the Act gives scope for the civil court to determine such a question. The judgment of the Division Bench of the Bombay High Court in *Singhal & Brothers v. MTNL* holds that such a question should also be decided only by the arbitrator. The following observations in the said judgment are relevant:

“Even in a matter, if an issue arises, whether notice has

been served satisfactorily, under Section 21, the matter has to be decided by the arbitral tribunal itself. It would therefore, be clear that all issues including procedural matters like whether there was proper notice under Section 21, or whether the claim is barred by limitation, whether there is arbitral clause, governing the subject-matter of the dispute and whether the arbitral clause itself is subsisting or valid are all issues which can be gone into under Section 16 of the Act of 1996 by the Arbitral Tribunal.”

34. It appears to this Court in the light of the scheme of the Act as discussed hereinbefore, the question whether the mandatory requirement of receipt of the notice by the Respondent in terms of the Section 21 of the 1996 Act has been complied with is also to be examined by the Arbitrator under Section 16 of the 1996 Act. The reliance by the learned Senior Counsel for the Plaintiffs upon the decision in *India Household & Healthcare Ltd. v. LG Household & Healthcare Ltd.* (supra) appears to be misplaced. The question that arose there was whether in terms of Section 16 of the 1996 Act, notwithstanding that the agreement itself was challenged as being vitiated by fraud, it would be for the Arbitrator to determine he had jurisdiction. Para 3 of the said decision in *India Household & Healthcare Ltd.* (supra) reveals that the respondent there had questioned the Memorandum of Understanding (M)U dated 1st November 2003 and the Licence Agreement dated 8th May 2004 containing the arbitration clause as being vitiated by fraud. The Respondent had filed a suit in the High Court in which an interim

injunction had been issued restraining the petitioner from acting on the MOU. In the said suit it had been categorically alleged that the Respondents had hatched a conspiracy to defraud the petitioner for the purpose of obtaining bribes, commissions and kickbacks. The matter came before the Supreme Court by way of an application under Section 11 filed by the Petitioner seeking the appointment of an arbitrator. It was pointed out by the Respondents that in terms of the judgment in ***SBP & Co. v. Patel Engineering Ltd.***, the Court under Section 11 was obligated to go into the question whether the entire agreement was vitiated by fraud and whether as a result thereof no valid arbitration agreement came into being. It is, therefore, seen that the decision in ***India Household & Healthcare Ltd.*** (supra) was in the context of the challenge to the existence and the validity of an arbitration agreement in proceedings under Section 11 of the Act. The question really was not whether the Court can examine such a question *dehors* the Act. In fact, ***India Household & Healthcare Ltd.*** (supra) indicates that even such questions have to be examined only within the scope of the 1996 Act and not outside it.

35. In the present case, for instance, if the Plaintiffs are aggrieved by the appointment of the learned Arbitrator they might have to seek remedies in terms of Section 11 of the Act. In fact the Plaintiffs seem to assert such a proposition in para 44 of the plaint. If the Plaintiffs are aggrieved by the interim order dated 23rd July 2009 passed by the learned Arbitrator under Section 17 of the 1996 Act, they can appeal against it in terms of under Section 37(2) (b) of the 1996 Act.

Therefore, it is not as if the Plaintiffs do not have a remedy.

The bar under the Specific Relief Act

36. The present suit also appears to be barred under Section 34 SRA. It is not possible to accept the contention of the learned Senior Counsel for the Plaintiffs that prayer (b) in the suit is in the nature of a consequential relief vis-a-vis the declaratory relief under prayer (a). A careful perusal of the said two prayers would reveal that prayer (a) seeks a bare declaration that the letter dated 17th July 2009 invoking arbitration proceedings is invalid. Prayer (b) seeks an injunction restraining the Defendant No.1 from invoking the arbitration clause. Prayer (b) cannot be said to be consequential to prayer (a). The consequential injunction that would arise from prayer (a) is that all further proceedings consequent upon the letter dated 17th July 2009 be set aside as being invalid. In fact, prayer (b) would be hit by Section 5 of the Act since that would be in restraint of the arbitration proceedings. There cannot possibly be an injunction restraining the Defendant No.1 from invoking the arbitration agreement particularly where it is not the case of the Plaintiffs that the arbitration agreement either does not exist or is otherwise vitiated in law. The prayer (c) is for an injunction in respect of a matter which is covered by the arbitration clause. Resultantly the suit as framed is really for a bare declaration in terms of prayer (a) and that is clearly barred under Section 34 SRA.

37. Therefore, the prayers in the suit are not capable of being granted by this Court. There is an express bar in terms of Section 9 CPC to this Court entertaining the suit.

38. For all of the aforementioned reasons, the plaint is rejected in terms of Order VII Rule 11 (d) CPC. The suit is accordingly does not survive. The pending application stands disposed of.

S. MURALIDHAR, J.

AUGUST 18, 2009
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