

REPORTED

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% DATE OF RESERVE: February 26, 2010

DATE OF DECISION: May 25, 2010

+ RFA 219/2009 and CM No.9219/2009 (stay)

THE HANDICRAFTS & HANDLOOMS EXPORTS
CORPORATION OF INDIA LIMITED Appellant
Through: Mr. Amrendra Saran, Sr. Advocate
with Mr. Amit Kumar, Mr. Somesh
Chandra and Ms. Rekha Bakshi,
Advocates

versus

ASHOK METAL CORPORATION & ANR. Respondents
Through: Mr. D. Moitra, Advocate

CORAM:
HON'BLE MS. JUSTICE REVA KHETRAPAL

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether judgment should be reported in Digest?

: REVA KHETRAPAL, J.

1. This appeal is directed against the judgment and decree of the learned Additional District Judge dated 21.05.2009 wherein and whereunder the suit filed by the plaintiff, being Suit No.611/2008 was held to be hit by Section 5 of the Arbitration and Conciliation Act, 1996 and hence not maintainable before the Civil Court.

2. The plaintiff, who is the appellant in the appeal, filed a suit for declaration and permanent injunction, inter alia, with the following prayers:-

“a. Pass a decree of declaration that the request for the arbitration made by the defendant No.1 on 18/03/08 bearing reference no.1634 submitted by the defendant No.1 to defendant No.2 as illegal and invalid and the impugned notice issued by defendant No.2 on 20/03/2008 pursuant thereto and/or relating thereto as illegal, invalid and void;
b. Pass a decree of declaration that the defendant No.2 has no jurisdiction and initiation of arbitration proceeding vide its letter dated March 20, 2008 is illegal, invalid and void;
c. Pass a decree of permanent injunction against defendant No.1, its agent, sole proprietor and employees etc. from continuing to pursue the reference of arbitration and/or commence arbitration proceedings;
d. Pass a decree of permanent injunction prohibiting defendant No.2, its agent, officers and employees, etc. from acting upon and commencing any proceedings pursuant to the impugned notice no. ref. no. ICA/1634/AC/1631 dated 20/03/2008.”

3. The facts as alleged in the plaint are as follows:-

- (i) The plaintiff, a Government company within the meaning of Section 617 of the Companies Act, 1956, had entered into an agreement with the defendant No.1, which is the sole proprietary concern of one Mr. Kishore Jain at Mumbai, involved in the business of bullion (gold and silver), jewellery, diamonds, etc., on the 1st day of October, 1998, whereby the defendant No.1 was appointed as the General Sales Representative of the plaintiff for imported gold and silver for delivery at Ahmedabad.

- (ii) The said agreement contained an arbitration clause, being Clause No.14 of the Agreement, which is as under:-

“14. DISPUTE:

The jurisdiction for all disputes covered under the agreement shall be Indian Council for Arbitration, Mumbai (India). The Indian Arbitration Act, 1940 and the rules there under any statutory modifications thereof for the time being in force shall be applied under this agreement.”

- (iii) As per the terms and conditions of the agreement, the defendant No.1 was to be paid 25% of the premium earned by the plaintiff on the import of gold and silver under the OGL scheme for delivery at Ahmedabad. The said contract was extended from time to time and finally it came to an end on 31st March, 2006.
- (iv) On 30.03.2007, the plaintiff got issued a legal notice to the defendant No.1 through its counsel wherein the plaintiff directed the defendant No.1 to remove the logo of the plaintiff from the letterhead of the defendant No.1.
- (v) The defendant No.1 through its counsel submitted a reply dated 19.04.2007 to the aforesaid legal notice of the plaintiff, stating that the scope of the agreement dated 01.10.1998 had been extended by the plaintiff agreeing to pay commission at 25% of the premium earned in respect of any business brought/introduced by the defendant No.1 to the plaintiff, as the plaintiff's general sales representative.

- (vi) On 22.11.2007, the defendant No.1 got issued a legal notice to the plaintiff seeking payment of the premium earned by the plaintiff between the years 1998 to 2006. The defendant No.1 also sought initiation of arbitration proceedings and named Dr. Justice B.P. Saraf as its arbitrator, requesting the plaintiff to accept him as sole arbitrator.
- (vii) On 11.12.2007, the plaintiff through its counsel replied to the legal notice of the defendant No.1 dated 22.11.2007, clearly rejecting the claim of the defendant No.1, stating that there was no such agreement between the plaintiff and the defendant No.1.
- (viii) On 4th March, 2008, the defendant No.1 approached the Indian Council of Arbitration, Delhi for deciding the dispute through arbitration and filed its statement of claim purportedly based on the agreement dated 01.10.1998, seeking a recovery of Rs.8 crores (approximately) from the plaintiff.
- (ix) On 20.03.2008, the plaintiff received a registered notice of the same date from the Indian Council of Arbitration, Delhi seeking a payment of Rs.5,22,250/- towards the costs and expenses of arbitration proceedings initiated by the defendant No.1. Along with the said notice, a copy of the statement of claim of the defendant No.1 was also forwarded to the plaintiff.

(x) Resultantly, on 04.06.2008, the plaintiff filed a suit bearing Suit No.611/2008 seeking a decree of declaration and permanent injunction that the initiation of the arbitration proceeding is illegal, invalid and void.

(xi) Written statement was filed by the defendant No.1 on 10.07.2008, wherein a preliminary objection was raised with regard to the jurisdiction of the civil court. The defendant No.1 in its written statement also emphatically stated that the dispute shall be adjudicated upon by the Indian Council of Arbitration, being the apex body of arbitration.

4. After the filing of replication by the plaintiff, a preliminary issue was framed by the learned Additional District Judge to the following effect:-

“Whether the suit of the plaintiff is hit by Section 5 of the Arbitration and Conciliation Act, 1996?”

5. After hearing the counsel for the parties, the suit, as stated above, was held to be hit by Section 5 of the Arbitration and Conciliation Act and, as such, not maintainable before the Civil Court. Aggrieved by the aforesaid findings of the learned Additional District Judge, the present appeal was preferred by the plaintiff.

6. Thus, the sole question arising in the instant appeal is as to whether the jurisdiction of the Civil Court is barred under Section 5 of the Arbitration and Conciliation Act, 1996 in a case where the plaintiff alleges that the arbitration agreement is null and void.

7. I have heard Mr. Amrendra Saran, the learned senior counsel for the plaintiff-appellant and Mr. D. Moitra, the learned counsel for the defendants-respondents at some length.

8. The learned senior counsel for the appellant contended that clause 14 of the agreement between the parties is apposite, which merely says that the jurisdiction for all disputes covered under the agreement shall be with the Indian Council of Arbitration, Mumbai (India). There is no Indian Council of Arbitration in Mumbai and since the Indian Council of Arbitration at Delhi has not been conferred power under the alleged arbitration agreement to proceed with the matter and conduct arbitration proceedings, Clause 14 of the agreement is void, as both the parties were under mistake as to a matter of fact, viz., the non-existence of the Indian Council of Arbitration at Mumbai.

9. Reliance is placed by Mr. A. Saran, the learned senior counsel for the appellant, on Section 20 of the Contract Act and illustration (a) thereof in support of his contention that where the parties to an agreement are under a mistake as to a matter of fact, the agreement is void. Section 20 of the Act lays down as under:-

“20. Agreement void where both parties are under mistake as to matter of fact.— Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

Explanation.— An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement, is not to be deemed a mistake as to a matter of fact.

ILLUSTRATIONS

(a) A agrees to sell to B a specific cargo of goods supposed to be on its way from England to

Bombay. It turns out that, before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of the facts. The agreement is void.”

10. It is further contended by the learned senior counsel for the appellant that the learned Additional District Judge erred in coming to the conclusion that the suit is barred by the provisions of Section 5 of the Act, in that the learned Additional District Judge completely ignored the dicta laid down by the Supreme Court in ***SBP & Co. vs. Patel Engineering Ltd. and Anr.***, (2005) 8 SCC 618, wherein the Supreme Court in paragraphs 19 and 39 held as under:-

Para 19

*“19. It is also not possible to accept the argument that there is an exclusive conferment of jurisdiction on the arbitral tribunal, to decide on the existence or validity of the arbitration agreement. Section 8 of the Act contemplates a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement, on the terms specified therein, to refer the dispute to arbitration. A judicial authority as such is not defined in the Act. It would certainly include the court as defined in Section 2(e) of the Act and would also, in our opinion, include other courts and may even include a special tribunal like the Consumer Forum (See ***Fair Air Engineers (P) Ltd. and Anr. v. N.K. Modi***). When the defendant to an action before a judicial authority raises the plea that there is an arbitration agreement and the subject matter of the claim is covered by the agreement and the plaintiff or the person who has approached the judicial authority for relief, disputes the same, the judicial authority, in the absence of any restriction in the Act, has necessarily to decide whether, in fact, there is in existence a valid arbitration agreement and whether the dispute that is sought to be raised before it, is covered by the arbitration clause. It is difficult to contemplate that the judicial authority has also to act mechanically or has merely to see*

*the original arbitration agreement produced before it, and mechanically refer the parties to an arbitration. Similarly, Section 9 enables a Court, obviously, as defined in the Act, when approached by a party before the commencement of an arbitral proceeding, to grant interim relief as contemplated by the Section. When a party seeks an interim relief asserting that there was a dispute liable to be arbitrated upon in terms of the Act, and the opposite party disputes the existence of an arbitration agreement as defined in the Act or raises a plea that the dispute involved was not covered by the arbitration clause, or that the Court which was approached had no jurisdiction to pass any order in terms of Section 9 of the Act, that Court has necessarily to decide whether it has jurisdiction, whether there is an arbitration agreement which is valid in law and whether the dispute sought to be raised is covered by that agreement. There is no indication in the Act that the powers of the Court are curtailed on these aspects. On the other hand, Section 9 insists that once approached in that behalf, "the Court shall have the same power for making orders as it has for the purpose of and in relation to any proceeding before it". Surely, when a matter is entrusted to a Civil Court in the ordinary hierarchy of Courts without anything more, the procedure of that Court would govern the adjudication (See **R.M.A.R.A. Adaikappa Chettiar and Anr. v. R. Chandrasekhara Thevar**)."*

x x x x

Para 39

"39. It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense, whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and

obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the arbitral tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral tribunal.”

11. Mr. Amrendra Saran contended that the case of the appellant is also covered by the judgment of the Supreme Court in ***Shin-Etsu Chemical Co. Ltd. Vs. M/s. Aksh Optifibre Ltd. and Anr., 2005 (6) SCALE 561***. Reference in particular was made by him to paragraph 43 and paragraphs 54 and 55 of the dissenting judgment in the said case, rendered by Justice Y.K. Sabharwal (as His Lordship then was), which read as follows:-

Para 43

“43. The traditional approach has been to allow a court, where a dispute has been brought despite an arbitration agreement, to fully rule on the existence and validity of the arbitration agreement. This approach would ensure that the parties are not proceeding on an invalid agreement as this would be a fruitless exercise involving much time and expenditure. In some countries, however, the traditional approach has changed. The liberal approach which seems to be gaining increasing

popularity in many legal systems both statutorily as well as through judicial interpretation is to restrict the review of validity of arbitration agreement at a prima facie level. For final review the parties may raise issue before arbitral forum or post award.”

Para 54

*“54. In **Rio Algom Ltd. v. Sammi Steel Co. Ltd.**, Ontario Court of Justice, General Division (Year book of Commercial Arbitration, Vol. XVIII, 1993, Page 166) dealt with Article 16 of the UNCITRAL Model Law dealing with the competence of arbitral tribunal to rule on its jurisdiction which reads as under:*

"Article 16. Competence of arbitral tribunal to rule on its jurisdiction.

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request,

within 30 days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award."

Para 55

"55. In pursuance of an arbitration agreement, one of the parties referred the dispute to the arbitrator whereas the other party commenced an action before the court challenging the jurisdiction, of the arbitrator to arbitrate the issues and for an order staying the arbitration proceedings. The Court ordered the trial of issues raising matters of the contract interpretation affecting arbitrator's jurisdiction. On appeal, it was held that issues defining the scope of the arbitration agreement, which raise matters of contract interpretation, ought to be resolved by the arbitrators in the first instance before resort to the courts. The Court observed that 'what appears to me of significance is that the Model Law reflects an emphasis in favour of arbitration in the first instance in international commercial arbitrations to which it applies'. The Courts in matters of contract interpretation as such are limited in that they do not appear to have a role in determining matters of law or construction; jurisdiction and scope of authority are for the arbitrator to determine in the first instance, subject to later recourse to set aside the ruling or award. The role of the court before arbitration appears to be confined to determining whether the arbitration clause is null and void, inoperative or incapable of being performed (Article 8), if not it is mandatory to send the parties to arbitration. Thus, it was observed that the issue of validity of the arbitration agreement is to be determined by the court. However, there is no reference as to whether the court should take a prima facie view or a final view."

12. Reliance was also placed by the learned senior counsel for the appellant on the judgment of the Supreme Court in ***N. Radhakrishnan***

vs. M/s. Maestro Engineers & Ors., 2009 (13) SCALE 403 and to the judgments of this Court in *Lucent Technologies Inc. vs. ICICI Bank Limited and Ors., MANU/DE/2717/2009, Punjab State Electricity Board vs. M/s. Vee Kay General Industries, 2008 I AD (DELHI) 98* and *Ministry of Sound International Ltd. Vs. Indus Renaissance Partners Entertainment Pvt. Ltd., 156 (2009) DLT 406* to contend that the suit is not hit by the bar of Section 5 of the Act and is maintainable.

13. The learned counsel for the respondents, on the other hand, in support of the contention of the respondents that the suit is hit by Section 5 of the Act relied upon the decisions rendered in the cases of *KV Aerner Cementation India Ltd. Vs. Bajranglal Agarwal & Anr. 2001 (3) RAJ 414 (SC)*, *Hindustan Petroleum Corpn. Ltd. Vs. M/s. Pinkcity Midway Petroleums JT 2003 (6) SC 1*, *Shree Subhlaxmi Fabrics Pvt. Ltd. Vs. Chand Mal Baradia and Ors. JT 2005 (11) SC 155*, *United India Insurance Co. Ltd. Vs. M/s. Kumar Texturisers and Anr. AIR 1999 Bombay 118*, *Oval Investment Pvt. Ltd. Vs. Indiabulls Financial Services 2009 (165) DLT 652* and *Shree Krishna Vanaspati Industries (P) Ltd. Vs. Virgoz Oils & Fats PTE Ltd.*

14. In the case of *KV Aerner Cementation India Ltd. Vs. Bajranglal Agarwal & Anr., 2001 (3) RAJ 414 (SC)*, a three-Judge Bench of the Supreme Court affirmed the order of the learned Single Judge of Bombay High Court holding that in view of Section 5 of the Arbitration and Conciliation Act read with Section 16 thereof, the Civil Court has no

power to pass any injunction against the arbitral proceeding. The relevant part of the said judgment is set out hereinbelow:-

“1. These special leave applications are directed against an order of a learned Single Judge of Bombay High Court refusing to interfere with an order of the Civil Court vacating an interim order of injunction granted by it earlier. The suit in question had been filed for a declaration that there does not exist any arbitration clause and as such the arbitral proceedings are without jurisdiction. The learned Single Judge of Bombay High Court came to hold that in view of Section 5 of the Arbitration and Conciliation Act, 1996 read with Section 16 thereof since the arbitral Tribunal has the power and jurisdiction to make rule on its own jurisdiction, the Civil Court would not pass any injunction against an arbitral proceeding.

2. Mr. Dave, the learned Senior Counsel appearing for the petitioner contends that the jurisdiction of the Civil Court need not be inferentially held to be ousted unless any statute on the face of it excludes the same and judged from that angle when a party assails the existence of an arbitration agreement, which would confer jurisdiction on an arbitral Tribunal, the Court committed error in not granting an order of injunction. There cannot be any dispute that in the absence of any arbitration clause in the agreement, no dispute could be referred for arbitration to an arbitral Tribunal. But, bearing in mind the very object with which the Arbitration and Conciliation Act, 1996 has been enacted and the provisions thereof contained in Section 16 conferring the power on the arbitral Tribunal to rule on its own jurisdiction including ruling on any objection with respect to existence or validity of the arbitration agreement, we have no doubt in our mind that the Civil Court cannot have jurisdiction to go into that question. A bare reading of Section 16 makes it explicitly clear that the arbitral Tribunal has the power to rule on its own jurisdiction even when any objection with respect to existence or validity of the arbitration agreement is raised and a conjoint reading of Sub-section (2), (4) and (6) of Section 16 would make it

clear that such a decision would be amenable to be assailed within the ambit of Section 34 of the Act. In this view of the matter, we see no infirmity with the impugned order so as to be interfered with by this Court. The petitioner who is a party to the arbitral proceedings may raise the question of jurisdiction of the Arbitrator as well as the objection on the ground of non-existence of any arbitration agreement in the so-called dispute in question and such an objection being raised, the Arbitrator would do well in disposing of the same as a preliminary issue so that it may not be necessary to go into the entire gamut of arbitration proceedings.”

15. In the case of ***Hindustan Petroleum Corpn. Ltd. Vs. M/s. Pinkcity Midway Petroleums***, ***JT 2003 (6) SC 1***, there was a petroleum dealership agreement between the appellant Corporation and the respondent outlet. Disputes having arisen between the parties, the appellant Corporation discontinued supplies to the respondent. The respondent filed a civil suit challenging the action of the appellant. An application under Section 8 of the Arbitration and Conciliation Act, 1996 read with Section 5 thereof was filed by the appellant for reference of the disputes to an Arbitrator pursuant to an arbitration clause in the agreement. The Civil Court dismissed the said application of the appellant. An appeal filed therefrom was dismissed by the High Court. On an appeal having being preferred to the Supreme Court, the Supreme Court held that the Courts below had erred in dismissing the application of the appellant and that the Civil Court had no jurisdiction to entertain the suit in view of Section 16 of the Act which empowers the Arbitral Tribunal to rule on its own jurisdiction, including rule on any objection with respect to the existence or validity of the arbitration agreement.

16. In the case of *Shree Subhlaxmi Fabrics Pvt. Ltd. Vs. Chand Mal Baradia and Ors.*, *JT 2005 (11) SC 155*, the Supreme Court, while holding that Section 5 of the Act clearly indicates the legislative intent to minimize the supervisory role of Courts to ensure that intervention of the Court is minimal, upheld the order of the Civil Court at Calcutta declaring that it had no jurisdiction to try the suit since arbitration proceedings had already begun, and the Civil Court should not interfere with the functioning of the Arbitrator.

17. In the case of *United India Insurance Co. Ltd. Vs. M/s. Kumar Texturisers and Anr.*, *AIR 1999 Bombay 118*, the Bombay High court, while dealing with a petition seeking a declaration that no disputes existed between the petitioner and the respondent No.1 and a prayer for injunction to restrain the respondent No.2 to proceed with the arbitration proceedings, held that considering the express language of Section 5 of the Act of 1996 and in the absence of the case falling within the purview of Sections 14(2) or Section 34 or Section 37(2), which are the only three Sections which basically confer power on the Court to intervene in the matter, the Court will have no jurisdiction to entertain the petition as constituted.

18. In the case of *Oval Investment Pvt. Ltd. Vs. Indiabulls Financial Services*, *2009 (165) DLT 652*, it was held that barring Section 9 of the 1996 Act under which the Court may pass an interim order even before the commencement of the arbitral proceeding, the Court's power to interfere with arbitration proceedings is indeed very limited. Thus, the

Court comes into the picture only at two stages, viz., (i) under Section 37(2)(a) of the 1996 Act whereunder 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 and under Section 37(2)(b) against an interim order passed by the Arbitrator under Section 17 of the 1996 Act either granting or refusing interim relief, and (ii) under Section 34(2) which provides for challenge to the award passed by the Arbitrator inter alia on the ground that the arbitration agreement is not 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 a decision on matters beyond the scope of submission to arbitration. It was also held that under Section 33 of the Act of 1940, the Arbitrator could examine the question of the existence or validity of the arbitration agreement. Section 16 of the present Act not only preserves this power of the Arbitrator, but in fact expands it.

19. In the case of *Shree Krishna Vanaspati Industries (P) Ltd. Vs. Virgoz Oils & Fats PTE Ltd.*, the Delhi High Court, while ruling upon the maintainability of the suit filed by the plaintiff, seeking a declaration that initiation of arbitration proceedings was malafide, illegal, null and void ab initio and an injunction against the defendants from proceeding with the arbitration on the basis of sales contracts which contained an arbitration clause, held that the question whether there is an agreement in writing so as to bring an arbitration clause into operation cannot be permitted to be adjudicated in the suit. Referring to the judgment of the

Supreme Court in ***Bhatia International vs. Bulk Trading S.A. 2002 (4) SCC 105***, it was held that the spirit of change in the arbitration law, even independently of ***Bhatia International***, was to minimize the intervention of the Court in arbitration proceedings and to expedite the same. Significantly, it was observed:-

“If the suits as the present one are to be entertained, it would give tool in the hands of the party who is interested in delaying the arbitration (as one party is generally found to be) to in every case of arbitration first institute a suit for determination of validity thereof.”

20. A look now at the relevant provisions of the Arbitration and Conciliation Act, 1996. Sections 5, 8 and 16 of the said Act, for the sake of ready reference are reproduced hereinbelow:

“5. Extent of judicial intervention.–
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.

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 so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

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

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

16. Competence of arbitral tribunal to rule on its jurisdiction.— (1) *The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose, –*

(a) *an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and*

(b) *a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.*

(2) *A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed , or participated in the appointment of, an arbitrator.*

(3) *A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.*

(4) *The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.*

(5) *The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.*

(6) *A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.”*

21. A conjoint reading of Sections 5, 8 and 16 of the Act, in my view, point to the legislative intent that the Civil Court must keep well away from the turf of arbitration proceedings. Section 9, Section 37 and Section 34 are the only Sections whereunder the Civil Court is allowed to interject. The intervention of the Civil Court under Section 9 of the

Act is, however, confined to the domain of interim orders alone and that too, with a view to ensure preservation of the property which forms or may be forming the subject matter of the arbitration proceedings. Sections 37 and 34 invest the Civil Court with appellate powers in a manner of speaking. Indubitably, the Civil Court also entertains applications under Sections 8 and 11, but this is in consonance with the provisions of the Act itself. Thus, simply because while interpreting Sections 8 and 11 of the Act, it has been held by the Supreme Court that the Court before referring the parties to arbitration, must satisfy itself of the existence and validity of the arbitration agreement, is not reason enough to hold that a suit for the declaration of the same relief would also be maintainable. There is no provision in the Act enabling the filing of such a suit. It also cannot be lost sight of that an application under Section 8 is filed in a case where a suit is already before the Court; while an application under Section 11 is envisaged by the Act merely for the reference of the disputes to arbitration by appointment of the Arbitrator. Thus, in my considered opinion, merely because the Court must satisfy itself about the existence and validity of an arbitration agreement when faced with an application under Section 11 of the Act or one under Section 8 of the Act, is not good enough reason to hold that it would be open to a party to the arbitration agreement to file a suit challenging the validity or existence of the arbitration agreement.

22. The aforesaid position of law is no longer susceptible to challenge after a Bench of three-Judges of the Supreme Court in ***KV Aerner***

Cementation India Ltd. (supra) has laid down that it is not open to the Civil Court to go into the question of non-existence of an arbitration agreement in a suit for declaration, both in view of the stringent provisions of Section 5 of the Arbitration Act and the power bestowed upon the Arbitral Tribunal to rule on its own jurisdiction by Section 16 of the Act, more so, as the decision of the Arbitral Tribunal would be amenable to be assailed within the ambit of Section 34 of the Act.

23. The reliance placed by the learned senior counsel for the appellant on *SBP & Co. (supra)* and *Shin-Etsu Chemical Co. Ltd. (supra)* do not further the case of the appellant, inasmuch as the observations in *SBP & Co. (supra)* are in relation to an application under Section 11 of the Act. In *Shin-Etsu Chemical Co. Ltd. (supra)*, a suit as in the present case had been filed, but the maintainability of the said suit was not in question, and hence the said judgment cannot be said to be a judgment on the maintainability of such a suit. The Supreme Court in the said case only adjudicated upon the nature of the order on an application under Section 45 of the Act, ruling by a majority of 2:1 that the findings recorded by the Court on such an application must be viewed as prima facie and not final. As far as reliance on the judgment in *N. Radhakrishnan (supra)* is concerned, the observations made in the said case were in the context of an application under Section 8 of the Act in a case where there were allegations of fraud and serious malpractices. In the present case, no such application is under consideration nor there are allegations of fraud and serious malpractices.

24. In the case of *Ministry of Sound International Ltd. (supra)*, all that was held was that an arbitration clause does not prohibit filing of a civil suit. The contesting party always has the option to continue with a civil proceedings and give up the right to enforce the arbitration clause. The plaintiff takes a risk when he invokes the jurisdiction of a Civil Court in spite of an arbitration clause. Thereafter, it is the wish and will of the defendant which determines whether civil proceedings should continue or the parties should be relegated to arbitration. The ratio of this decision has no application to the facts of the present case, where the Court was considering the provisions of Section 8/45 of the Arbitration Act, 1996.

25. Likewise, the case of *Punjab State Electricity Board (supra)* is clearly distinguishable as in the said case the dispute raised in the suit was whether the original contract was superseded by a subsequent agreement, and pursuant to the said agreement whether or not the parties had discharged each other from their reciprocal obligations under the original contract. It was rightly held that such a dispute cannot form the subject matter of an arbitration agreement.

26. It may also be noted at this juncture that the contention of the appellant that the agreement is void being hit by the provisions of Section 20 of the Contract Act may well be raised before the Arbitral Tribunal and I find nothing to preclude the appellant from doing so in the arbitration proceedings already pending. It is not the case of the appellant that it is not open to the appellant to take the pleas taken in the

present suit before the Arbitral Tribunal. The contention of the appellant, on the other hand, is that it would be cumbersome and expensive for the appellant to resort to the arbitral process. I am afraid this contention can be of no avail to the appellant. Even assuming that it would be cumbersome and expensive for the appellant to go to arbitration, the appellant cannot be allowed to circumvent the arbitral process on this ground alone. Even otherwise, the decision of the Arbitrator would be amenable to be assailed by resorting to the provisions of Section 34 of the Act.

27. There is also no merit in the contention of the appellant that without an application under Section 8 of the Act, it was not open to the Civil Court to hold that the suit was not maintainable. The Courts are meant to carry out and implement the mandate of the legislature. The Legislature's explicit mandate is that judicial intervention be not allowed to circumvent dispute resolution through arbitration. The respondents, according to the appellant itself, have already set the arbitral process in motion and an Arbitrator has been appointed, who has called upon the appellant to file its statement of claim. In such circumstances, to state that the Civil Court must await the filing of an application under Section 8 of the Act by the party who has already set the arbitral machinery in motion would be hyper-technical to say the least.

28. There is yet another reason which weighs with me in holding that the instant suit is not maintainable. The relief of declaration and injunction as prayed for in the plaint falls within the Specific Relief Act

and the settled position of law is that such relief can be availed of by a party only when there is no other equally efficacious alternative remedy available to the said party. Indubitably, in the instant case, the appellant can avail itself of the remedy of taking the pleas taken by it in the instant case before the Arbitral Tribunal and this, in my view, must be termed an efficacious alternative remedy.

29. To conclude, the Arbitral Tribunal, as held by the Supreme Court in *KV Aerner Cementation India Ltd. (supra)*, is endowed with ample power and jurisdiction to rule on its own jurisdiction and it would not, therefore, be open to the Civil Court to pass an injunction against an arbitral proceeding in the teeth of the provisions of Section 5 of the Arbitration and Conciliation Act, 1996 and Section 16 thereof. To hold otherwise, would be to render otiose the provisions of Section 5 and Section 16 of the Act and to defeat the purpose of the enactment itself. Civil Courts would, therefore, be well advised to steer clear of the arbitral process, leaving only their door ajar to the aggrieved party for the purpose of interim orders, appeals, etc. Any other view, in my opinion, would through open the flood gates of pre-arbitral litigation, and in each and every case the party interested in delaying the arbitration proceedings would effectively resort to a civil suit as an adjudicatory mechanism for adjudging the existence and validity of the arbitration agreement and the jurisdiction of the Arbitral Tribunal. Needless to say, appeals and counter-appeals therefrom would effectively ensure that the

entire alternate dispute resolution system of arbitration is rendered ineffacious, cumbersome, expensive and dilatory.

RFA 219/2009 and CM No.9219/2009 are accordingly dismissed as being without merit.

**REVA KHETRAPAL
(JUDGE)**

**May 25, 2010
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