

IN THE HIGH COURT OF BOMBAY AT GOA**APPLICATION FOR APPOINTMENT OF****ARBITRATOR NO.6 OF 2014**

1. Mr. Peter Lovett,
son of Mr. Charles Edwin Lovett,
British National, aged 66 years,
and his brother.

2. Mr. John Lovett,
son of Charles Edwin Lovett,
British National, aged 58 years,

Both residents of
57, Eastcote Grove,
Southend-on-Sea,
Essex-SS2 4QA, England.

..... Applicants.

V/s.

1. M/s Averina International
Resorts Pvt. Ltd.,
A Company incorporated under
the Companies Act, 1956,
having Office at Mobor Beach,
Cavelossim, Goa 403731.

2. M/s. Trustlink International,
A Trust registered under No.21,
in Book IV, Vol. II, at pages 178 – 196,
dated 01.07.2002, with the Sub-Registrar,
Margao, Goa No.5 & 6,
2nd floor,
Garden View Apartments,
Margao, Goa.

3. M/s. First National Trustee
Company Pvt. Ltd., (FNTC),
309, Regency Enclave,
4, Magrath Road,
Near Municipal Park,
Banguluru 560025.

..... Respondents.

Mr. Shivan Desai and Mr. Jatin Ramaiya, Advocates for the applicants.

Mr. J. Samuel with Mr. S. Devdas and Mr. Amay Phadte, Advocates
for the respondents.

CORAM :- F. M. REIS, J.

DATE :- 18th December, 2015

ORAL ORDER :-

Heard Mr. Shivan Desai, learned Counsel appearing for
the applicants and Mr. J. Samuel, learned Counsel appearing for the
respondents.

2. This is an application under Section 11(6) of the
Arbitration and Conciliation Act, 1996 for appointment of an arbitrator
to adjudicate the disputes between the parties.

3. It is the case of the applicants that the applicants who are
United Kingdom Nationals, entered into a Membership Purchase

Agreement dated 19th January, 2002 with the respondent No.1. Pursuant to the said agreement, the applicants were entitled to occupy one bed apartment for two weeks, adults (privacy for 2 couples) during the RED season, prescribed by the respondents which is from 14.00 hours of Friday till 10.00 hours of the following Friday at the Averina Beach Club, Mobor Beach, Cavelossim, Goa. It is further their contention that in terms of the said agreement, a sum of Rs. 3,29,000/- was paid towards Holiday Membership Fees. It is further their case that the respondents illegally and arbitrarily had increased the service maintenance charges which were not acceptable to the applicants. It is further their contention that the respondents have also revised the terms and conditions of such Membership without the consent of the applicants, nor seeking any permission with that regard from the applicants. As there was a dispute with regard to the revision of the terms, as well as payment of such maintenance charges, the applicants served a notice on the respondents in terms of the arbitration clause in the agreement for appointment of an arbitrator. The said notice was issued as the petitioner had filed a suit in connection with such disputes and an application was filed in the said suit by the respondents under Section 8 of the Arbitration and Conciliation Act,

1996 claiming that there was an arbitration clause which covered the disputes raised by the applicants and, as such, the applicants were directed to refer the disputes to arbitration. After receipt of the said notice, the respondents sent their reply dated 12/2/2014, inter alia, suggesting the name of an Advocate who is last stated to be based in New Delhi as an Arbitrator. As the parties could not accept the appointment of the sole arbitrator in terms of the clause in the agreement between the parties, the applicants filed the above application for appointment of an Arbitrator in terms of Section 11(6) of the Arbitration and Conciliation Act, 1996.

4. The respondents opposed the said application, essential on the ground that as the applicants are foreign nationals, this Court has no jurisdiction to appoint an Arbitrator as, according to the respondent, as the contract between the parties is governed by the International Commercial Arbitration, and, as such, an Arbitrator has to be appointed by the Honourable Chief Justice of India. It is further their case that as the agreement between the parties is governed by the International Commercial Arbitration, this Court has no jurisdiction to entertain the above application. The merits of the claim are also

disputed by the respondents which are not relevant for the purpose of examining the present application.

5. During the course of hearing of the above petition, opportunities were given at the request of the learned counsels to explore the possibility to amicably settle the dispute or settle the name of an arbitrator to adjudicate the dispute. But however, it was pointed out that the parties could not arrive at any conclusion to that effect.

6. Shri Shivan Desai, learned Counsel appearing for the applicants has taken me through the Membership Agreement between the parties to point out that the agreement only provides a right to the applicants to occupy a specific block in the Hotel premises of the respondents for a period of two weeks in a year. The learned Counsel has further pointed out that if this is accepted, then such an agreement can, by no stretch of imagination, be covered by an international commercial arbitration, merely because the applicants are foreign nationals. The learned Counsel further points out that the respondents is an Indian Company, having their registered Office in India and, as such, raising such a contention is only to delay the matter and put the

petitioners to unnecessary expenditure. The learned Counsel further points out that even when the notice was issued to the respondents for appointment of an Arbitrator, in the reply sent by the respondents, there was no stand taken that the agreement was governed by an International Commercial Arbitration. The learned Counsel further points out that even at the time of exchanging the names of the Arbitrator, the respondents never pointed out that such proceedings would be governed an an International Commercial Arbitration. The learned Counsel has taken me through the correspondence exchanged between the parties to point out that no such a stand is found therein. The learned Counsel has also pointed out that even whilst filing the application under Section 8 of the Arbitration and Conciliation Act, 1996, there was nothing stated by the respondents to the effect that the arbitration will be governed as an International Commercial Arbitration. The learned Counsel, as such, submits that a fit person be appointed as an Arbitrator to adjudicate the disputes between the parties. In support of his submissions, the learned Counsel has relied upon a Judgment of this Court reported in *AIR 1965 Bombay 114 in the case of Kamani Engineering Corporation Ltd. and ors. vs. Societete De Traction Et. D'Electricite Societe Anonyme, and others.*

7. On the other hand, Mr. J. Samuel, learned Counsel appearing for the respondents has vehemently opposed the above application. The first contention of the learned Counsel is that this Court has no jurisdiction to appoint an arbitrator as, according to him, the jurisdiction is vested on the Hon'ble the Chief Justice of India in terms of Section 11(9) of the said Act of 1996. The learned Counsel has further pointed out that Section 11(9) provides that in case of an appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities. The learned Counsel has, thereafter, taken me through the definition of “international commercial arbitration” in terms of Section 2(f) of the said Act of 1996 to point out that the arbitration in the present case relates to disputes arising out of legal relationships, considered as commercial under the law in force in India and as the applicants are, admittedly, foreign nationals, the dispute in the present case is covered in terms of Section 11(9) of the said Act of 1996. The learned Counsel further points out that on perusal of the terms of the agreement executed between the parties, it clearly provides that the

applicants were entitled to transfer their right to occupy the units in the establishment of the respondents which clearly shows a commercial element in the relationship between the parties. The learned Counsel further points out that this Court would have to take a decision as to whether the dispute is covered by an international commercial arbitration in order to examine whether this Court has jurisdiction to appoint an arbitrator. The learned Counsel further points out that merely because the respondents have filed an application under Section 8 of the said Act of 1996 in the suit filed by the applicants would not, by itself, estop them from raising a contention that the dispute is covered by an international commercial arbitration. The learned Counsel further submits that there is an element of money transfer in the transaction which clearly envisages a commercial element in terms of the laws in India and, as such, the dispute between the parties is covered by an international commercial arbitration.

8. The learned Counsel in support of his submissions, has relied upon the Judgments of the Apex Court reported in (2009) 1 SCC 267 in the case of National Insurance Co. Ltd., v/s Boghara Polyfab Private Ltd.; (2012) 2 SCC 144 in the case of Bharat Rasiklal Ashra

V/s Gautam Rasiklal Ashra and another; (2011)13 SCC 258 in the case of APS Kushwaha (SSI Unit) V/s Municipal Corporation, Gwalior and others; 1999(2) SCC 479 in the case of Sundaram Finance Ltd., V/s NEPC India Ltd.; AIR 1961 SC 232 in the case of Atiabari Tea Co. Ltd., V/s State of Assam; AIR 1983 Bom. 36 in the case of European Grains and Shipping Ltd., V/s Bombay Extractions Pvt. Ltd.; 1994 (4) SCC 541 in the case of R. M. Investments & Trading Co. Pvt. Ltd., V/s Boeing Co.; 1977(2) SCC 670 in the case of Fatehchand Himmatlal & Ors V/s State of Maharashtra; 1989 (4) SCC 259 in the case of Kochi Navigation Inc V/s Hindustan Petroleum Corporation Ltd.; 2008(1) SCC 481 in the case of Citibank N A V/s TLC Marketing PLC and Anr; 2009(1) SCC 91 in the case of Comed Chemicals Limited V/s C.N. Ramchand.

9. I have duly examined the contentions of the learned Counsel and I have also gone through the records and the Judgments relied upon by the learned Counsel appearing for the respective parties. The main objection of the respondents to the appointment of the arbitrator is that this Court has no jurisdiction to appoint an arbitrator as, according to the respondents, the dispute is covered by an

international commercial arbitration and, as such, in terms of Section 11(9) of the said Act of 1996, the Hon'ble the Chief Justice of India or his designate has to appoint an arbitrator. To examine the said contention, it would be appropriate to briefly scan through the agreement between the parties to ascertain the relationship of the parties therefrom.

10. On perusal of the Rules relating to the occupation stipulated by the respondent no.1, the time share membership agreement means the membership agreement by which the company agrees to offer and the applicants agree to subscribe to the membership of the 'Averina Beach' club at Goa at the price and in accordance with the conditions set out in the agreement. The 'exclusive rights of occupation' inter-alia means the beneficial right to occupy and enjoy (and to allow the other to occupy and enjoy) an apartment for the weekly periods referred to in the membership agreement and/or membership certificate. Clause 3.5 of the said agreement further provides that the membership of the ordinary members shall cease upon the transfer of the member's membership certificates subject to the transferee and on the transferee becoming a member. The

agreement further contemplates the conditions to occupy such apartment for a specific week. Clause 8 of the said agreement inter-alia provides that upon the death of a member either his/her/their legal heirs or nominee trustee may apply to dispose of his/her/their exclusive rights of occupation in the like manner. It also provides that any members may apply to dispose of his/her/their exclusive rights of occupation to any person, whether by sale, gift or otherwise by means of the certificate of transfer appearing on the reverse of the membership certificate. Clause 10 of the said agreement further provides that a member may without effecting a transfer, permit any person or persons to take advantage to his/her/their exclusive rights of occupation to which the membership certificate relates and provided that if he wishes to do so he shall give the company not less than 14 days prior notice in writing to do so. Clause 11 of the said agreement reads thus :

**“11. NATURE OF MEMBERSHIP
RIGHT GRANTED TO MEMBER.**

No member shall be considered to be acquiring a property right on entering into a Membership Agreement. Any clause or sub-clause of these Rules of Occupation shall be null and void in

respect of any particular Membership Agreement if the application of that clause or sub-clause would bring any party to this Scheme Documentation or the Agreement itself within the scope of any legislation relating to investment or to property rights in the Country in which that Agreement was entered into. Notwithstanding the fact that any clause or sub-clause of these Rules of Occupation may have become null and void as a result of the application of this sub-clause, all other clauses or sub-clauses of these Rules of occupation shall remain valid and enforceable in their entirety.”

The agreement further stipulates the regulations relating to the occupation of an apartment at such beach resort. Clause 2 of the Membership Purchase Agreement inter-alia provides that the applicants herein have agreed to be bound by the Rules and Regulations contained in the said Rules. In such circumstances, the Rules relating to the right of occupation of the applicants in the resort belonging to the respondents forms part of the said agreement.

11. On analysis of the said terms and conditions and other clauses in the agreement what can be deduced is that the applicants have been given a right to occupy one bed apartment for two weeks (adults) during the red season subject to conditions stipulated therein.

12. The respondents filed their reply inter-alia contending that the application is not maintainable in law and claiming that Annexure -A has been revised on 15.08.2011. It was also contended that the applicants being foreign nationals, the arbitration sought is an international commercial arbitration as one of the parties to the arbitration agreement is a foreign national and that such application would lie only in terms of Section 11(9) of the said Act of 1996. It was further contended by the respondents that reading of the agreement executed between the parties makes it explicit clear that the relationship of the parties arose under a contract and the terms and conditions are commercial under the law in force in India. It was further contended that though the word “commercial” is not defined under the said Act of 1996, but however, the preamble itself shows that the entire Act of 1996 is based on the model law on International Commercial Arbitration adopted by the United Nations Commission on

International Trade Law in 1985 and it further contended that the term 'commercial' must be given a wide meaning to cover the matters arising from all relationships which are commercial in nature and would also include any trade transaction for the supply or exchange of goods or services. It was further submitted that the contractual relationship between the applicants and the respondents is in respect of the services provided by the respondents for valuable consideration under certain agreed terms and conditions which are commercial in nature under the law in India. It would also be appropriate to note the definition of the word “International Commercial Arbitration” in terms of Section 2(1) (f) of the said Act of, 1996 which reads thus :

“International Commercial Arbitration” means

an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is -

(i) an individual who is a national of, or habitually resident in, any country other than India; or

(ii) a body corporate which is incorporated in

any country other than India; or

(iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or

(iv) the Government of a foreign country.

13. On perusal of the said definition, it has two elements, one physical and the other conceptual. The physical element is that one party should be a foreigner namely either a foreign national or resident or a foreign body corporate. The conceptual element is the legal relationship between the parties, contractual or otherwise must be such that it is considered “commercial” under the Indian laws. The fact that the physical element is satisfied in the present case cannot be disputed as the applicants are foreign nationals. The only aspect to be ascertained is whether the conceptual element in the definition stands satisfied. No doubt, the expression 'commercial' has to be construed broadly considering the manifold activities which are an integral part of the international trade today. Even rendering of consultation services for promoting a commercial transaction may be considered to

be a commercial transaction but what has to be examined in the present case is whether on perusal of the terms and conditions and the purchase agreement executed by the applicants herein, any commercial element can be derived from such contractual relationship which could be termed to be 'commercial' in the laws in India. No doubt, it is normally difficult to find an exact meaning to the phrase 'considered as commercial under the law in force in India'. In the present case, neither side is able to point out any particular provisions of law wherein the phrase 'commercial' or matters commercial have been defined. In the present case, as pointed out herein above, the agreement only gives a right to the applicants to occupy the resort for two weeks during the red season. The agreement clearly provides that no interest in the land or in the business of the respondents is created in favour of the applicants. The terms also did not involve the applicants into any business of the resort belonging to the respondents nor allows the applicants to participate in the profit of the respondents by such agreement. The terms of the agreement provide that the applicants have refused to participate in the business of the respondents and/or any contract or any contracts with the respondents in connection with the running of their resort. In fact, the terms of the agreement prima facie,

disclose that the applicants have kept themselves out of any commercial relationship with the respondents. The observations relied upon by Mr. Samuel, learned counsel appearing for the respondents in case of *Atiabari Tea Co. Ltd.* (supra) is in the context of different sequences in the series of operations which constitute trade or commerce in connection with the payment of entry tax for transfer of goods from one State to the other. The said observations cannot be applicable to the facts of the present case considering the relationship between the parties based on the agreement executed between them. Reading Clause 11 referred to herein above, the agreement between the parties clearly provides that any clause or sub- clause of the Rules of occupation shall be null and void in respect of any particular membership agreement if the application of that clause or sub -clause would bring any party to the scheme documentation or the agreement itself within the scope of any legislation relating to investment or to the property rights in the country in which the agreement was entered into. Thus, even assuming any law in India would construe any terms therein to be in the nature of any investment or right to the property such term would be null and void in terms referred to herein above. In such circumstances, it is not open to the respondents to contend that the

relationship between the parties can be termed to be commercial under the laws in India. Merely rendering services to maintain the apartment which does not lead to profit or an investment in the business of the respondents can by no stretch of imagination be considered to be services which could be linked to any commercial relationship between the applicants and the respondents. There is nothing in the agreement prima facie to link the right to transfer the exclusive right to occupy the apartment with services rendered by the respondents based on the agreement executed between the parties.

14. In any event, the applicants are seriously disputing the contention of the respondents that they are governed by an international commercial arbitration. Though the respondents are claiming that on bare perusal of the agreement, there is a commercial relationship between the parties which would clearly mean that the parties are governed by an international commercial arbitration, but however, reading the term as a whole the relationship which prima facie can be drawn on the basis thereof is that it is only a right to occupy an apartment for a period of two weeks which has been reserved for the applicants on payment of maintenance expenses to the

respondents which does not create any commercial relationship between the parties. This disputed question of fact can be examined only after leading evidence in order to consider the actual relationship between the parties. Though Mr. Samuel, learned counsel appearing for the respondents has pointed out that even in the proceedings under Section 11(6) of the said Act of, 1996, this Court can record evidence, if the Court deems fit, I find that it would not be appropriate in the facts of the present case to direct the parties to lead evidence at this stage in order to draw such conclusion. This aspect can be kept open to be decided by the Arbitrator after recording of evidence on its own merits. On bare perusal of the agreement the legal relationship between the parties cannot prima facie be considered "commercial" as per the laws in India.

15. The considerations of this Court while examining an application for appointment of an arbitrator are limited inter-alia to examine whether there is a subsisting arbitration clause and a live claim between the parties. As far as the existence of an arbitration clause to adjudicate the dispute between the parties cannot be disputed. In fact, the records reveal that the applicants had filed a suit

in the Court of the learned Civil Judge, Jr. Division at Margao in connection with the dispute between the parties raised in the present petition. The respondents themselves filed an application under Section 8 of the said Act of 1996, clearly accepting the existence of an arbitrable dispute between the parties. As such, *prima facie*, the respondents cannot resile from their stand and contend that this Court would have to examine the existence or otherwise of an arbitrable dispute which entitles this Court to appoint an arbitrator to adjudicate the dispute between the parties under Section 11(6) of the said Act of 1996.

16. On going through the agreement, I find that the jurisdiction where the arbitration has to take place is in Margao, Goa. Hence, it cannot be disputed that Margao, Goa is within the territorial jurisdiction of this High Court and, as such, the contention of the learned Counsel appearing for the respondents that the applicants have not approached the correct High Court deserves to be rejected.

17. In this context, even the conduct of the respondents would be relevant. The respondents are Indian Companies registered under

the Companies Act, 1956. In the suit filed by the applicants before the learned Civil Judge, Jr. Division, Margao, the respondents contended that the dispute is covered by an arbitration clause and, as such, an application was filed under Section 8 of the said Act of 1996. The learned Counsel appearing for the respondents accepts that an application under Section 8 of the said Act of 1996 is filed in domestic arbitration. It is, however, pointed out by the learned Counsel appearing for the respondents that this by itself, would not defeat the contention of the respondents that the relationship between the parties is covered by an international commercial arbitration. No doubt, there can be no estoppel against law, but, however, the conduct of the respondents in filing the application under Section 8 of the said Act of 1996 and not under Section 45 of the said At of 1996 would clearly disclose that even the respondents assumed that the agreement between the parties was covered by a domestic arbitration. The scope of consideration of an application under Section 45 by the Judicial Authority is different from the consideration of an application under Section 8 of the said Act of 1996. The respondents themselves chose to file an application under Section 8 of the said Act of 1996 which prima facie shows that they accepted that they were governed by the

domestic arbitration and not by an international commercial arbitration as sought to be contended now by the respondents.

18. The decision of the Court on an application under Section 11 of the said Act of 1996 is based on a tentative finding only for the purpose of deciding such application for appointment of arbitrator. Under Section 16 of the said Act of 1996, the arbitrator can also rule on his own jurisdiction. As such, whether the relationship between the parties can be considered to be commercial under the law in India which is seriously disputed by the parties can be examined only after both the parties lead evidence. As such, the issue with that regard can be kept open to be examined by the arbitrator on its own merits after evidence is recorded. On this aspect, the Apex Court in the judgment reported in *(2010) 3 SCC 1* in the case of *Trimex International Fze Limited, Dubai V/s Vedanta Aluminium Limited, India*, has inter-alia held that the forum to examine the relationship between the parties based on an agreement would be an arbitrator. It has been further held that the question of existence of charter party arising in an international commercial petition filed under Section 11 of the said Act of 1996 is the Arbitral Tribunal and not the Hon'ble Supreme Court.

19. Even the Apex Court in the judgment reported in **(2009) 1 SCC 267** in the case of ***National Insurance Company Limited V/s Boghara Polyfab Private Limited***, has observed at paras 22, 22.1, 22.2, 22.3 and 23 thus :

“22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under section 11, the duty of the Chief Justice or his designate is defined in SBP & Co. This Court identified and segregated the preliminary issues that may arise for consideration in an application under section 11 of the Act into three categories, that is (i) issues which the Chief Justice or his Designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.

22.1. The issues (first category) which the Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied under section 11 of the Act, is a party to such an agreement.

22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

(a) Whether the claim is a dead (long -barred) claim or a live claim. (b)

Whether the parties have concluded the contract/ transaction by recording satisfaction of their mutual rights and

obligation or by receiving the final payment without objection.

22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are :

- (i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).
- (ii) Merits or any claim involved in the arbitration.

23. It is clear from the scheme of the Act as explained by this Court in SBP & Co., that in regard to issues falling under the second category, if raised in any application under section 11 of the Act, the Chief Justice/his designate may decide them, if necessary by taking

evidence. Alternatively, he may leave those issues open with a direction to the Arbitral Tribunal to decide the same. If the Chief Justice or his Designate chooses to examine the issue and decides it, the Arbitral Tribunal cannot re-examine the same issue. The Chief Justice/his designate will, in choosing whether he will decide such issue or leave it to the Arbitral Tribunal, be guided by the object of the Act (that is expediting the arbitration process with minimum judicial intervention). Where allegations of forgery/fabrication are made in regard to the document recording discharge of contract by full and final settlement, it would be appropriate if the Chief Justice/his designate decides the issue.”

20. In the present case, as pointed out herein above, whether the relationship between the parties is a commercial or not would have to be examined based on the evidence adduced by both the parties and as such, it would not be appropriate to examine such aspect at this stage which the Arbitral Tribunal can examine after recording of evidence. Thus, the issue as to whether the agreement between the parties can be termed to be commercial would come within the scope of the category wherein this Court can keep the issue open keeping it to the decision of the arbitrator. As already pointed out herein above, as the evidence would have to be recorded to examine the commercial element as contended by the respondents, such issue can be left open for consideration by the arbitrator. But however, as pointed out herein above, prima facie, based on the agreement the relationship culled out there from, I find that there is no commercial relationship between the parties in terms of the provisions of the said Act of 1996.

21. The principles laid down in the judgment of the Apex Court relied upon by Mr. Samuel, learned counsel appearing for the respondents in the case of *Sundaram Finance Limited* (supra) would not be applicable to the facts of the present case as the interpretation of

the provisions of the said Act of 1996 herein have not been arrived at by reading the principles underlying the repealed Arbitration Act, 1940. The judgment of the Apex Court relied upon by the learned counsel appearing for the respondents in the case of ***R. M. Investments and Trading Co. Pvt., Limited*** (supra) is in connection with the agreement for rendering services to a company for promoting and assisting in sales of latter's aircraft in India on payment of compensation. In the present case, there is nothing on record prima facie to show in what way the relationship between the parties would have helped in assisting or promoting the business activities of the respondents. The judgment of the Apex Court relied upon by the respondents in the case of ***M/s Koch Navigation Inc.*** (supra) is also not applicable to the facts of the present case. No doubt, the Act was calculated and designed to subserve the cause of facilitating international trade and promotion thereof by providing for speedy settlement of disputes arising from such trade through the arbitration. But however, the relationship of the parties in the present case has not been established by the respondents to be for facilitating any international trade on the basis of the agreement between the parties. The judgment of the Apex Court relied upon by Mr. Samuel, learned

counsel appearing for the respondents in the case of *Comed Chemicals Ltd.*, (supra) is in the context wherein the MoU between the parties provided that the respondent will work full time with the company at least for 8 years from the date of signing of the agreement. It also invested large amount in the new adventure and paid substantial sum as remuneration to the respondent. It was held therein that the services rendered by such person were inextricably linked with the functions which could be undertaken by a businessman or by a company and such activities form an integral part of his activities and as such, there is an element of commerce in such relationship. It was further noted that the applicant company therein wanted to venture into the field of bio-technology which was not previously traversed by it and the respondent possessed special knowledge and to get benefit of such research, his services were taken. In such facts of the case, it was held that the relationship between the parties was covered by an international commercial arbitration. In the present case, there are no averments to that effect by the respondents nor the agreement would show that the right to occupy the apartment for two weeks was to improve the business of the respondents which could be termed to be a commercial relationship. The judgment of the Apex Court relied upon

by the learned counsel appearing for the respondents reported in **(2011) 13 SCC 258** in the case of ***APS Kushwaha (SSI Unit) V/s Municipal Corporation, Gwalior and others*** would not be applicable to the facts of the present case. The findings with regard to the nature of the agreement entered into between the applicants and the respondents are tentative findings by keeping the issue open about the legal effect of the relationship of the parties based on such agreement and the relevant rules applicable to the parties which are to be examined on its own merits after recording of evidence for the reasons stated herein above. As such, I find, prima facie, that the contention of the respondents that the agreement between the parties is covered by an international commercial arbitration cannot be accepted. This aspect can be examined by the arbitrator on its own merits after evidence is led by the parties in the light of the observations made hereinabove.

22. In view of the above, Justice N. A. Britto, Retired Judge of this Court is hereby appointed as a sole Arbitrator to adjudicate the dispute between the parties. All contentions of the parties on merits, including the aspect of jurisdiction referred to herein above are left open.

At this stage, learned Counsel appearing for the respondents prays for eight weeks' stay of the operation of the order passed today. Learned Counsel appearing for the applicants opposes such a request. In the facts and circumstances of the case, operation of this order is stayed for a period of eight weeks from today.

F.M. REIS, J.

ssm/at*