

particulars of claim set out in Exhibit AA and Exhibit BB to the plaint. The summary suit is based on and arises out of two contracts being the mandate letter dated 4.8.2008 and mandate letter dated 17.11.2008 which are Exhibit B & Exhibit D, respectively, to the plaint. After filing the summary suit, the plaintiffs took out summons for judgment bearing No.24 of 2015 at which stage the present Notice of Motion was taken out by the defendants.

3 It is the case of the applicants/defendants that clause-6 of the aforesaid mandate letter constitutes an arbitration agreement between the parties and therefore, disputes should be referred to Arbitration. Clause-6, the existence of which is not disputed, reads as under :-

“Any and all disputes, controversies or claims arising out of or in connection with this letter, including any questions regarding its existence, validity or termination, shall be referred to Arbitration under and in accordance with the Arbitration and Conciliation Act, 1996. The venue of Arbitration shall be Mumbai.”

4 Section 8 of the said Act prior to the 2015 amendment reads as under :-

“8. Power to refer parties to arbitration where there is an arbitration agreement – [(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party 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."

There were some discussion as to section 8 of the said Act, prior to 2015 amendment (came into force on 23.10.2015) is applicable or as amended was applicable. As mentioned later, I did not have to go into that issue. I am now proceeding on the basis-section 8 as it existed prior to 2015 amendment.

5 The applicants/defendants submitted that provisions of section 8 of the said Act is mandatory in character and once an application is made it is obligatory that the Court refer the parties to arbitration. The applicants relied upon (a)¹ *P.Anand Gajapati Raju & Ors. Vs. P.V.G.Raju & Ors.* (b)² *Kalpana Kothari Vs. Sudha Yadav & Ors.* and (c) ³ *Sundaram Finance Limited Vs. T.Thankam.*

6 It was submitted that in the present case the arbitration clause uses the term "*shall be referred to Arbitration*" and the Supreme Court in the case of ⁴*Jagdish Chander Vs. Ramesh Chander & Ors.* has held that use of the term "*shall be referred to Arbitration*" constitutes an arbitration agreement and where there is a specific and direct expression of intent to have disputes settled by

1 (2000) 4 SCC 539

2 (2002) 1 SCC 203

3 2015 SCC Online SC 147

4 2007 (3) AWC 2402

arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement.

7 According to counsel Shri Joshi for the applicants, in the present case clause-6 is specific and that too a direct expression of intent to have disputes settled by arbitration. Hence, this Court is required to refer parties to arbitration.

8 The counsel also relied upon ⁵*Svenska Handelsbanken Vs. Indian Charge Chrome Ltd.*, ⁶*Economic Development Corporation of Goa, Daman & Diu Limited Vs. Suniwas Builder & Ors.*, ⁷*Olive Healthcare Vs. Lannet Company*, ⁸*Radha Sundar Datta Vs. Mohd. Jahadur Rahim* and ⁹*Swiss Timing Limited Vs. Organising Committee, Commonwealth Games*.

9 This application is resisted by the respondents/plaintiffs on the following two grounds :-

- (a) Under the mandate letters, there is no firm/mandatory intent to refer the disputes to arbitration ; and
- (b) Fraud is not arbitral in cases of domestic arbitration in India.

5 (1994) 2 SCC 155

6 1997 (3) Bom C.R.299

7 2012(3) Bom. C.R.36

8 1959 SC 24

9 (2014) 6 SCC 677

10 The counsel for the respondents/plaintiffs Shri Andhyarujina elaborated on the two grounds of resistance as under :-

(a) Under the mandate letters there is no firm/mandatory intent to refer the present dispute to arbitration :- It was submitted that in the mandate letters, it is apparent that the parties were not ad idem insofar as selection of arbitration only as a form of dispute resolution. This is because the mandate letters also contained an exclusive jurisdiction/Litigation clause, i.e, Clause-7 which reads as under :-

"7 This letter shall in all respects be governed by and construed in accordance with laws of India. The Adviser and by its counter signature of to/on this letter, the company hereby irrevocably agrees that courts of India are to have exclusive jurisdiction to settle any disputes arising out of or in connection with this letter and accordingly any proceedings arising out of or in connection with this letter shall be brought forth in such courts."

(hereinafter referred to as litigation clause)

11 The counsel submitted that this clause-7 is contradictory to clause-6 which is reproduced earlier and in view of the contradictory dispute resolution clauses contained in the same contract between the parties, the parties had not arrived at a definite conclusion that the dispute between them must be referred to arbitration only and that they should not be resolved by any other method of dispute resolution. The counsel submitted that if the parties had intended to adopt arbitration as the only method of resolution of dispute, then, there was no room for clause-7, i.e., the

litigation clause. It was further submitted that simultaneous occurrence of an arbitration clause and litigation clause in the same contract would suggest that the parties intended to refer their dispute to arbitration only if they so wished to do so, i.e., arbitration was optional and not mandatory.

12 Relying upon the judgment of the Apex Court in ¹⁰*Wellington Associates Ltd. Vs. Kirti Mehta*, the counsel for the respondent submitted that the Apex Court has laid down that in cases where it appears that the parties have agreed that they “could also” go to arbitration implies that a fresh consent would be necessary in such case and in such circumstances, no firm/mandatory intent could be gathered from the contract between the parties. The counsel submitted, relying upon the said judgment, that under Section 7 of the said Act, it is essential that arbitration agreement must mandatorily require appointment of arbitrators and in the absence of such mandatory/firm intent, the Court should refuse to refer the dispute to arbitration.

13 Shri Andhyarujina also submitted that in the *Wellington Associates* (supra) the arbitration clause contained therein postulated that the parties “may” go to suit or “may also” go to arbitration. However, in the present case the arbitration clause and the litigation

¹⁰ AIR 2000 SC 1379

clause contained in the mandate letters, both, postulates that the parties “shall go to arbitration” and that the parties “shall go to litigation”. The Court therefore, must apply the test laid down in *Wellington Associates* (supra) while deciding an application under Section 8 of the said Act.

14 Mr. Andhyarujina also relied upon a subsequent decision of the Madras High Court in ¹¹*M/s.Sankar Sealing Systems Pvt. Ltd. V/s. M/s.Jain Motor Trading Co.*, where the Court had the occasion to consider and interpret an arbitration clause and an exclusive jurisdiction clause contained in the same contract. He submitted that the Court came to a conclusion that where an arbitration clause under jurisdiction/litigation clause are there in the same contract, it was apparent that the arbitration clause was not a mandatory requirement under the contract and that it was not the intention of the parties that arbitration was to be the sole remedy.

15 The respondents/plaintiffs also relied upon a judgment of a single Judge of this Court in the case of ¹²*IND Synergy Ltd. & Ors. Vs. Clearwater Capital Partners Singapore Fund III Pvt. Ltd. & Anr.* and submitted in order to refer a dispute under Section 8 of the said Act, the parties must have a firm intention that the dispute should be

¹¹ AIR 2004 MAD 127

¹² Unreported judgment of this court in Notice of Motion 2099/2010 in Suit No.1916 of 2010 decided on 6.9.2010 (R.Y.Ganoo,J)

referred to arbitration and a slightest deviation by the parties from their intention to refer a dispute to arbitration would lead to non compliance of requirement of section 8 of the said Act. The counsel submitted that the learned single Judge had concluded while construing the arbitration clause and litigation clause in the same contract that it was not possible to arrive at a conclusion that the only intention of the parties was to refer the dispute between them to arbitration.

To conclude, the counsel submitted that clause-6 and clause-7 reproduced above were contradictory to each other which would mean that the parties were not ad idem of resolving the dispute by way of arbitration and hence the Court must not tilt in favour of arbitration clause by ignoring what is stated in the litigation clause. However, it was agreed by both the counsels that whether parties were ad idem in respect of resolving the dispute by way of arbitration only or whether an arbitration clause and litigation clause were contradictory to each other or whether there was an ambiguity or whether the litigation clause only gave an additional right which was not in derogation of the arbitration clause or whether the litigation clause had an overriding effect on the arbitration clause etc. would entirely depend on the wordings of each clause. The counsel also agreed that the judgments relied upon by them are only indicative of the way the Court should analyze the clauses and in the

end it would depend upon the wording and the language of each clause and the intent has to be interpreted into the contract.

16 (b) Fraud is not arbitral in case of domestic arbitration in India :-

It was submitted that the present dispute cannot be referred to arbitration because the applicants/original defendants had raised serious allegations of fraud in the performance of the suit contract. It was submitted that in the affidavit in reply to the Summons for Judgment (filed after this Notice of Motion was taken out), the applicants/defendants have averred as under :-

“..... It is submitted that the entire contract between the parties has been vitiated by the fraudulent and illegal activities of the plaintiff and its Chairman and Managing Director. Any direction for payment would tantamount to rewarding the plaintiff for its criminal activities and would be opposed to public policy and morality. Thus the Defendant has correctly refused to make any payments to the plaintiff.....”

17 The counsel relied upon the judgment of the Apex Court in ¹³*N.Radhakrishnan Vs. M/s.Maestro Engineers & Ors.* to submit that when a dispute raises allegation of fraud it would be in the interest of justice that such a matter should be tried in a Court of law rather than by an Arbitrator because Court of law would be more competent and would have the means to decide such complicated matters. It should be noted that a subsequent decision delivered by a single Judge of the Hon'ble Supreme Court in the case of ¹⁴*Swiss Timing*

¹³ (2010) 1 SCC 721

¹⁴ (2014) 6 SCC 677

Limited Vs. Organising Committee, Commonwealth Games 2010, Delhi, held that the judgment in *N.Radhakrishnan* (supra) was per incuriam. The counsel submitted that *Swiss Timing* (supra) does not lay the correct law and therefore, ought not to be followed because *Swiss Timing* was delivered by a single Judge; and (b) the decision rendered in ¹⁵*HPCL Vs. Pinkeity Midway Petroleums* and ¹⁶*P Anand Gajapathi Raju & Ors. Vs. P.V.G.Raju (Died) and Ors.*, which the single Judge had considered to hold *N.Radhakrishnan* (supra) per incuriam, did not deal with the situation where allegation of fraud has been raised etc.

18 Having heard the counsel extensively, I am inclined to yield in favour of arbitration clause no.6 and ignore what is stated in the litigation clause no.7 of the mandate letters and the reasons are as under.

19 The conditions which are required to be satisfied under sub-section 1 & 2 of section-8 before the Court can exercise its powers are :-

(a) There is an arbitration agreement; (b) party to the agreement brings an action in the Court against the other party; (c) subject matter of the action is the same as subject matter of the arbitration

¹⁵ AIR 2003 SC 2881

¹⁶ AIR 2000 SC 1886

agreement and (d) the other party moves the Court for referring the parties to arbitration before submits its first statement on the substance of the dispute. This last provision creates a right in the person bringing the action to have the dispute adjudicated by the Court, once the other party has submitted its first statement of defence. But if the party, who wants the matter to be referred to arbitration applies to the Court after submission of his statement and the party who has brought the action does not object, there is no bar on the Court referring the parties to arbitration. The Apex Court in *P.Anand Gajapathi Raju* (supra) has held that language of section 8 is peremptory and it is obligatory for the parties to refer the dispute for arbitration in terms of the arbitration agreement and nothing remains to be decided in the original action or the appeal arising therefrom. The Court also held that there is no question of stay of the proceedings till the arbitration proceeding conclude and the award becomes final. Paragraphs-5 to 8 of the said judgment read as under :-

"5 The conditions which are required to be satisfied under sub-sections (1) and (2) of [Section 8](#) before the Court can exercise its powers are :

- (1) there is an arbitration agreement;*
- (2) a party to the agreement brings an action in the Court against the other party;*
- (3) subject matter of the action is the same as the subject matter of the arbitration agreement;*
- (4) the other party moves the Court for referring the parties to arbitration before it submits his first statement on the substance of the dispute.*

This last provision creates a right in the person bringing the action

to have the dispute adjudicated by Court, once the other party has submitted his first statement of defence. But if the party, who wants the matter to be referred to arbitration applies to the Court after submission of his statement and the party who has brought the action does not object, as is the case before us, there is no bar on the Court referring the parties to arbitration.

6 In our view, the phrase which is the subject of an arbitration agreement does not, in the context, necessarily require that the agreement must be already in existence before the action is brought in the Court. The phrase also connotes an arbitration agreement being brought into existence while the action is pending. Blacks Law Dictionary has defined the word is as follows:

This word, although normally referring to the present, often has a future meaning, but is not synonymous with shall have been. It may have, however, a past signification, as in the sense of has been.

7 A further question arises whether the Court is in these circumstances obliged to refer the parties to arbitration and if so with what effect.

8 In the matter before us, the arbitration agreement covers all the disputes between the parties in the proceedings before us and even more than that. As already noted, the arbitration agreement satisfies the requirements of [Section 7](#) of the new Act. The language of [Section 8](#) is peremptory. It is, therefore, obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement. Nothing remains to be decided in the original action or the appeal arising therefrom. There is no question of stay of the proceedings till the arbitration proceedings conclude and the Award becomes final in terms of the provisions of the new Act. All the rights, obligations and remedies of the parties would now be governed by the new Act including the right to challenge the Award. The Court to which the party shall have recourse to challenge the Award would be the Court as defined in clause (e) of [Section 2](#) of the new Act and not the Court to which an application under [Section 8](#) of the new Act is made. An application before a Court under [Section 8](#) merely brings to the Courts notice that the subject matter of the action before it is the subject matter of an arbitration agreement. This would not be such an application as contemplated under [Section 42](#) of the Act as the Court trying the action may or may not have had jurisdiction to try the suit to start with or be the competent Court within the meaning of [Section 2](#) (e) of the new Act."

This has been followed in *Kalpana Kothari* (supra) and

Sundaram Finance (supra).

20 In the present case the arbitration clause uses the term “shall be referred to arbitration”. It is trite as could be seen from *Jagdish Chander (supra)*, that where the clause provides, in the event of dispute arising between the parties the dispute shall be referred to arbitration, it is an arbitration agreement. It would be useful to reproduce paragraph-8(iii) and 9 of the said judgment.

“8. This Court had occasion to refer to the attributes or essential elements of an arbitration agreement in *K K Modi v. K N Modi* [1998 (3) SCC 573], *Bharat Bhushan Bansal vs. U.P. Small Industries Corporation Ltd.* [1999 (2) SCC 166] and *Bihar State Mineral Development Corporation v. Encon Builders (I) (P) Ltd.* [2003 (7) SCC 418]. In *State of Orissa v. Damodar Das* [1996 (2) SCC 216], this Court held that a clause in a contract can be construed as an 'arbitration agreement' only if an agreement to refer disputes or differences to arbitration is expressly or impliedly spelt out from the clause. We may at this juncture set out the well settled principles in regard to what constitutes an arbitration agreement :

(i) to (ii)

(iii) Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to Arbitration, it is an arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement. But where the clause relating to settlement of disputes, contains words which specifically excludes any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement. For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the Authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the Authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement.

9. Para 16 of the Partnership deed provides that if there is any

dispute touching the partnership arising between the partners, the same shall be mutually decided by the parties or shall be referred to arbitration if the parties so determine. If the clause had merely said that in the event of disputes arising between the parties, they "shall be referred to arbitration", it would have been an arbitration agreement. But the use of the words "shall be referred for arbitration if the parties so determine" completely changes the complexion of the provision. The expression "determine" indicates that the parties are required to reach a decision by application of mind. Therefore, when clause 16 uses the words "the dispute shall be referred for arbitration if the parties so determine", it means that it is not an arbitration agreement but a provision which enables arbitration only if the parties mutually decide after due consideration as to whether the disputes should be referred to arbitration or not. In effect, the clause requires the consent of parties before the disputes can be referred to arbitration. The main attribute of an arbitration agreement, namely, consensus ad idem to refer the disputes to arbitration is missing in clause 16 relating to settlement of disputes. Therefore it is not an arbitration agreement, as defined under [section 7](#) of the Act. In the absence of an arbitration agreement, the question of exercising power under [section 11](#) of the Act to appoint an Arbitrator does not arise."

21 Therefore, as the term used herein is "shall be referred to arbitration", it constitutes an arbitration agreement and in view of the specific and direct expression of intent to have disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement. Clause-6 is specific and direct of intent of the parties to have dispute settled by arbitration.

The question which we need to now consider is whether this intention gets diluted or it should be rendered nugatory in view of clause-7 which also uses the expression ".....the Courts of India are to have exclusive jurisdiction..... and accordingly, any proceedings arising out of or in connection of this letter "shall" be

brought forth in such courts.” Therefore, we need to decide whether litigation clause-7 is in addition to or in derogation to the arbitration clause-6 as submitted by the plaintiffs/respondents or it is not in derogation of the arbitration clause ; whether clause-7 affects the factum of the binding nature of the arbitration agreement clause-6 or whether such clauses are incorporated to meet a situation after the matter has been referred to arbitration and/or where judicial redress sought in the arbitration process or to challenge the award.

22 In *Svenska Handels Banken* (supra) the Apex Court dealt with a contract which in addition to the arbitration clause reserved the lenders' right to commence proceedings against the borrower in the Courts of India or Sweden or United Kingdom or the State of New York. It was contended that there was no arbitration clause at all. The Hon'ble Supreme Court rejected this contention and held that such a clause gave an additional right which was not in derogation of the arbitration clause. It was also held that the arbitration clause remained untouched by the other clause. Paragraphs- 45 to 55 read as under :-

“45. Mr Venugopal, learned counsel for the borrower/plaintiff referred us to clause 18 of the agreement so far as the lenders are concerned which reads as under:

“ 1 8. Governing Law : Jurisdiction 18.02 All disputes arising from the provisions of this Agreement or its performance shall be finally settled by arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with these rules.Arbitration shall take place in Stockholm and be conducted in the English language. The

award of the arbitral tribunal is final and obligatory for the parties without any right for a further appeal or contestation of its fulfillment. The borrower hereby expressly submits to the jurisdiction of the above mentioned arbitration tribunal. 18.03 Notwithstanding the provisions of the foregoing clause, the lender reserves the right to commence proceedings against the borrower in the Courts of India or Sweden or the United Kingdom or the State of New York and the borrower hereby expressly submits to the jurisdiction of such courts. 18.04 The borrower hereby irrevocably appoints the Ambassador of India to Sweden as its process agent to receive service of any proceedings on its behalf."

46. Mr Venugopal submitted that in view of clause 18.03 there is no arbitration clause at all in the contracts governing the lenders as one party alone is bound by such an agreement and the other is not bound by such agreement, the agreement is not an arbitration agreement. It was submitted that inasmuch as clause 18.02 of the contract declares "the borrower hereby expressly submits to the jurisdiction of the above mentioned arbitration tribunal" but clause 18.03 through a non-obstante clause relieves the lenders of their duty to have the disputes settled through arbitration and authorises the lenders to commence proceedings in the courts of India or any other country as the lenders may determine. It was submitted that it is only in the agreement of defendant 4 that instead of any other country, which is struck off, Sweden, the United Kingdom or the State of New York are mentioned. However, clause 18.04 makes it clear that the real purpose of rendering clause 18.02 inapplicable was to enable the lenders to sue the borrower in Sweden. It was submitted that where the arbitration clause is rendered inapplicable to a party to the dispute at his choice, the said clause is no arbitration clause at all.

47. It will be noticed that it is totally a new point urged on behalf of the plaintiff borrower that there is no arbitration clause so far as defendant 4 and defendants 5 to 11 are concerned.

48. Since it is a disputed question of fact, we ought not to allow it to be raised for the first time. However, the arbitration agreements are before us and the clause is admitted. Defendant 4 has throughout been relying upon clause 18.02 of the contract and still is ready and willing to have the dispute settled by arbitration under the said clause, should the plaintiff raise it before the ICC in accordance with clause 18.02. It is the plaintiff who is resisting arbitration and once the suit instituted by it in India is stayed it is for the plaintiff to have the matter resolved by arbitration.

49. Clause 18.02 of the contract is the arbitration agreement. It clearly provides that "all disputes ... shall be finally settled by arbitration ... the award of the Arbitral Tribunal is final and obligatory for all purposes without any right for a further appeal or contestation of its fulfillment. ..." Both parties are, therefore, required to have the

disputes settled by arbitration and both parties are bound by the award.

50. It is significant to note that in the present case, no dispute is being raised by defendant 4. It is only the plaintiff who is disputing its liability to pay.

51. When parties agree to have their disputes settled by arbitration it does not mean that both have bound themselves not to go to court to have the disputes settled. At page 163 of Russell on Arbitration, Twentieth Edn. it is stated that "a party to a contract to refer disputes to arbitration has a perfect right to bring an action in respect of those disputes, and the court has jurisdiction to try such disputes. Any provision to the contrary would be an ouster of the jurisdiction of the Courts."

52. Lord Macmillan in the House of Lords decision in Heyman v. Darwin Ltd. 4 pointed out as under:

"I venture to think that not enough attention has been directed to the true nature and function of an arbitration clause in a contract. It is quite distinct from the other clauses. The other clauses set out the obligations which the parties undertake towards each other here. But the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution."

53. It may be that even after entering into an arbitration clause any party may institute legal proceedings. It is for the other party to seek stay of the suit by showing the arbitration clause and satisfying the terms of the provisions of law empowering the court to stay the suit. Clause 18.03, therefore, merely states what is otherwise the legal position. The object of 4 1942 AC 356, 373 : 166 LT 306, 312 : (1942) 1 All ER 337 175 clause 18.03 is to reserve to defendant 4 the right to sue for money advanced. It is intended to be exercised in cases where there is no dispute whatsoever but still payments have not been made. These are standard clauses in all credit agreements. Clause 18.03 gives an additional right. To the extent this clause is exercised in cases where there are disputes, it would be the exercise of a legal right and both parties have agreed that the borrower will submit to the jurisdiction of the court. In such an eventuality defendant 4 would have elected to exercise the right under clause 18.03, which is in addition to and not in derogation of the arbitration clause in clause 18.02. As the arbitration clause remains untouched by clause 18.03, if defendant 4 was to sue the plaintiff under clause 18.03 for recovery of its loan, it may be open to the plaintiff (borrower) to apply under [Section 3](#) and seek stay of the suit. The stay of the suit could be granted notwithstanding clause 18.03 for the simple reason that the agreement to submit to the jurisdiction to the court under clause 18.03 relates to the

maintainability of the suit in a court agreed to by both parties, but does not affect the question whether the proceedings should be stayed in view of the arbitration clause. The plaintiff may well elect to have the dispute decided in court or it may apply under [Section 3](#) of the Foreign Awards Act or a similar provision in Sweden, England or United States, depending on where defendant 4 files the suit. Such clauses like clause 18.03 do not affect the factum or binding nature of the arbitration agreement in clause 18.02.

54. There is no question of parallel proceedings by reason of the nonobstante clause in clause 18.03. The plaintiff can have the dispute settled by arbitration as agreed in clause 18.02 or it may have the dispute settled in a court in proceedings instituted by defendant 4. However, the plaintiff cannot institute proceedings in any court against defendant 4. It is clear from a reading of clause 18.02 and clause 18.03 that there will be no parallel proceedings.

55. There is thus no obstacle in the applications filed on behalf of defendant 4 and defendants 5 to 11 for staying the suit filed by the borrower/plaintiff under the provisions of [Section 3](#) of the Foreign Awards Act."

23 Did the parties by virtue of litigation clause 7 agree to exclude the arbitration clause-6 as submitted by the plaintiff/respondents. In other words, whether in view of litigation clause-7 of the mandate letter, the arbitration clause-6 has to be ignored or does it get rendered nugatory ?

We cannot take this view that clause-6 has to be assumed to have been ignored or rendered nugatory. The intention of the parties by having clause-6 of the mandate letter is clear that any and all disputes, controversies or claims arising out of or in connection with the mandate letter including any question regarding its existence or validity or termination shall be referred to arbitration under and in accordance with the said Act. Even the venue of the

arbitration is agreed upon as Mumbai. By making a provision like clause-6 that the parties would refer any and all disputes or controversies or claims to arbitration, in my view, the parties have excluded the jurisdiction of the Courts. The reason for this is quite obvious. The parties otherwise would not have included the arbitration clause-6. If we accept what the plaintiffs/respondents say then clause-6 would not carry any meaning at all. The very fact that the arbitration clause is included in the mandate letters between the parties conveys their clear intention to exclude the jurisdiction of the Courts. Conversely if the parties had intended that all Courts in India where the cause of action or a part thereof had arisen or where the parties carry on business would continue to have jurisdiction over the disputes, then the arbitration clause would not have found place in the mandate letters. The very existence of the arbitration clause in an agreement that too when it is so expressly worded makes the intention of the parties to an agreement quite clear.

24 If one considers litigation clause-7 it merely states the legal position. It says that the parties irrevocably agree that the Courts of India have exclusive jurisdiction and all proceedings shall be brought forth in such Courts. The plaintiff is an Indian company, the defendant is an Indian company, the contract was entered into in India, the amounts were payable in India. Therefore, the cause of

action also arose in India. Certainly, only Indian Courts will have jurisdiction and no other Courts. This litigation clause would have some meaning or purpose if in clause-7 the parties have said instead of laws of India, English law or American law or Singapore law would apply and a particular Court in India for e.g. Mumbai or Delhi or Chennai will have exclusive jurisdiction. In my view, there was absolutely no need for incorporating litigation clause-7 at all and therefore, does not show any intention of the parties. My view might have been different had the clause specified a particular Court in India to have exclusive jurisdiction.

25 Let us consider a situation where the mandate letters did not have arbitration clause-6 and litigation clause-7. In such a situation for reasons mentioned in the earlier paragraph, the Indian Law would have applied to the dispute and only Indian Courts would have had jurisdiction. Therefore, litigation clause-7 should be considered as redundant or unnecessary. Clause-7 would have made some sense if one of the party to the agreement is a foreign party or the cause of action or part of the cause of action would have happened outside the country.

26 Similarly, this Court in the case of *Economic Development Corporation of Goa* (supra) considered clauses of an agreement

which provided that all disputes arising out of or in any way connected with the suit agreement were to be deemed to have arisen in Goa and only Courts in Goa shall have jurisdiction to determine the same. This Court held that the clause that provided for exclusive jurisdiction of the Court in Goa has been provided in order to meet a situation which may arise after the matter is referred to the Arbitrator and the clause did not have an overriding effect over the arbitration clause. Paragraph-5 of the said judgment reads as under :-

"5 There is no dispute on the proposition of law that existence or validity of agreement can be decided by the Court alone and not Arbitrator and rulings of the Apex Court in (U. P. Rajkiya Nirman Nigam Ltd. v. Indure Pvt. Ltd. and others), A. I. R. 1996 S. C. 1373 and (Union of India v. M/s. G. S. Atwal and Co. , (Asansole)) J. T. 1996 (2) S. C. 607, upon which reliance has been placed by Shri G. Tamba are crystal clear on the subject. In order to answer the first point, it is necessary to enumerate Condition 0. 42 of the contract, Clauses (4) and (6) of Agreement dated 20th January, 1986 of the said Agreement.---
Settlement of Disputes :

If any dispute or difference of any kind whatsoever shall arise between the Employer or the Architect and the contractor in connection with or arising out of the contract or the carrying out of the works (whether during the progress of the works or after their completion) and whether before or after the determination, abandonment or breach of the contract, it shall be referred to and settled by the Architect who shall state his decision in writing and give notice of the same to the Employer and the contractor. Such decision in respect of every matter so referred shall be final and binding upon the Employer and the contractor until the completion of the work and shall forthwith be given effect to by the contractor who shall proceed with the works all due diligence whether notice of dissatisfaction is given by him or by the Employer as hereinafter provided or not. If the Architect shall fail to give such decision for a period of 30 days after being requested to do so or if either the Employer or the contractor be dissatisfied with any such decision of the Architect then and in any such decision or within 30 days (as the case may be) required that the matter shall be referred to the Arbitration and final decision of a single Arbitrator being a Fellow of the Indian Institute of Architects or the Indian Institute of Engg. to be

agreed upon and appointed by both the parties or in case of disagreement as to the appointment of a single Arbitrator, to the Arbitration of two Arbitrators both being Fellows of Indian Institute of Architects or Indian Institute of Engineers, one to be appointed by each party, which Arbitrators shall before taking upon themselves the burden of reference appoint an Umpire.

The Arbitrator, the Arbitrators or the Umpire shall have power to open up, review and review any certificate, opinion, decision, requisition or notice, save in regard to the excepted matters referred to in the proceeding clause, and to determine all matters in dispute which shall be submitted to him or these and of which shall notice have been given as aforesaid.

Upon every or any such reference the cost of and incidental to the reference and Award respectively shall be in the direction of the Arbitrator or Arbitrators or the Umpire who may determine the amount thereof, or direct the same to be taxed as between attorneys and client or as between part and party and shall direct by whom and to whom and in what manner the same shall be borne and paid. This submission shall be deemed to be submission to Arbitration Act, 1899 or any statutory modification thereof. The award of the Arbitrator or Arbitrators or the Umpire shall be final and binding on the parties. Such reference except as to the withholding by the Architect of any certificate under Clause 0. 41 to which the contractor claims to be entitled shall not be opened or entered upon until after the completion or alleged completion of the works or until after the practical cession of the works arising from any cause unless with the written consent of the Employer and the Contractor. Provided always that the Employer shall not withheld the payment of an Interim Certificate nor the contractor except with the consent in writing of the Architect in any way delay the carrying out of the works be reason of any such matter, question of dispute being referred to Arbitration but shall until the decision of the Arbitrator or Arbitrators or the Umpire to be given abide by the decision of the Architect and no Award of the Arbitrator or Arbitrators or the Umpire shall relieve the contractor of his obligations to adhere strictly to the Architects instructions with regard to the actual carrying out of the works. The employer and the contractor hereby works and also agrees that Employer under this clause shall be a condition precedent to any right of action under the contract. "

"4. The said contract drawings, the specifications and the said price schedule of quantities and the said terms and conditions and the Appendices thereto along with the work order dated 22-5-85 issued by the Employer with the additional conditions therein and covering letter No. SB/335/84-85 dated 14-1-85 submitted with the tender, letter No. SB/405/84-85 dated 2-3-85 and letter No. SB/64/85-86 dated 20-5-85 by the contractor collectively annexed hereto as Annexure C and list of drawings collectively attached hereto as Annexure A shall be read and construed as forming part of this agreement and the parties

hereto will respectively abide by and submit themselves to the conditions and stipulations and perform the agreement on their parts respectively in such conditions contained. "

"6. All disputes arising out of or in any way connected with this Agreement shall be deemed to have arisen in Goa and only courts in Goa shall have jurisdiction to determine the same. "

The contract drawings referred to in Clause 4 are Annexure C to Agreement dated 20th January, 1986; the specifications and the price schedule of quantities referred to in Clause 4 is found in the Tender Document; the terms and conditions referred to in Clause 4 are incorporated in the Tender Document in which Condition 0. 42 figures. Appendices to the Tender Document, Work Order and additional conditions referred to in various letters in Clause 4 are to be read and construed as forming part of the agreement in terms of Clause 4 of the said agreement. Thereafter, Clause 6 follows which states that all disputes arising out of or in any way connected with this agreement shall be deemed to have arisen in Goa and only courts in Goa shall have jurisdiction to determine the same. This clause has been provided in order to meet situation which may arise after the matter is referred to the Arbitrator, but this clause can by no stretch of imagination be said to have overriding effect on condition 0. 42 of the Tender Document which has been clearly incorporated in Clause 4 of the said agreement. In fact I do not see any conflict whatsoever between Clause 4 and Clause 6 and the question of harmonious construction would arise only if there is some conflict between the two clauses. Even if a situation arises where there may appear to be some conflict between Clauses 4 and 6, the harmonious construction would, of course, be that Clause 6 cannot be said to have effect of overriding. Condition 0. 42 has to be read and construed as forming part of the agreement in terms of Clause 4 of the said agreement. There is no force in the contention of Advocate Shri Tamba that there has been material alteration of the terms and conditions of contract in the said agreement dated 20th January, 1986 and the ruling of the Apex Court quoted by him does not in any manner help the cause of the petitioner. The lower Court had dealt with this matter from a different angle but had come to the same conclusion. I do not find any error whatsoever in the impugned order which would call for exercise of revisional jurisdiction by this Court insofar as the first point of dispute which has been raised before me is concerned"

27 This Court extensively also discussed the law on the subject in *Olive Health Care* (supra) wherein the reference to arbitration was challenged on the ground that the arbitration clause was not mandatory since the contract provided that any action which

in any way involves the rights, duties and obligations of either party under the said agreement would be brought in the State court sitting in the Federal District Court in the eastern district of Pennsylvania. The Court rejected the contention after considering *Svenska Handels Banken* (supra) and held that the said clause was mandatory in nature. In the *Svenska Handels Banken* case there was an arbitration clause as well as governing law-jurisdiction clause.

28 It is also settled law that where there are 2 constructions of a document possible, the one which gives effect to all clauses in the document should be adopted as against other which renders one or more clauses nugatory. The Apex court in the case of *Radha Sundar* (supra) has held in paragraph-13 as under :-

"Now, it is a settled rule of interpretation that if there be admissible two constructions of a document, one of which will give effect to all the clauses therein while the other will render one or more of them nugatory, it is the former that should be adopted on the principle expressed in the maxim " ut res magis valeat quam per-eat ". What has to be considered therefore is whether it is possible to give effect to the clause in question, which can only be by construing Exhibit B as creating a separate Patni, and at the same time reconcile the last two clauses with that construction. Taking first the provision that if there be other persons entitled to the Patni of lot Ahiyapur they are to have the same rights in the land comprised in Exhibit B, that no doubt posits the continuance in those persons of the title under the original Patni. But the true purpose of this clause is, in our opinion, not so much to declare the rights of those other persons which rest on statutory recognition, but to provide that the grantees tinder the document should take subject to those rights. That that is the purpose of the clause is clear from the provision for indemnity which is contained therein. Moreover, if on an interpretation of the other clauses in the grant, the correct conclusion to come to is that it creates a new Patni in favour of the grantees thereunder, it is difficult to see how the reservation of the rights of the other Patnidars of lot Ahiyapur, should such

there be, affects that conclusion. We are unable to see anything in the clause under discussion, which militates against the conclusion that Exhibit B creates a new Patni."

29 So even if we go further and say litigation clause-7 is not to be ignored or rendered nugatory then, the interpretation of the two clauses must be done in a manner which would ensure that none of the 2 clauses are rendered nugatory. In the present case while clause-6 provides for arbitration, the reference to resolution of disputes by Courts in India in clause-7 must be construed to mean reference to Courts as provided by the said Act in order to meet a situation which may arise after the matter is referred to the arbitrator to give effect to both the clauses and ensure that both clauses are not rendered nugatory.

30 Even assuming there was an apparent inconsistency in the clauses, we must attempt to give a meaning to the clauses in order to give effect to the general intention of the parties, which was to submit disputes to arbitration. If we strike out clause-6, the surviving clause-7 only states what is otherwise the legal position. If we strike out clause-7 then the surviving clause-6 carries into effect the real intention of the parties, i.e., refer the dispute to arbitration. If we accept the submission of the plaintiff/respondent and accept clause-7 as overriding, it would defeat the object of the agreement or

intention of the parties, which was to submit disputes to arbitration.

31 Eminent authors in their commentaries on arbitration have highlighted this approach adopted by various Courts. The relevant extracts of these commentaries are as under :

(A) The Law and Practice of Commercial Arbitration in England, Second Edition by Mustill and Boyd, Butterwords, 1989 (at Pgs.106 & 107)

“ 3 Certainty :

As regards the third question, it must be shown that the terms of agreement to arbitrate are sufficiently certain to be enforceable. Allegations of uncertainty may arise in various ways.

(a) Inconsistent clauses

In the first place, it may happen that the contractual documents contain two or more apparently inconsistent provisions as to arbitration. In such a situation, the court will usually try to save the submission to arbitration, either by effecting a reconciliation between the clauses, or by construing one clause as applicable to the exclusion of the others. Sometimes, however, the conflict will be so acute that the Court can make no sense of the arbitration provisions, read as a whole. In such a case, the underlying contract will not be void for uncertainty, but will be enforced as if it contained no provision for arbitration.

(b) Abbreviated clauses

A similar question will arise, where the parties have agreed upon a term as to arbitration, but it is said that the term is too uncertain to be enforced. The courts will lean against frustrating the intention of the parties, and will try to give the clause a meaning. It is thus no objection that the clause is terse. Thus, 'Arbitration to be settled in London' is sufficiently clearly to be enforced, and indeed it has been said that the single word 'Arbitration' will suffice."

(B) Redfern and Hunter on International Arbitration, Sixth Edition, Oxford University Press : (at Pgs.135 & 136)

H. Defective Arbitration Clauses

The principal defects found in arbitration clauses are those of inconsistency, uncertainty and inoperability. The argument as to whether an arbitration clause suffers from one or more of these defects is likely to be raised where, for example, a party takes action in a national court in relation to a dispute and the defendant seeks a stay of the proceedings on the basis of the existence of the arbitration clause. In such circumstances, the application for a stay may be opposed on the basis that the arbitration agreement was 'inoperative or incapable of being performed.'

(a) Inconsistency

Where there is an apparent inconsistency in the clause, most national courts usually attempt to give a meaning to it, in order to give effect to the general intention of the parties, which was to submit disputes to arbitration. This is the case in England, where the courts uphold a clause and strike out an inconsistent provision if it is clear that the 'surviving clause' carries into effect the real intention of the parties and the 'discarded clause' could defeat the object of the agreement'.

This approach has been also applied by the Courts in India.

32 The two judgments : *IND Synergy* (supra) and *M/s. Sankar Sealing* (supra) relied upon by the plaintiffs/respondents are not applicable to the facts of the present case. In both the cases the contract clauses under reference were materially different from the clauses in the present case and created a doubt as to whether the arbitration clause was mandatory. No such ambiguity exists in the present case. In the case of *IND Synergy* (supra) the Court was called upon to interpret the effect of a without prejudice clause in the contract which expressly provided a party to apply for an injunction, restraining order, right for recovery, suit for specific performance or such other equitable relief as a Court of competent jurisdiction may deem necessary or appropriate to restrain the other party from creating any violation or enforce the performance, obligation or representation contained in that agreement. In the light of this peculiar clause, the Court held that there was no binding agreement to arbitration. This judgment was considered by this Court in the

case of *Olive Health Care* (supra) where it took notice of the peculiar clause of the contract and distinguished the same from the clauses which were the subject matter of that case.

33 In *Olive Health Care* (supra) this Court also took notice of the wording of the arbitration clause in *M/s.Sankar Sealing Systems* (supra) and distinguished that case as well. In *Sankar Sealing Systems* (supra) the arbitration clause provided for appointment of a neutral party agreed to by both the parties. The Madras High Court held that the words “agreed to by both” meant that the parties had to agree to the neutral person and in the absence of an agreement, they could not be compelled to arbitrate. Hence, consensus upon a neutral person therefore, necessary. For the said reason the clause was held not to be mandatory. In the present case, clause-6 of the mandate letters is not affected by need of any consensus. It would be useful to reproduce paragraphs-26 & 27 of *Olive Health Care* (supra) :-

26. Now coming to the judgments cited on behalf of the Petitioner in support of the contention that Clause 16 of the Agreement is not mandatory, in my view, the same do not aid the Petitioner. In so far as the first judgment reported in [MANU/TN/1856/2003](#) : AIR 2004 Mad 127 in the matter of M/s. Sankar Sealing Systems Pvt. Ltd. v/s. M/s. Jain Motor Trading Co. and anr. is concerned, the arbitration clause was in two parts which were clauses 23A and 23B. Clause 23A read thus :

Any dispute arising in relation to this Agreement will be settled by the arbitration of a neutral person agreed to by both

The learned Single Judge of the Madras High Court therefore

held that the words "agreed to by both" meant that the parties had to agree to the neutral person and in the absence of an agreement, they could not be compelled to arbitrate. Hence consensus upon a neutral person was, therefore, necessary. For the said reason the clause was held not to be mandatory. In so far as judgment reported in [MANU/SC/0232/2000](#) : (2000) 4 SCC 272 in the matter of Wellington Associates Ltd. v/s. Kirit Mehta is concerned, the clause in the said case was also different. The clause in the said case read thus :

It is also agreed by and between the parties that any dispute or difference arising in connection with these present may be referred to arbitration

The Apex Court noted that the clause used the word "may" and not "shall" and therefore, came to a conclusion that a clause which contemplates that disputes may be referred to arbitration gives the parties the option to go to arbitration and is not mandatory. The next judgment is the judgment of the Apex Court reported in [MANU/SC/7338/2007](#) : (2007) 5 SCC 719 in the matter of Jagdish Chander v/s. Ramesh Chander and ors. Clause 16 in the said case read thus :

If during the continuance of the partnership or at any time afterwards any dispute touching the partnership arises between the partners, the same shall be mutually decided by the partners or shall be referred for arbitration if the parties so determine.

The Apex Court therefore in the said case held that the word "determine" indicates that the parties are required to reach a decision by application of mind. The Apex Court held that the clause requires the consent of parties before the disputes can be referred to arbitration. It is in the said context that the Apex Court held the said clause is not mandatory.

27. In so far as the judgment in IND Synergy Ltd of a learned Single Judge of this Court (Coram : R Y Ganoo, J) is concerned, the clause in contention was clause 16.11 which was termed as the litigation clause and which read as follows :

Without prejudice to the provisions of this Agreement, the parties agree that each party shall be entitled to an injunction, restraining order, right for recovery, suit for specific performance or such other equitable relief as a Court of competent jurisdiction may deem necessary or appropriate to restrain the other party from committing any violation or enforce the performance of the covenants, obligations and representations contained in this Agreement. These injunctive remedies are cumulative and are in addition to any other rights and remedies the parties may have at law or in equity, including without limitation a right for recovery of the amounts due under this Agreement and related costs and a right for damages

As can be seen from the above, the said Clause 16.11 expressly contemplated that a party could file a suit for specific performance or other equitable relief including to enforce performance of covenants, obligations and representations contained in the Agreement. It is in the said context where the parties had expressly contemplated applications to a Court in various situations including by filing a suit for specific performance or enforcing performance of contractual covenants, obligations and representations, that the learned Single Judge concluded that there was no binding agreement to arbitrate. The facts of the present case are that apart from the word "shall" used in the opening of the said Clause 16, the said arbitration clause is clear, unambiguous and mandatory and can only be said to provide for applications being made to a civil Court for interlocutory reliefs".

34 The Delhi High Court also in the case of ¹⁷*Aez Infratech Pvt. Ltd. Vs. SNG Developers Ltd.*, while considering the clauses similar to clause-6 & clause-7 of the mandate letters, in paragraph-15 disagreed with the view taken by the Madras High Court in *Sankar Sealing* (supra). Paragraph-15 of the said judgment reads as under :-

15. It is a well known and well established principle of interpretation that the word shall ought to not be considered as may, which the respondent herein seeks to go against. It cannot be said that merely because clause 43 provides that Courts shall have exclusive jurisdiction, an arbitral tribunal cannot have jurisdiction in respect of the contract at all. Indeed, the Counsel's own admission - that clause 44 ought to be considered as optional and that the parties may refer their disputes to arbitration if they so desire - runs contrary to the contention that the Courts in New Delhi shall have jurisdiction, to the exclusion even of arbitral tribunals. This interpretation would render the provision in clause 44 otiose, and thus ought to not be preferred if another reasonable interpretation would give effect to both the clauses; *ut res magis valeat quam pereat*.⁴ It is for this reason, that this Court finds itself respectfully disagreeing from the judgment of the Madras High Court cited by the respondent.⁵ A perusal of the judgment, specifically paragraphs 20 to 24 thereof, shows that the Court has, after setting out the jurisdiction and arbitration clauses, directly proceeded to hold that in view thereof the arbitration

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clause is non-mandatory. This Court cannot be bound by a decision that was perhaps given in the peculiar circumstances that necessitated an interpretation that ordinarily ought to not have been preferred.

35 Even if we take the two clauses cannot be construed harmoniously, then in that case Clause 6, which is earlier to clause 7, would prevail over clause 7 and the parties are required to be referred to arbitration. In ¹⁸*Kailvelikkal Ambunhi (Dead) By LRs Vs. H.Ganesh Bhandary*, the Hon'ble Supreme Court while laying down the principles for interpretation of clauses of Will, held that unlike Wills in case of other documents where there is an inconsistency between the earlier and subsequent parts or specific clause, the earlier part will prevail over the subsequent part.

36 It was also submitted by Shri Joshi that the mandate letters put forth by the plaintiff have been issued on the letterhead of the plaintiff and are identical in nature. Thus the said documents have been prepared by the plaintiff. Therefore, applying the principles of '*contra preferentum*', the interpretation of clause-7 must be against the plaintiff.

The principle of *Contra Preferentum* requires that any ambiguity is to be construed against the party putting forward the clause for his protection. In the present case since the plaintiff is claiming ambiguity on the grounds of the purported conflict between clauses 6 and 7 of the contract, the interpretation of the clause 7 must be against the plaintiff.

37 Thus the interpretation of the terms of the mandate letter by the plaintiffs/respondents is not acceptable and the judgments

18 (1995) 5 SCC 444

relied upon by the plaintiffs are not applicable to the facts of the present case.

38 As regards the plaintiffs' contention of non arbitrability due to fraud is also not acceptable as it is incorrect.

39 It has to be remembered that at the stage of section 8 application, this Court is not to consider the defence of the defendants since the objection under Section 8 has to be filed prior to the filing of statement of defence of the defendants. The plaintiff itself has not raised any allegation of fraud in its plaint. Therefore, this defence is not available to the plaintiff/respondent.

40 Moreover in *Swiss Timing Limited* (supra) the Hon'ble Supreme Court dealt with the earlier judgment of the Hon'ble Supreme Court in case of *N.Radhakrishnan* where it had been held in cases related to allegations of fraud and serious malpractices on the part of the respondents, such a situation can only be settled in court through furtherance of detailed evidence by either parties and such a situation cannot be properly gone into by the arbitrator. The Hon'ble Supreme Court held that said judgment was contrary to law laid in other judgments of the Hon'ble Supreme Court and was therefore per incuriam. The court therefore held that even cases

where fraud was alleged the disputes could be referred to arbitration.”

In the plaint there are no allegations of fraud. The plaintiff has not approached this Court with this original action that the disputes are not arbitrable due to serious issues of fraud. There is no allegation of fraud at all in the plaint.

41 As regards the stand of the respondents that *Swiss Timing* (supra) does not lay down the correct law and therefore, ought not to be followed, a division bench of this Court in ¹⁹*Avitel Post Studioz Ltd. & Ors. Vs. HSBC PI Holdings (Mauritius) Ltd.* has held that it is not open for us to follow the dictum in *N.Radhakrishnan* (supra) as the said judgment has been found to be per incuriam. It would be useful to reproduce paragraph-38.

38] In the aforesaid regard, we must note that though the decision in Swiss Timing (supra) has been delivered by a Single Judge of the Supreme Court, nevertheless, the same is after taking into consideration the earlier decision in N.Radhakrishnan(supra). There are two specific reasons indicated as to why in its opinion, the decision in N.Radhakrishnan (supra) is 'per incuriam'. In such circumstances, it is not open for us to follow the dictum in N.Radhakrishnan (supra) even if we were to agree with Mr. Kirpal that the said decision lays down absolute proposition that issues of fraud are per se nonarbitrable.

42 In any event the case of fraud taken by the defendant would be a non-issue. It is alleged in the affidavit in reply to the

¹⁹ Unreported judgment in Appeal 196/2014 in Arbitration Petition 1062/2012 decided on 31.7.2014.

summons for judgment (filed after the present Notice of Motion was taken out) that the directors of the plaintiffs along with officers of certain public sector banks were arrested by the CBI and eventually CBI registered cases and therefore, the plaintiffs dealings is the subject matter of ongoing criminal investigation and hence plaintiffs cannot claim any benefits of such performance. It is therefore, alleged that the contract between the parties therefore, has been vitiated by fraudulent and illegal activities by the plaintiffs and its directors. The stand taken is that if any direction for payment is made it would tantamount to encouraging the plaintiffs in its criminal activities and would be opposed to public policies and morality.

The fact is that the directors/managers of the plaintiffs are discharged in that case. Therefore, the question of going into any issue of fraud as regards contract between the parties is concerned, also does not arise.

43 In view of the above conclusions, I am not going into the issue as to whether section-8 prior to 2015 amendment of the said Act or post amendment is applicable. Either ways the disputes herein are referable to arbitration.

44 Therefore, in my view, as the arbitration clause-6 uses the expression "shall be referred to arbitration", it constitutes an

arbitration agreement and it expresses specific and direct intent to have any and all disputes settled by arbitration. Litigation clause-7 can only be construed as redundant. Even if we accept the litigation clause-7 it can only be construed as an addition to and not in derogation of the arbitration clause-6. At the most it can only be construed to come into effect to meet a situation which may arise after the matter is referred to arbitrator and did not have an overriding effect on the arbitration clause.

Further, in view of the mandatory character of the provisions of section 8, once an application is made, it is mandatory and obligatory for the Courts to refer the parties to arbitration and nothing remains to be decided in the original action. There is no question of stay also of the proceeding till the arbitration proceedings conclude and the award becomes final. All the rights, obligations and remedies of the parties would be determined in the arbitration and application before the Court under Section 8 merely brings to the Court's notice that the subject matter of the action before it is the subject matter of the arbitration agreement.

45 In the circumstances, any and all disputes, controversies and claims arising out of or in connection with the mandate letters be referred to arbitration, the venue being Mumbai.

Notice of Motion accordingly, stands disposed with costs.

Respondents/plaintiffs to pay sum of Rs.1,00,000/- as costs to the applicants within four weeks from today.

46 Summary Suit also accordingly disposed.

(K.R.SHRIRAM,J)