

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

% **Date of decision: 3rd July, 2018**

+ **CS(OS) No.1769/2003**

BHARTI TELE-VENTURES LTD. & ORS. Plaintiffs

Through: Mr. Gopal Jain, Sr. Adv. with
Mr. Tejveer Bhatia, Ms. Kriti
Pujari and Mr. Rohan Swarup,
Advts.

Versus

DSS ENTERPRISES PVT. LTD. & ORS.Defendants

Through: Mr. Vineet Jhanji and Mr.
Imran Maulaey, Advts. for D-1.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff no.1 Bharti Tele-Ventures Ltd. (BTVL) instituted this suit, for (i) declaration that the request dated 22nd August, 2003 submitted by defendant no.1 DSS Enterprises Pvt. Ltd. (DSS) to defendant no.6 ICC International Court of Arbitration (ICC) is illegal and invalid and that the communication dated 28th August, 2003 issued by ICC pursuant thereto is illegal and invalid; (ii) permanent injunction prohibiting ICC from acting upon or commencing any proceeding pursuant to the request dated 22nd August, 2003 of DSS for arbitration; and, (iii) permanent injunction restraining DSS from seeking to make reference and / or commencing arbitration proceeding on the basis of Arbitration Agreement contained in the Joint Venture Agreement (JVA) dated 12th August, 1992.

2. It was *inter alia* the case of BTVL in the plaint that:

- (a) on 3rd March, 1992, Skycell Communications Ltd. (Skycell) was incorporated;
- (b) on 12th August, 1992, a JVA was entered into between DSS, defendant no.2 Crompton Greaves Ltd. (CGL), defendant no.3 BellSouth International (Asia/Pacific) Inc., USA (BellSouth) and defendant no.4 Millicom International Cellular S.A., Luxembourg (Millicom), to subscribe to equity shares in the capital of Skycell and in pursuance whereof CGL, BellSouth and Millicom acquired 40.5%, 24.5% and 24.5% shares respectively of SkyCell; the remaining 10.5% shares of Skycell were held by DSS;
- (c) CGL, BellSouth and Millicom, being parties to JVA, sold their respective shareholding in Skycell to BTVL which thus acquired 89.5% shareholding of Skycell;
- (d) Skycell has since merged into defendant no.5 Bharti Cellular Ltd. (BCL);
- (e) DSS, at the time of filing of this suit, was having shareholding of 0.34% only in BCL;
- (f) from the request for arbitration made by DSS to ICC it is evident that the cause of action thereof is the JVA and DSS claims that it has been denied its rights, protection and benefits as a shareholder under the JVA;
- (g) DSS is estopped from invoking arbitration of ICC, because:
- (i) DSS filed Suit No.2089/2001 in this Court impleading BTVL, BellSouth, Millicom and Skycell as

defendants thereto, making the same averments as made in the request for arbitration to ICC and seeking to restrain Skycell and Millicom from effecting any changes in the Board of Directors of Skycell and in the capital of Skycell;

(ii) DSS, by filing such a suit clearly acknowledged that there is no Arbitration Agreement in force and existence;

(iii) even if there were such an agreement, DSS having submitted to the jurisdiction of this Court, ought to be held to have waived, repudiated or abandoned the Arbitration Agreement;

(iv) BTVL had also filed Suit No.2202/2000 impleading DSS, CGL, BellSouth and Millicom as defendants thereto; the said defendants filed applications under Section 45 of the Arbitration & Conciliation Act, 1996 (Arbitration Act) and sought to have the matter referred to arbitration on the basis of Arbitration Agreement contained in the JVA; the said applications were rejected vide order dated 15th May, 2001 holding that unless the party applying for arbitration (under Section 45 of the Arbitration Act) accepts each of the other parties, as parties to the Arbitration Agreement, there can be no reference to arbitration under Section 45 of the Arbitration Act; DSS was not accepting BTVL as party to the Arbitration Agreement contending that

BTVL was a stranger to the Arbitration Agreement; the said order dated 15th May, 2001 has become final and binding on the parties and as a result thereof, DSS cannot enforce the Arbitration Agreement against the BTVL;

(v) DSS also filed Suit No.115/2000 before the District Court, Delhi impugning the transfer of shares held by CGL in Skycell without the consent of DSS; though BellSouth and Millicom being defendants to the said suit applied for reference of disputes to arbitration but the applications filed in this respect were not pressed; the Suit No.115/2000 also had since been dismissed though an appeal filed by DSS thereagainst was pending; and,

(vi) BellSouth filed OA Nos.103-104/2000 before the High Court of Madras under Section 9 of the Arbitration Act on the basis of the Arbitration Agreement contained in the JVA and pursuant to order wherein an agreement was arrived at on 3rd May, 2000 and CGL, DSS and BellSouth agreed to sell their shareholding to BTVL.

3. The tussle amongst the parties is for the management and control of BCL.

4. The suit came up before this Court first on 26th September, 2003, when the counsel for DSS appeared and while issuing summons of the suit, the arbitration proceedings to be held pursuant to the letter of request dated 22nd August, 2003 of DSS were stayed.

5. CGL and BCL who were defendants no.2 and 5 respectively in the suit as originally filed, applied for transposition as plaintiffs no.2

and 3 and the same was allowed on 1st October, 2003 and the interim order continued.

6. DSS preferred FAO(OS) No.345/2003 against the order dated 13th October, 2003 of extension of interim order and which appeal was disposed of on 20th November, 2003 observing that since Single Judge was hearing the application for interim relief, there was no need to interfere.

7. Only DSS and BellSouth filed written statements. While DSS opposed the suit, BellSouth in its written statement supported BTVL.

8. DSS, in its written statement has pleaded (i) that the suit is barred by Section 5 of the Arbitration Act; (ii) that the Arbitral Tribunal can decide on its own jurisdiction and the Civil Courts have no jurisdiction to decide the same; (iii) CGL, BellSouth and BCL had themselves moved an application under Section 45 of the Arbitration Act for reference of disputes to arbitration; (iv) that merger of Skycell into BCL is illegal; (v) that the alleged termination of JVA is wrongful and illegal; (vi) that the request for arbitration was made by DSS on account of various breaches committed by BTVL, CGL, BellSouth, Millicom and BCL in respect of JVA; (vii) that DSS, by filing suit No.2089/2001 has not in any way waived and / or abandoned the Arbitration Agreement and has rather in the plaint therein expressly reserved its rights to refer disputes to arbitration; (viii) that in any event, the question whether DSS has abandoned the Arbitration Agreement or not is also in the exclusive domain of the Arbitral Tribunal; (ix) that the order dated 15th August, 2001 in suit No.2202/2000 is not final and binding and was only an interim order

and suit No.2202/2000 has since been withdrawn; (x) that Suit No.115/2000 filed by DSS does not constitute an acknowledgement that Arbitration Agreement had come to an end and RFA No.725/2003 preferred against the dismissal of the said suit is pending consideration; and, (xi) that DSS was not a party to Agreement dated 3rd May, 2000 pursuant to order dated 6th April, 2000 in OA Nos.103-104/2000 of the High Court of Madras.

9. The application for interim relief was finally disposed of by a detailed judgment dated 17th August, 2005 whereby arbitration proceedings requested by DSS vide letter dated 22nd August, 2003 and the operation of the letter dated 28th August, 2003 of ICC in pursuance thereto, was stayed during the pendency of the suit and the benefit of the said order was also extended to CGL and BCL.

10. Vide subsequent order dated 10th January, 2011, on the pleadings of the parties, the following issues were framed in the suit:

- “1. Whether the present suit is barred by any provisions of the Arbitration & Conciliation Act, 1996? OPD-1
2. Whether the defendant no.1 has waived, repudiated and / or abandoned the Arbitration agreement by filing a suit being Suit No.2089/2001 – DSS Enterprises Pvt. Ltd. vs. Bellsouth International & Ors. Before this Court? OPP
3. Relief?”

and the counsel for BTVL and the counsel for DSS stated that no oral evidence is required to be led and the parties were relying only on pleadings in the admitted litigation *inter se* the parties and the orders passed therein and the suit may be listed for final disposal.

11. Though DSS preferred FAO(OS) No.401/2005 against the order / judgment dated 17th August, 2005 supra allowing the application of BTVL for interim relief, but the said appeal was dismissed for non prosecution on 15th January, 2010. Though subsequently, vide order dated 9th August, 2011, the appeal was restored to its original position but the counsel for DSS on the same day withdrew the appeal in view of the suit itself having been posted for final hearing.

12. The suit thereafter was adjourned from time to time and came up before the undersigned on 18th December, 2016 when the counsels again sought adjournment. The senior counsel for BTVL and the counsel for DSS who alone have been appearing, were heard on 4th January, 2017 and order reserved granting liberty to the counsels to file affidavits of costs. Affidavit in this respect has been filed by counsel for DSS.

13. The senior counsel for BTVL argued that (i) in earlier suit filed by BTVL, the application of DSS under Section 45 of the Arbitration Act was dismissed vide order dated 15th May, 2001; (ii) that though the said order was appealable under Section 50 of the Act but DSS did not prefer any appeal; (iii) DSS admittedly made request for arbitration on the same subject matter; (iv) that the order dated 15th May, 2001 having attained finality, DSS is barred by *res judicata* from contending that the disputes are arbitrable; (v) that the principle of issue estoppel also applies; DSS, after allowing the order dated 15th May, 2001 to attain finality, is estopped from making a request for arbitration; (vi) the judgment dated 17th August, 2005 on the application of BTVL for interim relief also holds that since the stand

of DSS in the application filed under Section 45 of the Arbitration Act in the earlier suit unequivocally was that BTVL was not a party to the JVA and since there is no agreement between BTVL on the one hand and CGL, BellSouth, Millicom and DSS on the other hand, the application of DSS under Section 45 was not maintainable and it is not open to DSS to make a request for arbitration including against BTVL; (vii) that even otherwise, the prayers in the request for arbitration were infructuous because the license earlier granted to Skycell with respect to the Chennai Telecom Circle no longer existed and there is no arbitrable dispute; and, (viii) reliance was placed on paras no.131.1. and 131.2. of ***Chloro Controls India Pvt. Ltd. Vs. Severn Trent Water Purification Inc.*** (2013) 1 SCC 641 and on para no.8 of ***S.N. Prasad, Hitek Industries (Bihar) Ltd. Vs. Monnet Finance Ltd.*** (2011) 1 SCC 320.

14. Per contra, the counsel for DSS argued that (a) claims in the suit filed by DSS in this Court were *de hors* the JVA and thus institution of the suit does not bar DSS from invoking arbitration when arbitrable disputes arose; (b) that the objections if any of BTVL, CGL and/or BCL to arbitrability will be decided by ICC; (c) reliance was placed on (i) ***Venture Global Engineering Vs. Satyam Computer Services Ltd.*** (2008) 4 SCC 190, (ii) paras no.9,21.1, 21.2, 31 and 34 to 40 of ***Chatterjee Petrochem Company Vs. Haldia Petrochemicals Ltd.*** (2014) 14 SCC 574; (iii) para no.40 of ***World Sport Group (Mauritius) Ltd. Vs. MSM Satellite (Singapore) Pte. Ltd.*** (2014) 11 SCC 639; and, (iv) para no.165 of ***Chloro Controls India Pvt. Ltd.*** *supra*.

15. The senior counsel for the plaintiff, in rejoinder referred to ***Enercon (India) Ltd. Vs. Enercon GMBH*** (2014) 5 SCC 1.

16. I have perused the records.

17. Before looking at the factual matrix any further, I may state and as the issues framed in the suit also suggest, the first question to be adjudicated is, whether at all a suit for declaration that there is no arbitration agreement between the parties and for injunction restraining commencement or continuation of arbitral proceedings is maintainable. Only if such a suit is found to be maintainable, will the second question, whether the facts and circumstances of the present case justify the declaration and injunction sought, would arise. On the contrary, if it were to be held that such a suit is not maintainable, howsoever strong the case of BTVL may be for restraining DSS from continuing with the arbitration, BTVL would not be entitled to such an order.

18. Having held in ***Roshan Lal Gupta Vs. Parasram Holdings Pvt. Ltd.*** 2009 (109) DRJ 101, ***Spentex Industries Ltd. Vs. Dunavant SA*** 2009 SCC OnLine Del 1666 (MANU/DE/41662/2009) (RFA(OS) No.69/2009 preferred whereagainst was dismissed on 29th October, 2009), ***Shree Krishna Vanaspati Industries (P) Ltd. Vs. Virgoz Oils & Fats Pte Ltd.*** 2009 SCC OnLine Del 1665, ***M. Sons Enterprises Pvt. Ltd. Vs. Suresh Jagasia*** 2011 (123) DRJ 266 and ***Ashok Kalra Vs. Akash Paper Board Pvt. Ltd.*** 2013 SCC OnLine Del 3299, that a suit of the present nature is not maintainable, I had in the order dated 8th December, 2016 itself observed that *prima facie* the suit did not appear to be maintainable and was liable to be dismissed.

19. None of the judgments cited by the senior counsel for the plaintiff are on the aspect of maintainability of such a suit.

20. Upon the same being put to the senior counsel for the plaintiff, he stated that there is no judgment holding such a suit to be not maintainable.

21. As far as the reference by the senior counsel for BTVL to the observations in the judgment dated 17th August, 2005 on the application under Order XXXIX Rules 1 and 2 of the CPC is concerned, it is well settled principle that any observation contained in the order on the application under Order XXXIX Rules 1 and 2 of the CPC has no bearing at the time of final disposal of the suit. In fact, the counsel for DSS, on 9th August, 2011, before the Division Bench, had expressed an apprehension that the said judgment may tend to influence the final hearing in the suit and the Division Bench, in the order of the said date observed that there was no reason for such an apprehension as it is a settled principle that interim injunction is passed on a *prima facie* view of the matter at that stage and cannot influence the final judgment and it was in view of the same that DSS had withdrawn the appeal. It is thus not open to BTVL to today rely upon any observation in the judgment making the ad-interim injunction in favour of BTVL, absolute.

22. Even otherwise, there can be no *res judicata* on a question of law, even between the same parties, at successive stages of the same proceeding and the Court is not bound to decide a lis in violation of law, merely because an error of law may have been committed in an earlier order / judgment which has attained finality between the

parties. Supreme Court, in ***Erach Boman Khavar Vs. Tukaram Shridhar Bhatt*** (2013) 15 SCC 655, held that to attract the doctrine of *res judicata*, it must be manifest that there has been conscious adjudication of an issue; a plea of *res judicata* cannot be taken aid of unless there is an expression of an opinion on the merits; it is well settled in law that principle of *res judicata* is applicable between the two stages of the same litigation but the question or issue involved must have been decided at earlier stage of the same litigation. An order on an application under Order XXXIX Rules 1&2 of the CPC is not an order delineating on merits the respective contentions; it is only on a *prima facie* view of the matter. Recently, in ***Canara Bank Vs. N.G. Subbaraya Setty*** 2018 SCC OnLine SC 427, after considering a host of case law, it was summarised (i) the general rule is that all issues that arise directly and substantially in a former suit or proceeding between the same parties are *res judicata* in a subsequent suit or proceeding between the same parties; these would include issues of fact, mixed questions of fact and law and issues of law; (ii) to this general proposition, there are certain exceptions, when it comes to issues of law; (iii) where an issue of law decided between the same parties in a former suit or proceeding relates to jurisdiction of the Court, an erroneous decision in the former suit or proceeding is not *res judicata* in a subsequent suit or proceeding between the same parties, even where the issue raised in the second suit or proceeding is directly and substantially the same as that raised in the former suit or proceeding; an erroneous decision as to the jurisdiction of a Court cannot clothe a Court with jurisdiction where it has none; and, (iv) an

issue of law which arises between the same parties in a subsequent suit or proceeding is not *res judicata*, if by an erroneous decision given on a statutory prohibition in the former suit or proceeding, the statutory prohibition is not given effect to; this is despite the fact that the matter in issue between the parties may be the same as that directly and substantially in issue in previous suit or proceeding – this is for the reason that in such cases, the rights of the parties are not the only matter for consideration, as the public policy contained in the statutory prohibition cannot be set at naught.

23. Thus, notwithstanding the interim order in this suit restraining International Commercial Arbitration initiated by DSS against BTVL, the aspect of maintainability of a suit for the said relief has to be adjudicated.

24. Supreme Court, in ***Kvaerner Cementation India Limited Vs. Bajranglal Agarwal*** (2012) 5 SCC 214, held that though there cannot be any dispute that in the absence of an arbitration agreement, no dispute could be referred for arbitration to arbitral tribunal, but bearing in mind the very object with which Arbitration Act has been enacted and the provisions contained in Section 16, conferring the power on the arbitral tribunal to rule on its own jurisdiction including ruling on any objection with respect to existence or validity of the arbitration agreement, Civil Court cannot have jurisdiction to go into that question; moreover, a decision of an arbitral tribunal on an objection to its jurisdiction is amenable to be assailed within the ambit of Section 34 of the Arbitration Act; in this view of the matter, the Civil Court cannot go into the said question.

25. Supreme Court recently in *A. Ayyasamy Vs. A. Paramasivam* (2016) 10 SCC 386, though not directly concerned with the issue, cited *Kvaerner Cementation India Ltd.* supra with approval.

26. The reason which prevailed with the Supreme Court in *Kvaerner Cementation India Limited* supra for holding a suit for declaration that there does not exist any arbitration agreement and the arbitration proceedings are without jurisdiction and for injunction restraining the arbitration proceedings to be not maintainable, would in my opinion apply to the present suit as well. It is not the case of BTVL that it is not open to BTVL to, before ICC, take up the plea of DSS having abandoned the arbitration agreement or DSS being estopped from seeking arbitration. It is also not the plea of BTVL that ICC does not have the power to rule on its own jurisdiction. Thus even though Section 16, referred to in *Kvaerner Cementation India Limited*, located in Part I of the Arbitration Act applicable to domestic arbitration, may not be applicable to International Commercial Arbitration, as the arbitration in the present case is, but as long as the powers of ICC are the same as under Section 16, the dicta of the Supreme Court would apply to the present situation also.

27. I may in this context mention that though *Kvaerner Cementation India Limited*, *Roshan Lal Gupta*, *M. Sons Enterprises Pvt. Ltd.* and *Ashok Kalra* supra were with respect to domestic arbitration but *Spentex Industries Ltd.* and *Shree Krishna Vanaspati Industries (P) Ltd.* supra pertained to International Commercial Arbitration. In *Spentex Industries Ltd.*, it was considered whether what had been held in the context of domestic arbitration will also

apply to International Commercial Arbitration. The contention of the plaintiff therein that since Sections 5 and 16 of the Arbitration Act were located in Part I thereof relating to domestic arbitration, what had been held in the context of domestic arbitration will not apply to International Commercial Arbitration, was not accepted. It was held that Supreme Court in ***Bhatia International Vs. Bulk Trading S.A.*** (2002) 4 SCC 105 having held that provisions of Part I of the Arbitration Act apply to all arbitrations and to all proceedings relating thereto, Sections 5 and 16 were attracted to International Commercial Arbitration as well. It was yet further reasoned that the reliefs of declaration and injunction fall within the domain of Specific Relief Act and are discretionary reliefs and circumscribed by the provisions of the Specific Relief Act, to be available only when there is no alternative efficacious remedy available; the remedy of taking the plea as by way of suit, by way of objection to the arbitral award or at the time of enforcement thereof is an alternative efficacious remedy. In ***Shree Krishna Vanaspati Industries (P) Ltd.*** supra, it was in addition held that it was not the case of the plaintiff therein that the pleas sought to be taken by way of a suit could not be taken before the Arbitral Tribunal.

28. I find another Co-ordinate Bench of this Court in ***Devinder Kumar Gupta Vs. Realogy Corporation*** 182 (2011) DLT 32 having dealt with a similar suit. It was the case of the plaintiff therein also that he was not a party to any document containing a clause for arbitration of the American Arbitration Association. It was the contention of the defendant in the suit that the declaration sought by

the plaintiff with respect to arbitration agreement could not be granted by a Civil Court and the Civil Court could not restrain the defendant from pursuing arbitration proceedings before American Arbitration Association. The question framed for consideration was, whether existence of an arbitration agreement between the plaintiff and the defendant could be challenged by filing a civil suit and whether a civil Court, in such a suit, could stay arbitration proceedings. It was held that this Court as a Civil Court could not go into existence or validity of the arbitration clause invoked by the defendant and could not grant an injunction restraining the defendant from continuing with the arbitration proceedings initiated by it before the American Arbitration Association. The appeal preferred thereagainst was dismissed by the Division Bench of this Court vide judgment reported as ***Devinder Kumar Gupta Vs. Realogy Corporation*** 2011 (125) DRJ (DB).

29. Thus, as far as this Court is concerned, the consistent view has been that such a suit is not maintainable.

30. Supreme Court, in ***Chatterjee Petrochem Company*** supra also, was concerned with a suit, filed pursuant to the defendant making a request for arbitration, for declaration that the arbitration clause contained in the agreement between the parties was null and void. It was the contention of the defendant before the Supreme Court and as noted in para no.9 of the judgment, that Article 6 of the ICC Rules 1998 is *pari materia* to Section 16 of the Arbitration Act and the Civil Court has no jurisdiction to decide on such issues. Reliance by the counsel for the defendant was placed on ***Yograj Infrastructure Ltd. Vs. Ssong Yong Engg. and Construction Co. Ltd.*** (2011) 9 SCC 735.

Supreme Court *inter alia* framed the question for adjudication “Is the suit, filed by the respondents, seeking injunction against arbitration of disputes between parties sought for by the appellants as per Clause 15 of the principal agreement referred to supra maintainable in law?” and held that the contention of the respondents/plaintiffs that Section 5 of the Arbitration Act which bars intervention of judicial authority will not be applicable to international agreements cannot be accepted. Reliance was placed on ***Venture Global Engineering Vs. Satyam Computer Services Ltd.*** supra holding that because the Scheme of the Act is such that the general provisions of Part-I including Section 5 will apply to all Chapters or Parts of the Act.

31. ***World Sport Group (Mauritius) Ltd.*** supra is not found to be concerned with the said aspect. All that it holds is that the judicial authority under Section 45 of the Arbitration Act is not entitled to decline a reference to arbitration on the ground that another suit on the same issue is pending in the Indian Court.

32. Though the senior counsel for the plaintiff contended that ***Enercon (India) Ltd.*** supra holds a suit to be maintainable but the same is also not found to be dealing with the said question.

33. Mention may lastly be made of ***Bharat Aluminium Company Vs. Kaiser Aluminium Technical Services Inc.*** (2012) 9 SCC 552, overruling ***Bhatia International*** and ***Venture Global Engineering***, though prospectively. It was held that (i) Part I of the Arbitration Act has no application to International Commercial Arbitrations held outside India; such awards would only be subject to the jurisdiction of the Indian Courts when the same are sought to be enforced in India in

accordance with the provisions contained in Part II of the Act; (iii) there can be no overlapping or intermingling of the provisions contained in Part I with the provisions contained in Part II of the Arbitration Act; (iv) in a foreign seated International Commercial Arbitration, no application for interim relief would be maintainable under Section 9 of the Act or any other provision of Indian Law, as applicability of Part I of the Act is limited only to arbitrations which take place in India; (v) similarly, no suit for interim injunction simpliciter would be maintainable in India in respect of an International Commercial Arbitration with a seat outside India; (vi) pendency of an arbitration proceeding outside India would not provide the cause of action for a suit where the main prayer is for injunction; in such a case, the entire suit would be based on pendency of arbitration proceedings in a foreign country; if such a suit was to be filed, it would in all probability be stayed in view of Sections 8 and 45 of the Arbitration Act; therefore it would not be open to a party to file a suit touching on the merits of the said foreign arbitration and the plaint would be liable to be rejected under Order VII Rule 11(a) of the CPC; (viii) in matters pertaining to arbitration, the suit would also be barred under Section 14(2) of the Specific Relief Act, 1963; although the provision exists in Section 37 of the Specific Relief Act for grant of temporary / perpetual injunction but the existence of cause of action would be essential under this provision also; similar would be the position under Section 38 of the Specific Relief Act.

34. The aforesaid judgment leaves no manner of doubt that the suit as the present one is without cause of action and is not maintainable.

35. Accordingly, issue no.1 is decided, by holding the suit to be barred and without cause of action and not maintainable, against BTVL and other plaintiffs and in favour of DSS.

36. As far as issue no.2 framed in the suit is concerned, once this Court has held the suit to be not maintainable, it is not deemed appropriate to render any finding thereon inasmuch as the result of the dismissal of the suit would be continuation of the arbitral proceedings, if the parties so choose, and in which it will be open to BTVL to challenge the jurisdiction of the Arbitral Tribunal. It is felt that any finding on issue no.2 given in this suit, which has been held to be not maintainable, may prejudice either of the parties. Moreover, once the suit has been held to be not maintainable, this Court is not obliged under Order XIV Rule 2 of CPC to answer the remaining issues and which in any case as per law laid down in *Harbans Singh Vs. Juggat Pharma* 2013 SCC OnLine Del 5166, *Phonographic Performance Ltd. Vs. Union of India* (2015) 220 DLT 90 and *Savitri Devi Vs. Fashion Linkers* (2002) 95 DLT 893 would not be *res judicata*.

37. I therefore refrain from answering issue no.2, save for observing that no merit is found in the contention of the BTVL of the order dated 15th May, 2001 supra in earlier legal proceedings between the parties binding the parties. It has been held in *Shin-Etsu Chemical Co. Ltd. Vs. Aksh Optifibre Ltd.* (2005) 7 SCC 234 that pendency of an application under Section 45 of the Arbitration Act does not come in the way of the party so applying, invoking, commencing and proceeding with the arbitral proceedings. Once it is so, from the action of DSS of not choosing to appeal against the order dated 15th May,

2001 of dismissal of its application under Section 45 of the Arbitration Act, it cannot be held to have conferred any finality on the said order when in law, it was open to DSS to commence arbitration.

38. Accordingly, the suit is dismissed as not maintainable.

39. The defendant no.1 DSS, in affidavit of costs, has pleaded costs of Rs.15 lacs.

40. BTVL having enjoyed the interim order for the last 15 years and this being a commercial suit, to also pay costs of this suit of Rs.15 lacs to DSS and which if not paid by BTVL are made recoverable by execution, from BTVL.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

JULY 03, 2018

‘gsr/pp’..