

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

ARBITRATION PETITION NO.708 OF 2014

The Bombay Dyeing And
Manufacturing Co. Ltd.

... Petitioner

Versus

Shaan Realtors Private Limited

... Respondent

.....

Mr. Darius Khambata, Senior Advocate a/w Mr. Zal Andhyarujina, Mr. Pheroze Mehta, Ms. Niyathi Kalra and Ms. Sonu Bhasi I/b Negandhi Shah & Himayatullah for the Petitioner.

Mr. Shiraz Rustomjee, Senior Advocate a/w Mr. Rohaan Cama, Mr. Chaitanya D. Mehta and Ms. Sonali Aggarwal I/b Dhruve Liladhar & Co. for the Respondent.

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CORAM : S.C.GUPTE, J.

DATE : 4 JANUARY 2019

(Oral Judgment)

1 This arbitration petition challenges an award passed by a Sole Arbitrator in a reference arising out of a Memorandum of Understanding ('MoU') executed between the parties. The short facts of the case may be noted as follows :-

2 The Petitioner owns land known as 'Spring Mill Land' situate at G. D. Ambedkar Marg, Dadar (East), Mumbai, where it had proposed construction of a residential building. One Accord Holding Pvt Ltd ("Accord"), who is the predecessor in interest of the Respondent herein, entered into the present MoU with the Petitioner for purchasing flats admeasuring an aggregate area of 1 lac sq. ft. in the proposed building. As

of the date of this MoU, there were no sanctioned plans for the building proposed to be constructed. Accord was given a choice under the MoU for selection of flats. After Accord made such choice, a formal agreement for sale of flats/apartments was to be executed within ten days of receipt of IoD with sanctioned plans. The consideration payable for flats/apartments to be sold under the MoU was to be calculated at Rs.11,500/- per sq. ft. On 2 April 2010, a letter recording Accord's agreement to purchase and the Petitioner's agreement to sell/allot 10,000 sq ft in the latter's proposed project for a consideration of Rs.11.50 crores was issued to Accord. This was in anticipation of a forthcoming IoD. Between September 2010 and January 2011, further letters were issued by the Petitioner in favour of nominees of Accord for sale of flats aggregating to about 49,756 sq.ft. of carpet area. On 12 May 2011, Accord addressed a communication to the Petitioner claiming balance carpet area for its nominees, that is to say, difference of carpet area between 1 lac sq. ft. and 59,756 sq.ft. (comprising of 10,000 sq.ft. agreed to be sold under the letter dated 2 April 2010 and 49,756 sq.ft. to be sold under the letters issued between September 2010 and January 2011). The Petitioner refused to allot any further area and as a result, disputes arose between the parties. In an arbitration petition filed by Accord under Section 9 of the Arbitration and Conciliation Act, 1996 ("Act"), a sole arbitrator was appointed for adjudicating these disputes, and the petition under Section 9 was converted into an application under Section 17 of the Act to be argued before the sole arbitrator. That is how disputes between the parties were heard by the sole arbitrator.

3 The main dispute, as is apparent, concerned the area of flats/apartments to be sold by the Petitioner to Accord or its

successors/nominees. In particular, the question to be answered was whether 1 lac sq.ft. saleable area mentioned in the MoU was carpet area or built up or super built up area. Considering *inter alia* the provisions of Maharashtra Ownership Flats Act, 1963 ('MOFA') in the light of individual clauses of the MoU, the learned arbitrator held the area of 1 lac sq.ft. to be carpet area and granted specific performance of the agreement contained in the MoU to the extent of the balance carpet area on that basis, namely, difference between 1 lac sq.ft. and 59,756 sq.ft., in favour of the Respondent.

4 Mr. Khambata, learned Senior Counsel appearing for the Petitioner, submits that the impugned award suffers from breach of public policy as also patent illegality appearing on the face of the award in as much as it wrongly treats the MoU as an agreement under MOFA, contrary to the mandate of law and binding judgments of Indian Courts including the Supreme Court. Learned Counsel submits that the arbitrator, in effect, has ruled in favour of the Respondent, by holding the area of 1 lac sq.ft. mentioned in the MoU as carpet area solely on the basis of the mandate of MOFA and not by interpreting the individual terms of the MoU in the light of attending circumstances or otherwise at all. Learned Counsel submits that there are binding authorities of Supreme Court as well as of our court which hold that for an agreement to be considered as an agreement under Section 4 of MOFA it must be in the form provided in Section 4 read with rules framed under MOFA. Learned Counsel submits that, at any rate, any agreement, in order to qualify as an agreement under Section 4, must at least in substance satisfy the requirements of that Section read with the rules. Learned Counsel submits that contrary to this mandate and the law

laid down by courts, the learned arbitrator held the MoU to be an agreement under MOFA, though it was neither in the form stipulated under Section 4 of MOFA read with rules nor in substantial compliance of Section 4. Learned Counsel submits that the arbitrator has done so simply by considering the definition of 'promoter' and the capacity of Accord as 'purchaser'. Learned Counsel contends that even otherwise, neither can Accord be termed as 'purchaser' nor the agreement an 'agreement for sale of flat/s'; it is, by all account, an investment agreement dealing with a specified area within the project without reference to any particular flat/flats. Learned Counsel, secondly, submits that the present Respondent, who is a transferee company under a scheme of amalgamation sanctioned by this court, has no *locus* to prosecute the arbitration reference. Learned Counsel submits that the arbitration agreement and its enforcement, both of which are pre - 2015, that is to say, prior to the amendment of the Arbitration and Conciliation Act, 1996 ("Arbitration Act") by Act of 2015, do not envisage any arbitration reference between a party to an arbitration agreement and a third party. Learned Counsel submits that any transfer of rights by or under a scheme of amalgamation is nonetheless a voluntary transfer, though sanctioned by a court of law; and before Section 8 of the Act was amended in 2015 so as to bring it in line with Section 45 of the Act, a third party claiming through a party to an arbitration agreement could not claim enforcement of the arbitration agreement. Learned Counsel in this behalf relies on various cases including **Chloro Controls India Private Limited Vs. Severn Trent Water Purification Inc.**¹ and **General Radio & Appliances Co. Ltd Vs. M.A. Khader (dead) by L Rs.**²

1 (2013) 1 Supreme Court Cases 641

2 AIR 1986 Supreme Court 1218

5 Mr. Rustomjee, learned Senior Counsel appearing of the Respondent, on the other hand, submits that in essence, the question before the learned arbitrator was of interpretation of an agreement. Relying on the decisions of the Supreme Court in the cases of **Associate Builders Vs. Delhi Development Authority**³, and **HRD Corporation Vs. GAIL (India) Limited**⁴ and the decision of our court in the case of **Fermenta Biotech Limited Vs. K.R. Patel**⁵, learned Counsel submits that so long as such interpretation represents a possible view or a view which a fair or judicially minded person could take and not a view which would shock conscience of the court, the challenge court under Section 34 ought not to interfere with it. It is submitted that the arbitrator has not only taken into account the provisions of MOFA, but has also had regard to the agreement itself and its surrounding circumstances to arrive at what, according to him, was the correct meaning of the expression '1 lac sq.ft. saleable area' appearing in it. Apropos of the argument of the Petitioner concerning the *locus* of the present Respondent, learned Counsel submits that on the very terms of the scheme of amalgamation sanctioned by the court as well as under the scheme of Sections 391 to 394 of the Companies Act, 1956, the present Respondent is a successor in interest of Accord in every sense, entitled to prosecute the proceedings of the present arbitration reference. Learned Counsel, alternatively, submits that the question of succession of the present Respondent for prosecuting the reference was not raised at any time by the Petitioner before the arbitral tribunal. Learned Counsel submits that the Petitioner, having participated in the reference without raising any objection to the arbitrator's jurisdiction to hear the reference,

3 (2015) 3 Supreme Court Cases 49

4 (2018) 12 Supreme Court Cases 471

5 Arb. Petn. No.545 of 2017, dated 11 October 2018.

should be deemed to have waived its objection and is not entitled to challenge the award on that basis in the present arbitration petition. Learned Counsel in this behalf relies on the decisions of the Supreme Court in the cases of **Union of India Vs. PAM Development Private Limited**⁶ and **Geo-Group Communications Inc. Vs. IOL Broadband Limited**⁷, and also refers to the judgment of Queen's Bench Division in **A v B**⁸.

6 The main controversy in the matter, as noted above, concerns the area to be allotted to the Respondent under the MoU and particularly, whether '1 lac sq.ft. saleable area' referred to in the MoU was 'carpet area'. This question is essentially a question of construction of an agreement. If the agreement (namely, the MoU) were to be treated as an agreement for sale of flats, it was clearly possible to say that 'saleable area' referred to therein was 'carpet area', since MOFA, which governed all agreements for sale of flats, required the areas to be denoted in such agreements in terms of carpet area. It was submitted by the Petitioner that the MoU was not an agreement for purchase of flats/apartments, but in the nature of a commercial transaction, the basic or primary object of which was to make investment and earn profits. In other words, what was argued was that it was not a genuine agreement for purchase of flats; the paramount consideration of the claimant in entering into it was to register flats with the Respondent and then sell them at a profit to other persons; the MoU was executed only by way of a security for the amount invested by the claimant. It was in this context that the Petitioner argued before the arbitrator that the provisions of MOFA did not apply to the MoU; neither

6 (2014) 11 Supreme Court Cases 366

7 (2010) 1 Supreme Court Cases 562

8 (2016) EWHC 3003 (Comm)

the Petitioner could be termed as a promoter within the meaning of MOFA nor the claimant a purchaser. It was submitted that the agreement was neither in the prescribed form nor was it registered or stamped; it, thus, could not be said to be under MOFA. This was refuted by the Respondent herein.

7 The learned arbitrator, in this context, considered the provisions of MOFA starting with its preamble read in the light of the statement of objects and reasons, the definitions of 'flat', 'promoter' and 'prescribed' in Section 2 of MOFA, the general liabilities of promoter provided for in Section 3 including clause (n) of sub-section (2) thereof mandating sale of flats only on the basis of carpet area, Section 4 enjoining the promoter to enter into agreements for sale of flats in a prescribed form and with prescribed particulars against sanctions provided in Section 13, and the rule making power of the State Government in Section 15. The arbitrator also considered the rules framed by the State Government under Section 15 which *inter alia* prescribe the form of an agreement. The learned arbitrator then considered if non-conformation with the prescribed form, or non-registration of the agreement under Section 4, which was said to be fatal by our court in **Association of Commerce House Block Owners Vs. Vishandas Samaldas**⁹ for considering the agreement for sale of a flat as an agreement under MOFA, would vitiate the agreement and render it non-existent any more after the amendment of Section 4 and enactment of Section 4A of MOFA. The arbitrator considered in this behalf the judgment of our court in **Sushil Jhaver Shivdasani Vs. Air Inn Pvt. Ltd.**¹⁰, which had held that strict norms of particulars or format were not mandatory for

9 1981 Bom CR 716

10 (2009) 2 Bom CR 608

a writing to constitute a contract between the parties. The learned arbitrator also considered the relevant clauses of the MoU in this behalf.

8 Upon consideration of the foregoing material, the learned arbitrator came to a conclusion that the Petitioner was nothing but a 'promoter' as defined under Section 3(2) of MOFA and the claimant, as a person intending to purchase flat/s under the MoU, could well be said to be a purchaser; the provisions of MOFA, accordingly, applied to the transaction and rights and obligations of parties to the agreement (MoU) were to be determined in accordance with these provisions. In the light of the provisions of MOFA including Section 3 and particularly clause (n) of sub-section (2) thereof, which mandated sale of flats by a promoter to a purchaser only on the basis of carpet area, and Section 13 of MOFA which provided sanctions for non-compliance, and also the various clauses of the MoU in this behalf, the learned arbitrator rejected the Petitioner's contention that the agreement could not be said to be legal, valid or enforceable, for not being in the prescribed form or registered or stamped. The learned arbitrator came to this conclusion, firstly, on the ground that whatever might have been the legal position earlier, after the amendment of MOFA in 2008, non-registration of an agreement for sale or its non-conformation with the prescribed form, could not be said to be fatal to its enforceability. The learned arbitrator drew sustenance in this behalf from the decision of our court in the case of **Sushil Jhaver** (supra). The learned arbitrator held that in the light of the provisions of MOFA, particularly, after Amendment Act of 2008, and the ratio laid down in **Sushil Jhaver**, neither non-registration of the agreement nor non-conformation with the prescribed form could render the agreement either illegal, invalid or

unenforceable. The learned arbitrator then considered the distinction drawn by the Petitioner between “carpet area” and “saleable area”. The learned arbitrator rejected this distinction *inter alia* on the ground that once the Petitioner was held to be a “promoter” under MOFA and the transaction (MoU) as one governed by MOFA, there was an obligation on the part of the Petitioner to sell flats on the basis of carpet area alone and the area of 1 lac sq.ft. saleable area referred to in the MoU was, thus, bound to be treated as 'carpet area'. The learned arbitrator held that it was specifically with a view to clarify this position and protect flat purchasers, who generally are not very well aware or in the know of connotations of different expressions like “carpet area”, “saleable area”, “built-up area”, “super built-up area”, etc., that the legislature had amended the law and imposed an obligation on promoters to sell flats only on the basis of carpet area. The arbitrator held that the interpretation canvassed by the Petitioner would frustrate the laudable object underlying the amendment; it would supply a handle to unscrupulous promoters to easily circumvent a beneficial provision of law. The learned arbitrator then considered the correspondence between the local authority, namely, Municipal Corporation of Greater Mumbai, and the Petitioner herein and held that even this correspondence suggested that the area mentioned in the MoU was to be considered as carpet area.

9 The approach of the learned arbitrator as also the views expressed and conclusions drawn by him are clearly in the realm of possibility. They cannot be termed either as impossible or such that no fair or judicially minded person could adopt or take. There is nothing in them to shock the conscience of the court. As explained by the Supreme Court in **Associate**

Builders (Supra), short of the ground of fraud or corruption or contravention of Sections 75 and 81 of the Act, to make out a ground of conflict with public policy of India, a person challenging an award has to make out a case that either (a) it is in contravention with the fundamental policy of India law, that is to say, it shows infringement of either of the three basic juristic principles, namely, (i) requirement of a judicial approach, which demands that all decisions should be fair, reasonable and objective, (ii) principle of *audi alteram partem*, which mandates that no one shall be a judge in his own cause and (iii) mandate against perversity or irrationality, or (b) it is against the very basic notions of justice and morality, being a decision that shocks the conscience of the court. The only other ground that could possibly be urged, which is really based on the fourth head of public policy, is the ground of patent illegality. As the Supreme Court held in **Associate Builders**, this ground applies only when the award is in contravention (a) of the substantive law of India (the illegality thereunder going to the root of the matter and not being of a trivial nature), or (b) of the Arbitration Act itself, or (c) of the terms of the contract (construction of such terms being primarily for the arbitrator to decide, the only mandate being against a construction which no fair-minded or reasonable person could arrive at). The impugned award does not show either of these contraventions or infringements.

10 Mr. Khambata relies on the cases of **Jayantilal Investments Vs. Madhuvihar Co-operative Housing Society**¹¹ and **Axis Bank Ltd Vs. Madhav Prasad Aggarwal**¹² in support of his submission that any agreement which does not satisfy the requirements of Section 4 of MOFA is

¹¹ AIR 2007 S.C. 1011

¹² Appeal No.360 2017 Decided on 26 October 2018

not an agreement for the purposes of MOFA and does not confer on the parties thereto any right under MOFA. **Jayantilal**'s case *inter alia* considers statutory obligations of a promoter. The Supreme Court in that case *inter alia* held that a promoter is not only statutorily obliged to give particulars of land, amenities, facilities etc., he is also required to make full and true disclosure of the development potentiality of the plot which is the subject-matter of the agreement. He is required to declare whether the plot in question is capable of being loaded in future with additional FSI/floating FSI/TDR. In other words, at the time of execution of the agreement with the flat takers, the promoter is obliged statutorily to place before them the entire project/scheme, be it a one building scheme or a multiple buildings scheme. All this discussion in **Jayantilal** was in the context of whether the promoter was required to obtain prior consent of flat takers before putting up any additional construction. The court held that prior consent was not necessary in a case where these obligations were fulfilled by the promoter and the construction proposed was in accordance with the disclosures made in compliance. The observations of the Supreme Court that these obligations were strengthened by insertion of sub-section (1A) in Section 4 of MOFA by Maharashtra Amendment Act 36 of 1986 *inter alia* requiring every agreement between the promoter and the flat taker to comply with the prescribed form, have to be seen in that context. There is nothing in the judgment to suggest that no right can be claimed by a flat purchaser under MOFA, if his agreement with the promoter does not comply with the prescribed form. In **Axis Bank Limited** (supra), a Division Bench of our court was concerned with an application under Order VII Rule 11 of CPC for rejection of a plaint against a bank, who had taken symbolic possession of an incomplete development project under Section 13 of the

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (“SARFAESI Act”). The case of the bank, in its application under Order VII Rule 11, was that its action in taking over such possession being a measure provided for in Section 13, the plaint against it was barred under Section 34 of SARFAESI Act. The observations made by the division bench in that judgment concerning the requirement of Section 4 of MOFA have to be seen in that light. What the Division Bench held was that there being no registered agreement as prescribed under Section 4 of MOFA, there was no question of any right being claimed by the plaintiff-flat purchasers for their protection under MOFA so as to legally override the charge created by the bank on the project assets. Anyway, the division bench itself made it clear that these observations were limited in the context of issues before it under the provisions of Order VII Rule 11 of the Code of Civil Procedure, namely, the case of the bank for rejection of the plaint against it on account of bar of jurisdiction under Section 34 of SARFAESI Act, and not on the merits of the flat purchasers' case against the promoter himself in that case. There is no warrant for treating it as a definitive or general authority for determining *inter se* rights between a promoter and a flat purchaser under an agreement for sale of a flat, which does not comply with the provisions of Section 4 of MOFA.

11 In any event, the arbitrator has taken a particular view of the subject MoU on the basis of the law cited before him and on reasonable construction of various clauses forming part of the MoU. As noted above, what the arbitrator had to mainly consider was, whether the area described as 'saleable area' in the MoU was meant to be 'carpet area'. A subsidiary question for deciding this issue was whether the agreement was for sale of

flats or was it a mere investment in a project. If it was an agreement for sale, it lent support to the Respondent's case that the area mentioned in it was carpet area. The converse, of course, was not true. Even if the agreement were to be treated as an investment agreement, there was nothing in it to suggest that the area mentioned therein was not carpet area. The case 'whether or not the agreement could be said to be covered by MOFA' has to be seen in this limited context. The arbitrator has construed the MoU to hold that the area was 'carpet area'; he considered, whilst reaching this conclusion, the MoU to be an agreement for sale of flats covered by MOFA and not an agreement of mere investment in a housing project. The arbitrator's view in this behalf is clearly a possible view. The arbitrator cannot be said to have disregarded any binding authority of court to arrive at such finding. As this court held in **Fermenta Biotech Ltd** (supra), as much as a conclusion of fact, even a conclusion of law, where two views are possible, is not open to challenge under Section 34 on the ground of either contravention of fundamental policy of Indian law or the very basic notions of justice and morality. It is not even amenable to a challenge on the ground of a patent illegality appearing on the face of the award, as explained by the Supreme Court in **Associate Builders**. The question in the present case, namely, whether or not the agreement was covered by MOFA, is a question of application of MOFA to the facts of the case. Merely because it is possible to take a different view on such application, the award cannot be faulted under Section 34 of the Act.

12 Mr. Khambata makes two more submissions on merits. The first is that the subject matter of the MoU is saleable area expressed in square feet

and not a flat or flats. Learned Counsel contends that any agreement under MOFA, on the other hand, must relate to a flat or flats. He relies on the Supreme Court judgement in **Nahalchand Laloochand Pvt. Ltd. Vs. Panchali Co-operative Housing Society Ltd**¹³. The judgement in **Nahalchand**'s case considered whether 'stilt parking space' could be termed as a 'flat'. The Supreme Court held that parking space was not a flat or an appurtenant of a flat and the promoter had no right to sell any portion of a building which was not a 'flat' within the meaning of Section 2(a-1) of MOFA. The Judgement does not support the Petitioner's case. There is nothing in the agreement in our case to suggest even remotely that what was agreed to be sold to Accord thereunder was anything but separate and self-contained set of premises forming part of a building used or intended to be used for residence. The MoU was executed before the flats were identified, the choice being given to Accord to select them; they were described in the MoU simply with reference to the aggregate area. That, however, does not imply they were not meant to be flats as defined in Section 2(a-1) of MOFA. The second submission is that the evidence placed by the parties on their understanding of the expression "saleable area" in the MoU has been wholly disregarded by the arbitrator. There is no substance in this submission either. The Respondent's witness has clearly deposed in his evidence that the term "saleable area" was clearly understood as "carpet area". In his cross-examination he did not retract that position; he asserted that he always understood 'saleable area' to be the area a builder could sell to the buyer and 'carpet area' to mean habitable area within the flat. Nothing much could anyway be deduced to support the Petitioner's case from this cross-examination; it is not

13 AIR 2010 Supreme Court 3607

inconsistent with the Respondent's case that 'carpet area' was all that a promoter could sell, having regard to the provisions of MOFA.

13 Coming now to the second limb of Mr. Khambata's arguments, namely, want of *locus* on the part of the present Respondent to prosecute the arbitration reference, it may be noted at the very outset that in this case, what we are dealing with is an arbitration reference already sought by parties to an arbitration agreement and made by the court and not an application of a third party transferee seeking a reference either under Section 11 or under Section 8 of the Arbitration Act. The issue in the present case is whether, by virtue of a scheme of amalgamation sanctioned by the court, the transferee company can continue to prosecute an arbitration reference commenced by the transferor company, and not whether the transferee company can seek an arbitration reference under Sections 8 or 11 in a pre-2015 amendment scenario. Mr. Khambata relies on the Supreme Court decision in **General Radio & Appliances Co. Ltd** (*supra*) in support of his submission that any transfer to, or vesting of a right in, a transferee company on the basis of an order sanctioning a scheme of amalgamation of companies under Sections 391 and 394 of the Companies Act, is a voluntary transfer. The court in that case was considering Section 14(b) of Delhi Rent Control Act, which prohibited sub-letting of rented premises or assignment or other modes of parting with possession thereof without the consent of the landlord. The court held that the transfer of tenancy in that case, which was the result of a scheme of amalgamation as between the transferor and transferee companies, could not be called an involuntary transfer effected by law or a court order. The court held that transfer of tenancy as between transferor and

transferee companies in that case was a voluntary transfer in contravention of the Rent Act as well as of the terms and conditions of the rent agreement, making the transferee liable to be evicted from the tenanted premises. Learned Counsel also relies on the case of **Singer India Limited Vs. Chander Mohan Chadha**¹⁴, which was also a case arising under Section 14(1)(b) of Delhi Rent Control Act. The Supreme Court, after considering the case law on the subject, held in **Singer India Ltd.**, that even if there was an order of a court sanctioning a scheme of amalgamation under Sections 391 and 394 of the Companies Act, whereunder a lease, tenancy or occupancy right of the transferor company got vested in, and became a property of, the transferee company, it would make no difference insofar as the applicability of Section 14(1)(b) was concerned, as the Rent Control Act did not make any exception in favour of a lessee who may have adopted such course of action in order to secure compliance with law. Using these legal propositions, Mr. Khambata argues that the transfer as between Accord and the present respondent was nothing but a voluntary transfer; the Respondent, in the premises, claimed its *locus* in the reference as a party claiming under Accord through such transfer; and there being no recognition in Section 8 of the Act of any party claiming under a party to an arbitration agreement, the arbitrator lacked the jurisdiction to adjudicate any dispute between the Petitioner and the Respondent under the subject arbitration agreement.

14 The argument of Mr. Khambata, in the first place, presupposes that assignment of an arbitration agreement is not permissible and the assignee cannot claim any right thereunder. There is nothing in law to suggest that

14 (2004) 7 SCC 1

an arbitration agreement is not assignable. In fact, both Indian and English Courts have always held it to be assignable by its very nature. If a contract is assignable, the arbitration clause contained in it does not make it unassignable; the arbitration clause, on the other hand, would follow the assignment of the underlying contract. Besides, in the particular case we are dealing with here, the contract contained in the MoU (of which the arbitration clause is a part) is in terms assignable. The MoU specifically provides for it. If that is so, there could really be no objection to assignment of the contract; and any such assignment would clearly have the effect of assignment of the arbitration clause contained in the contract, the assignee being both bound by, and entitled to claim under, it.

15 Delhi High Court has, in **Triveni Engineering Industries Limited Vs. Dasuya Co-operative Sugar Mills Ltd¹⁵** and **Punjab State Industrial Development Corpn. Ltd. Vs. Triveni Engineering Industries Limited¹⁶**, held that if a contract describes a party as a 'purchaser' and defines that expression to include all successors and assigns, the arbitration agreement contained in it would follow the assignment of the contract.

16 Russel on Arbitration states the law thus (19th Edn. Pg.69) :

“Parties to the arbitration agreement-An arbitration agreement will bind not only the actual parties to it, but also an 'assignee' of a contract containing it, the personal representative of a deceased party, a trustee in bankruptcy who adopts a contract containing it, and in general all persons claiming under a party to it but not a stranger to the

15 2007 (Suppl) Arb LR 503, 507

16 (2008) 3 Arb LR 575, 580

agreement.”

17 Even otherwise, the scheme of Sections 391 to 394 of the Companies Act makes it clear that a scheme of amalgamation has a statutory force. It has, in fact, a greater sanctity than a mere *inter partes* agreement. Sanction of a court to a scheme of amalgamation operates as a judgment *in rem* and binds everyone. The effect of a scheme of amalgamation sanctioned by a court, in the context of the transferee company's right to prosecute an arbitration reference to which the transferor was a party, was considered by our court in the case of **Delta Distilleries Ltd Vs. Shaw Wallace & Co. Ltd**¹⁷. The arbitrator in that case had allowed the transferee's application for being brought on record as a successor of the transferor, who was a party to the reference. Our court did not find fault with this order. The argument before the court was that by reason of the scheme of amalgamation sanctioned by the court, the transferor company had become extinguished and as a result, the reference had abated; there was no question of the transferee being impleaded. The court held that the arbitration proceedings had devolved upon the transferee company and it was entitled to be impleaded in the proceedings. In **DLF Power Limited Vs. Mangalore Refinery & Petrochemicals**¹⁸, a learned Single Judge of our court upheld an order passed by an arbitrator under Section 16 of the Act by which the arbitrator had rejected objections to his jurisdiction on the ground that assignee of an arbitration agreement had no locus to contest a reference under that agreement. The learned Judge held that the assignee had every right to invoke the arbitration agreement, having stepped into the shoes of the assignor.

17 (2009) 148 Com Cases 809 (Bom)

18 Arb. Petn. 509 of 2011 dated 20 July 2016

18 Mr. Khambata cannot point out any provision or principle of law or authority to contest this position. He, however, relies on the case of **Chloro Controls** (supra) to suggest otherwise. In **Chloro Controls**, the invocation of an arbitration agreement was under Section 45 of the Act by a non-signatory, and the Supreme Court was called upon to consider permissibility of an arbitration reference between a signatory and a non-signatory or third party to the arbitration agreement. The entire discussion on this point in that case is in the context of principles of “group of companies” or “composite performance” and not assignment of an arbitration agreement. Mr. Khambata lays emphasis on the distinction drawn by the Supreme Court between Section 45 of the Act on the one hand and Section 8 on the other. The Court had observed that Section 8 of the 1996 Act used the expression “parties” simpliciter without any extension, whereas, in a significant contradistinction, Section 45 used the expression “one of the parties or any person claiming through or under him”. The court was of the view that this aspect could not be ignored; due weightage had to be given to the legislative intent; and Section 45 had to be interpreted liberally. Nothing in this discussion rules out the invocation of an arbitration agreement by an assignee of a party under Section 8. A judgment, it is trite to say, is an authority for the proposition it decides or bases its decision on, and not for what follows logically from it. What the Supreme Court decided or based its ruling on was the wide construction to be given to Section 45 of the Act and allowing it to be invoked by parties claiming under parties to arbitration agreement. Merely because the court, whilst construing the amplitude of Section 45, contrasted it with Section 8, it cannot be said to have laid down any proposition of law that Section 8 is restrictive in that it does not admit of its invocation by an assignee to an

arbitration agreement.

19 There is one more reason why the Petitioner must fail in its challenge to the Respondent's *locus* in the reference. In the present case, the Petitioner clearly appears to have proceeded with the hearing of the arbitration reference without raising any objection to the *locus* of the Respondent to prosecute the reference after sanction of the scheme of amalgamation. Though the Petitioner generally raised the issue of *locus* on the part of the present Respondent, that was in an altogether different context. The objection was on the footing that the application for substitution was made at a far too belated stage and the scheme of amalgamation was suppressed from the court, and not on the basis that under the Arbitration and Conciliation Act, 1996, the reference could not have been entertained as between a party to an arbitration agreement and a successor of the other party thereto under a voluntary transfer effected by that other party. A party, having proceeded with a reference without having raised its objection to non-compliance with any provision (i.e. any derogable provision) of Part-I without undue delay or within the stipulated period of time, is deemed to have waived its right to object on the same ground at a later stage. This principle of Section 4 of the Arbitration Act bars the Petitioner from objecting to the award on the ground of want of *locus*, for having failed to so object at any time before the arbitrator.

20 Learned Counsel for the Petitioner submits that the objections contemplated under Section 4 of the Act are objections other than jurisdictional objections. Learned Counsel submits that it is impermissible to the parties to confer jurisdiction on an arbitrator, which he did not

possess. That may be so with reference to objections either of subject matter jurisdiction or any other inherent lack of jurisdiction on the part of the arbitrator. The prosecution of an arbitration reference by or against a successor of a party to a reference can very well be sustained on the ground of consent or waiver. After all, consensual submission of *inter partes* disputes is the very foundation of an arbitrator's jurisdiction; it is through such consensual submission that the arbitrator gets his jurisdiction over the disputes. If that is so, it can hardly be said that not raising of an objection in that behalf would not be fatal to a later challenge to the award on its ground.

21 Learned Counsel for the Petitioner submits that there is no foundation in the pleadings of the Respondent to base such argument on. Learned Counsel submits that waiver, in any case, is a mixed question of law and fact and must be pleaded. May be so generally, but waiver, under Section 4 of the Arbitration Act, is a matter of law. If such law, namely, Section 4, could be applied to admitted facts, a plea or argument of waiver could very well be sustained even if it is not expressed in the pleadings. At any rate, the very plea of want of jurisdiction was for the first time raised in the arbitration petition herein and it is perfectly legitimate to test that plea, or any argument in answer to it, on admitted facts. And the occasion to do so is now, that is, for the first time in this petition.

22 The Supreme Court in **Union of India Vs. Pam Development Private Limited**¹⁹ was concerned with the appellant's argument based on want of jurisdiction in the arbitrator based on an illegal appointment. The

¹⁹ (2014) 11 Supreme Court Cases 366

arbitrator's appointment in that case was said to be against the contractual conditions. The argument was countered by the other side by submitting that the appellant having participated in the proceedings before the arbitrator without demur or objection could not be permitted to object to the arbitrator's jurisdiction at a belated stage. The Supreme Court agreed with the respondent's contention, holding that the appellant, having failed to raise the plea of jurisdiction before the arbitral tribunal, cannot be permitted to raise it for the first time before a challenge court.

23 In the premises, there is no infirmity in the impugned award on either of the two grounds urged by the Petitioner herein. There is, accordingly, no merit in the arbitration petition. The petition is dismissed. There shall, in the facts of the case, be no order as to costs.

(S.C. GUPTE, J.)