

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

APPEAL (L) NO. 585 OF 2018
IN
NOTICE OF MOTION (L) NO. 3049 OF 2018
IN
SUIT (L) NO. 1676 OF 2018

1. Ravi Arya, Indian Inhabitant,
Residing at 6, Satlej Terrace,
6, Walkeshwar Road,
Mumbai – 400 006
2. Nakul Arya, Indian Inhabitant
Residing at 6, Satlej Terrace,
6, Walkeshwar Road,
Mumbai – 400 006
3. Sushma Arya, Indian Inhabitant
Residing at 6, Satlej Terrace,
6, Walkeshwar Road,
Mumbai – 400 006
4. Varun Arya, Indian Inhabitant,
Residing at 6, Satlej Terrace,
6, Walkeshwar Road,
Mumbai – 400 006
5. Ravi Arya HUF,
Through Mr. Ravi Arya,
Karta, Residing at 6,
Satlej Terrace,
6, Walkeshwar Road,
Mumbai - 400 006

..Appellants
(Ori. Plaintiffs)

VERSUS

1. Palmview Investments Overseas Ltd.
Portcullis Trustnet Chambers,
P.O. Box 3444, Road Town,
Tortola, British Virgin Islands
2. Arya Iron & Steel Co. Pvt. Ltd.
Having registered office at 51-53A,
Mittal Court, “A” Wing,
Nariman Point, Mumbai – 400 021
3. Vijay Maniyar, Indian Inhabitant,
Company Secretary of Arya Iron
Steel & Co. at 51 -53 A, Mittal Court,
“A” Wing, Nariman Point,
Mumbai - 400 021
4. Pawan Aryan, Indian Inhabitant,
at 51 -53 A, Mittal Court,
“A” Wing, Nariman Point,
Mumbai – 400 002
5. Puneet Arya, Indian Inhabitant,
at 51 -53 A, Mittal Court,
“A” Wing, Nariman Point,
Mumbai – 400 002
6. Poonam Arya, Indian Inhabitant,
at 51 -53 A, Mittal Court,
“A” Wing, Nariman Point,
Mumbai – 400 002
7. Trupti Arya, Indian Inhabitant,
at 51 -53 A, Mittal Court,
“A” Wing, Nariman Point,
Mumbai – 400 002
8. Pawan Arya, HUF
at 51 -53 A, Mittal Court,
“A” Wing, Nariman Point,

Mumbai – 400 002

9. MP Recycling Pvt. Ltd.
having its Registered office at 43,
Ramwadi, Kalbadevi Road,
Mumbai - 400 002
 10. Arya Ship Breaking Company
Pvt. Ltd.
having its registered office,
at 43, Ramwadi, Kalbadevi Road,
Mumbai – 400 002
- ..Respondents
(Ori. Defendants)

....

Mr. Haresh Jagtiani Senior Advocate along with Mr. Apurva Manwani and Ms. Bhavi Vora i/b Siddesh Bhole for Appellants

Mr. D.D. Madon, Senior Advocate, Mr. Pradeep Sancheti, Senior Advocate and Mr. Kevic Setalvad, Senior Advocate i/b Vinay J. Bhanushali for Respondent No.1

Mr. Manavendra Mishra along with Mr. Akash Karmakar i/b Khaitan & Co. for Respondent No. 2

Mr. G.S. Godbole along with Rahul Soman i/b Aditya P. Shirke for Respondent No.3

Mr. Karl Tamboly along with Mr. Hrushi Narvekar, Mr. Vivek Vashi, Ms. Alya Khan, Ms. Aditi Bhansali and Mr. Yash Momaya i/b Vashi and Vashi for Respondent Nos. 4 to 8

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CORAM: NARESH H. PATIL, C.J. &
N.M. JAMDAR, J.

RESERVED ON 22 JANUARY 2019

PRONOUNCED ON 12 FEBRUARY 2019

JUDGMENT: [PER NARESH H. PATIL, C.J.]

1. Admit. The Appeal is heard finally by consent of the parties at admission stage.

2. The Appeal is directed against an order dated 17 December 2018 passed by the learned Single Judge in Notice of Motion (L) No. 3049 of 2018 in Suit (L) No. 1676 of 2018 dismissing the Notice of Motion.

3. The appellants are plaintiffs in a suit (Lodging) No. 1676 of 2018 inter alia seeking temporary injunction restraining the respondent nos. 1 to 8 (original Defendants) from proceeding with the Arbitration proceedings as invoked by Communication dated 30 April 2018.

4. The appellant no.1 and respondent no.4 Pawan are real brothers. The respective groups are referred to as RA Group and PA Group. The appellants constitute part of RA Group and the respondents i.e. respondent Nos. 4 to 8

constitute the PA Group. Members of both the Groups were partners since long in business and have set up various businesses primarily that of running industrial Units in the State of Odisha. The respondent no.2 – Company i.e. Arya Iron and Steel Pvt. Ltd. was incorporated on 27 July 2004. The Promoters of the Company were RA Group, PA Group & respondent nos. 9 and 10. It is the appellants' contention that the RA Group and PA Group collectively held 21.428% each of the share-holding of the respondent no.2 - Company and the respondent nos. 9 and 10 held 41.145% respectively and 11.999% of the share-holding in the said Company.

5. The appellants state that due to global depression in the year 2008 – 2009, the respondent no.2 – company along with other companies made some losses. The PA Group, at that time, insisted that they should take loan to revive the company from respondent no.1- company as it would be easy to procure loan on account of the family relations with the PA Group shared with the Jindal Group, the owners of respondent no.1. It is submitted that respondent no.1 is married to respondent no.7, the daughter of one of the brothers of Jindal Group.

6. It was decided that the respondent no.1 company

would purchase 49% share-holding of the respondent no.2 – company. Accordingly, on 25 March 2009, a Share Purchase and Share Subscription Agreement as well as Shareholders Agreement were entered into between the parties. It was represented at this time by all the PA Group that the Promoters' Groups comprising of the PA and RA Groups would still be in majority as the respondent no.1 - company was introduced only as a strategic investor. As per the terms, the respondent no.1 – company purchased 49% shareholding of the respondent no.2 – company. Accordingly, Articles of Association (AOA) of the respondent no.2 – company were amended.

7. In or around April 2011, differences arose between RA and PA Groups. It is alleged that shareholding in the respondent no.2 – company was misused by PA Group who got dominance over the affairs of respondent no.2 – company.

8. During the period from 2012 – 2014, the relations further got strained and therefore, efforts were made to resolve the disputes by involving friends and family members of both sides. While the attempts to resolve the disputes amicably were going-on, the appellants state that PA Group filed Suit (L) No. 194 of 2015 in the High Court at Bombay against the RA

Group on or around 25 February 2015 staking illegal claim on the properties belonging to M/s. Kash Foods Private Ltd. and personal properties belonging to the appellant nos. 2 and 4. On-going efforts of settlement suffered due to filing of the suit, according to the appellants.

9. On or about 14 August 2015 Consent Terms were entered into for finding out a solution to the entire dispute arising between RA Group and PA Group. From August 2015, the PA and RA Groups were negotiating for Supplemental Consent Terms as contemplated under the Consent Terms. In the month of May 2016, the PA Group i.e. Pawan Arya Group for execution of part of the Consent Terms, filed Chamber Summons No. 1020 of 2016 along with Execution Application No. 1069 of 2016 before this Court. The PA Group did not intimate or made it known to the RA Group that the Consent Terms given by respondent no.1 by communication dated 18 August 2015, had elapsed or was not valid beyond 29 August 2015.

10. In the said Chamber Summons, on 3 May 2016, an order came to be passed directing both the parties not to act on the Consent Terms.

11. In or around 20 April 2017, the RA Group filed a Company Petition No. 149 of 2017 under Sections 241 and 242 of the Companies Act, 2013 for oppression and mismanagement against respondent no.1, PA Group, respondent no.2 – company and others. The petition is pending adjudication before the National Company Law Tribunal, Mumbai (NCLT, Mumbai).

12. On 30 November 2017, the Bombay High Court passed order disposing of Chamber Summons No. 1020 of 2016 along with Execution Application No. 1069 of 2016 in favour of the RA Group. The said order was confirmed by the Division Bench of this Court vide its order dated 21 December 2017.

13. On 15 March 2018, the PA Group challenged the order dated 21 December 2017 passed by the Division Bench of this Court in Special Leave Petition (C) No. 9971 – 9972 of 2018 before the Apex Court.

14. On 15th March 2018, a Board Meeting of the respondent no.2 – company was held at its registered office.

The meeting was attended to by appellant nos. 1 and 2, respondent nos. 3, 4 and 5, Mr. Sunil Kumar Jain, Ms. Daisy Thakur who was the proposed nominee director of respondent no.1 and Mr. Girish Sharma. Respondent nos. 9 and 10 remained unrepresented. Such a Resolution came to be passed whereby respondent no.3 and Mr. Pravesh Pandey (GM Corporate Affairs and Commercials of respondent no.2 company) were jointly authorized to appoint advocates, arbitrators, counsel in all proceedings against respondent no.2 – company.

15. The appellants state that the said Resolution was passed with the active participation of representatives of respondent no.1. According to the appellants, the joint authority was given to respondent no.3 and Mr. Pravesh Pandey (GM Corporate Affairs and Commercials of respondent no.2 – company) only to act on behalf of the Board and not as to substitute the Board. The appellants state that in furtherance of the conspiracy hatched by the PA Group, respondent nos.1 and 3, advocates of respondent no.4 sent an e-mail on 30 April 2018 attaching a letter dated 30 April 2018 to respondent no.2 – company, the respondent nos. 3 and 4 and the appellants invoking the arbitration (Invocation Notice) under clause 16 of

the Shareholder's Agreement.

16. Pursuant to the order passed by the Apex Court in SLP dated 7 May 2018, mediation proceedings were initiated under the aegis of Mr. S.J. Vazifdar (Former Chief Justice, Punjab and Haryana High Court) wherein the issue of bidding of the entire shareholding of respondent no.2 – company (including the 49% shareholding of respondent no.1 being represented by the PA Group), was under consideration along with both the other issues.

17. The appellants contend that by communication dated 30 April 2018 respondent no.3 sent response to the invocation notice and illegally nominated Justice Mohit Shah, former Chief Justice of Bombay High Court to act as an Arbitrator in the Arbitration Proceedings as invoked by respondent no.1.

18. It is the appellants' contention that on the same day i.e. 30 May 2018, Justice Mohit Shah addressed a letter of consent to his appointment as an Arbitrator along with copy of the Disclosure as per Section 12 of the Arbitration and Conciliation Act, 1996 (Act of 1996) wherein it was

mentioned that “out of these 39 arbitrations, there are some arbitrations between same parties or related parties in connected or similar contracts”.

19. The appellants contend that respondent no.2 derived his alleged authority by nominating an Arbitrator on behalf of respondent no.2 - company based on the Resolution passed by the Board Meeting dated 15 March 2018. The appellants contend that as an email was sent without any Board authority, the same was illegal and non-est. Thus, the appellants contend that appointment of Mr. Justice Mohit Shah by respondent no.3 was unauthorized and illegal.

20. Vide letter dated 8 June 2018, Justice C.K. Thakker Former Judge of the Supreme Court of India, accepted his appointment as Presiding Arbitrator and scheduled a preliminary meeting of the Arbitration Proceedings on 28 June 2018 in Mumbai. On 20 June 2018 advocates of the appellants addressed a letter to Justice C.K. Thakker, Justice Deepak Verma and Justice Mohit Shah (Arbitral Tribunal) followed by communication between the appellants of both the sides.

21. On 25 June 2018 Mediation meeting between both

the Groups was initiated. There were 20 meetings held by Justice S.J. Vazifdar, the learned Arbitrator. On 25 June 2018 a preliminary meeting of the proceedings was held in Mumbai which was presided over by the Arbitral Tribunal. In the said meeting, it is submitted that RA Group attended and apprised the Arbitral Tribunal of the on-going mediation between RA and PA Groups, the proceedings were adjourned to 13 September 2018 and thereafter on 14 September 2018. The Board meeting was conducted on 3 September 2018 and 14 September 2018. Vide order dated 28 September 2018, the Tribunal upheld the constitution of the Arbitral Tribunal. On 14 September 2018 the RA Group raised objection with regard to the constitution of the Arbitral Tribunal and requested the Tribunal to disband itself.

22. By an order dated 28 September 2018, the Arbitral Tribunal upheld the constitution of the Arbitral Tribunal. Thereafter, an intimation was given to the parties to file their Statement of Claim on or before 26 October 2018, Statement of Defence / Counter-claim with documents on or before 23 November 2018 and fixed a further program accordingly.

23. On 26 October 2018, respondent no.1 filed its

Statement of Claim with the Tribunal. On 23 November 2018 Statement of Defence was filed by respondent nos. 4 to 8 and respondent no.2. In this view of the matter, the appellants claim that the Suit (L) No. 1676 of 2018 along with Notice of Motion (L) No. 3049 of 2018 was filed on 10 December 2018 by the appellants seeking reliefs restraining the arbitration proceedings. By an order dated 17 December 2018 the learned Single Judge of this Court dismissed the said Notice of Motion which order is impugned herein.

24. Mr. Haresh Jagtiani, the learned Senior Counsel for the appellants submits that the appellants are not raising issue of competency of the Arbitral Tribunal. The Tribunal is constituted by collusion and is illegal and non-est as the same cannot be recognized in the eye of law. The conduct of respondent nos. 1 and 4 to 8 i.e. 74.5% shareholders of respondent no.2 – company with respect to collusive invocation of the arbitration proceedings, is objectionable. The respondent no.1 and respondent nos. 4 to 8 are close relatives. The learned Senior Counsel further submits that Resolution dated 15 March 2018 authorizing respondent no.3 to appoint an Arbitrator on behalf of respondent no.2 was misused by respondent no.3 by not consulting Board of Directors. The

Resolution passed on 15 March 2018 could never have been utilized to appoint an Arbitrator. There was no such authority given. It was submitted that respondent no.1 was involved in appointing the Arbitrator on behalf of respondent no.2 – company since the representatives of the respondent no.1 actively and positively voted in passing the Resolution dated 15 March 2018 under which respondent no.3 derived its authority. The appellants have narrated the series of incidents to show that unsuccessful attempts were made by the PA Group to get some flats allotted to them from the plaintiffs and misused of their authority.

25. In paragraph AA of the Grounds in the appeal memo, the appellants state as under:

“The learned Judge failed in considering that the respondent no.3 had not raised any queries or sought any clarification upon receiving the letter dated 30 May 2018 from the 'arbitrator nominated on behalf of the respondent no.2' wherein it was mentioned that out of the 39 ongoing arbitrations there were some arbitrations between the same parties or related parties in connected or similar matters clearly portraying that respondent no.3 was absolutely unconcerned about the interest of the respondent no.2.”

26. The learned Senior Counsel for the appellants submitted that in view of the Disclosure, it would be a matter of conflict with the Arbitrators in case the arbitration proceedings is allowed to proceed. The Counsel submitted in the course of arguments that he has highest respect and regard for the learned Arbitrators. In the submission of the learned Counsel, there are disquieting features in the way in disbanding the proceedings. Timing of the arbitration claim is also very crucial. The Counsel submitted that the mediation efforts have failed. The issue raised in the appeal, is regarding the legitimacy of the Tribunal and not the competency of the Arbitrators.

27. The learned Counsel has taken us through the various communications, letters, clauses of the Agreements and the impugned order.

28. On behalf of the Respondent no.1, Mr. Madon, the learned Senior Counsel submitted that there is no element of fraud in the entire exercise of authorizing respondent no.3 and Mr. Pravesh Pandey (GM Corporate Affairs and Commercials of respondent no.2 - company) by the Board of Directors,

neither the appointment of Arbitrator, nor the action taken for appointment of an Arbitrator, is without any authority. Under the Resolution passed by the Board of Directors, respondent no.3 and Mr. Pravesh Pandey (GM Corporate Affairs and Commercials of respondent no.2 – company) had resorted to taking steps for appointing Arbitrator. In the facts of this case, the Counsel submitted that the suit itself as filed by the appellants, is not maintainable. The Counsel placed reliance on the provisions of Sections 4, 5, 11, 12 and 13(1)(2) of The Arbitration and Conciliation Act, 1996 (Act of 1996).

29. There was no bar for the Promoters to ask for appointment of Arbitrator. It was submitted that the appellants are not challenging the appointment of Mr. Justice Mohit Shah (Retd.) as an Arbitrator. The Counsel referred to the order passed by the Arbitrators and the Minutes of the Meeting of the Arbitrators. The Counsel submitted that charge is against the Promoters and not against the Company. The Counsel submitted that objection raised before the learned Single Judge and before this Court, is in respect of legitimacy of the Tribunal, jurisdictional issue and competency of the Tribunal, which could be gone into, in case, the appellants raise the same before the Arbitrators as it has to be raised before the Arbitrator

alone. The Civil Court's doors are shut for the appellants in such matters. Even under Section 16 of the Act, the issue of fraud can also be gone into by the Arbitrators as sought to be raised by the learned Counsel for the appellants. It was submitted that all such issues ought to have been raised before the Arbitrator alone.

30. In support of his contention, the learned Senior Counsel for the appellants has placed reliance upon the decision in the case of *RRB Energy Limited v. Vestas Wind Systems and Anr.*¹ and submitted that the suit is maintainable and proceedings in the present form can be entertained. We have perused the said judgment. In our opinion, in the said decision, the Court held that there was a serious issue of fraud and thus, involves a matter of public importance which is not arbitrable. However, in the present case, there is no allegation of fraud, hence, this decision is not helpful for the appellants. Moreover, there are decisions of the Apex Court wherein it is held that once the matter is before the Arbitral Tribunal, the Civil Court cannot entertain any proceedings seeking injunction against the Arbitral Tribunal during the course of arbitration proceedings. So also, bearing in mind the very object with which the Arbitration and Conciliation Act, 1996

1 [2015 SCC OnLine Del.8734 : (2015) 219 DLT 516]

has been enacted and the provisions thereof contained in Section 16 conferring the power on the Arbitral Tribunal to rule on its own jurisdiction, including ruling on any objection with respect to existence or validity of the arbitration agreement, we have no doubt in our mind that the civil court cannot have jurisdiction to go into that question.

31. In support of the above contentions, Mr. Madon, the learned Senior Counsel for the respondent no.1, has placed reliance on the following judgments:

(1) In the case of *Kvaerner Cementation India Limited vs. Bajranglal Agarwal and anr*².

(2) In the case of *A. Ayyasamy vs. A. Paramasivam and ors*³.

(3) In the case of *Duro Felguera, S.A. vs. Gangavaram Port Limited*⁴,

(4) *Hema Khattar and anr. vs. Shiv Khera*⁵

(5) *Meguin GmbH & Company vs. Nandan Petrochem Ltd.*⁶

(6) *Ameet Lalchand Shah and ors. vs. Rishabh*

2 [(2012) 5 SCC 214]

3 [(2016) 10 SCC 386]

4 [(2017) 9 SCC 729]

5 [(2017) 7 SCC 716]

6 [(2016) 10 SCC 422]

*Enterprises and anr*⁷.

(7) In the case of *HRD Corporation (Marcus Oil and Chemical Division) vs. Gail (India) Limited (Formerly Gas Authority of India Limited)*⁸

(8) In the case of *NIIT Limited vs. Ashish Deb and anr.*⁹

(9) In the case of *Mukeshkumar Rajkumar Agrawal vs. Rajkumar Avinashchand Agarwal*¹⁰;

32. In the case of *Kvaerner Cementation India Limited vs. Bajranglal Agarwal and anr.* (supra), the Supreme Court in para 3 observed as under:-

“3. There cannot be any dispute that in the absence of any arbitration clause in the agreement, no dispute could be referred for arbitration to an Arbitral Tribunal. But, bearing in mind the very object with which the Arbitration and Conciliation Act, 1996 has been enacted and the provisions thereof contained in Section 16 conferring the power on the Arbitral Tribunal to rule on its own jurisdiction, including ruling on any objection with respect to existence or validity of the arbitration agreement, we have no doubt in our mind that civil court cannot have jurisdiction to go into that question.”

7 [2018 SCC OnLine SC 487]

8 [(2018) 12 SCC 471]

9 [2004-2-L.W.244]

10 [2000(1) M.P.L.J. 209]

(II) In the case of *A. Ayyasamy vs. A. Paramasivam and ors. (supra)*, the Supreme Court, in paras 37 and 45, observed as under:-

“37. The position that emerges both before and after the decision in *N. Radhakrishnan* is that successive decisions of this Court have given effect to the binding precept incorporated in Section 8. Once there is an arbitration agreement between the parties, a judicial authority before whom an action is brought covering the subject matter of the arbitration agreement is under a positive obligation to refer parties to arbitration by enforcing the terms of the contract. There is no element of discretion left in the court or judicial authority to obviate the legislative mandate of compelling parties to seek recourse to arbitration. The judgment in *N. Radhakrishnan* has, however, been utilised by parties seeking a convenient ruse to avoid arbitration to raise a defence of fraud. First and foremost, it is necessary to emphasise that the judgment in *N. Radhakrishnan* does not subscribe to the broad proposition that a mere allegation of fraud is ground enough not to compel parties to abide by their agreement to refer disputes to arbitration. More often than not, a bogey of fraud is set forth if only to plead that the dispute cannot be arbitrated upon. To allow such a plea would be a plain misreading of the judgment in *N. Radhakrishnan*. As I have noted earlier, that was a case where the Appellant who had filed an application Under Section 8 faced with a suit on a dispute in partnership had raised serious issues of criminal wrongdoing, misappropriation of funds

and malpractice on the part of the Respondent. It was in this background that this Court accepted the submission of the Respondent that the arbitrator would not be competent to deal with matters “which involved an elaborate production of evidence to establish the claims relating to fraud and criminal misappropriation”. Hence, it is necessary to emphasize that as a matter of first principle, this Court has not held that a mere allegation of fraud will exclude arbitrability. The burden must lie heavily on a party which avoids compliance with the obligation assumed by it to submit disputes to arbitration to establish the dispute is not arbitrable under the law for the time being in force. In each such case where an objection on the ground of fraud and criminal wrongdoing is raised, it is for the judicial authority to carefully sift through the materials for the purpose of determining whether the defence is merely a pretext to avoid arbitration. It is only where there is a serious issue of fraud involving criminal wrongdoing that the exception to arbitrability carved out in N. Radhakrishnan may come into existence. Allegations of fraud are not alien to ordinary civil courts. Generations of judges have dealt with such allegations in the context of civil and commercial disputes. If an allegation of fraud can be adjudicated upon in the course of a trial before an ordinary civil court, there is no reason or justification to exclude such disputes from the ambit and purview of a claim in arbitration. Parties who enter into commercial dealings and agree to a resolution of disputes by an arbitral forum exercise an option and express a choice of a preferred mode for the resolution of their disputes. Parties in choosing arbitration place priority upon the speed, flexibility and

expertise inherent in arbitral adjudication. Once parties have agreed to refer disputes to arbitration, the court must plainly discourage and discountenance litigative strategies designed to avoid recourse to arbitration. Any other approach would seriously place in uncertainty the institutional efficacy of arbitration. Such a consequence must be eschewed.

45. *Similarly, Redfern and Hunter on International Arbitration contains the following statement of legal position in relation to arbitrability of matters involving fraud:*

(vi) *Fraud*

Where allegations of fraud in the procurement or performance of a contract are alleged, there appears to be no reason for the arbitral tribunal to decline jurisdiction. Indeed, in the heat of battle, such allegations are frequently made, although much less frequently proven.”

(III) In the case of *Duro Felguera, S.A. vs. Gangavaram Port Limited*, (*supra*), the Supreme Court, in para 19, observed as under :

“19. *The effect of the Arbitration and Conciliation (Amendment) Act, 2015 in Section 11 of the Act has been succinctly elucidated in the textbook “Law Relating to Arbitration and Conciliation” by Dr P.C. Markanda, which reads as under :*

“The changes made by the amending Act are as follows:

1. The words ‘Chief Justice or any person or institution designated by him’ shall be substituted by the words ‘the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court’. Thus, now it is not only the Chief Justice who can hear applications under Section 11, the power can be delegated to any Judge as well.

2. As per sub-section (6-A), the power of the Court has now been restricted only to examination of the existence of an arbitration agreement. Earlier, the Chief Justice had been given the power to examine other aspects as well i.e. limitation, whether the claims were referable for arbitration, etc. in terms of the judgments of the Supreme Court in SBP and Co. vs. Patel Engg. Ltd. And National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd. Now all preliminary issues have been left for the Arbitral Tribunal to decide in terms of Section 16 of the Act.

3. The amending Act has categorically provided in sub-section (6-B) that designation of any person or institution by the Supreme Court or High Court would not be construed as delegation of judicial power. The order passed by a designated person or institution would continue to be regarded as a judicial order.

4. *It has been provided in sub-section (7) that the order passed under this section shall not be appealable. This change means that finality is attached to the order passed under this section and it would not be subject to further examination by an appellate court.*

5. *Sub-section (8) has been amended to bring it in conformity with amended Section 12 with regard to ensuring independence and impartiality of the arbitrator. Before appointing any arbitrator, a disclosure in writing has to be obtained in terms of Section 12(1) of the Act. This is to ensure that the appointed arbitrator shall be independent and impartial and also harmonizes the provisions of Sections 11 and 12 of the Act.*

6. *The amending Act has introduced sub-section (13) which provides that the disposal of the application under this section has to be expeditious and endeavour shall be made to dispose of the application within a period of 60 days from the date of service of notice on the opposite party. This sub-section would ensure speedy disposal of applications under this section and all contentious issues have been left to be decided by the Arbitral Tribunal.*

7. *For determining the fee structure of the Arbitral Tribunal, it has been recommended that the High Courts may frame the necessary rules and for that*

purpose, a model fee structure has been provided in the Fourth Schedule of the amending Act. However, this sub-section would not be applicable for the fee structure in case of international commercial arbitrations and domestic arbitrations where the parties have agreed for determination of fee as per rules of an arbitral institution. This sub-section has been inserted to ensure a reasonable fee structure since the cost of arbitration has increased manifold due to high charges being levied on the parties by the Arbitral Tribunal and other incidental expenses.”

[Reference: Law Relating to Arbitration and Conciliation by Dr P.C. Markanda; Lexis Nexis, 9th Edn., p. 460]

(IV) In the case of *Ameet Lalchand Shah and ors. vs. Rishabh Enterprises and anr. (supra)*, the Supreme Court, in paras 33 and 34, observed as under :-

“33. According to the respondents, it is not a case where “fraud is alleged merely to disable an arbitration”. Mr. Sibal, learned senior counsel for respondents contended that the plaint is based on the averments that from inception, the intention of appellants/defendants was to cheat the respondents and the respondents were made to part with large sums of money on the basis of the misrepresentation made by the appellants. It was submitted that alternative prayer in the plaint will not convert the fraud suit to a regulatory suit

because of alternative prayer since alternative prayer - 'lease rental' has been projected only as an alternative remedy. Placing reliance upon Arundhati Mishra (Smt.) v. Sri Ram Charitra Pandey, (1994) 2 SCC 29, it was submitted that it is settled law that it is open to the parties to raise mutually inconsistent pleas and the relief could be granted on the alternative plea so raised.

34. Refuting the above contentions, Mr. Shanti Bhushan, learned senior counsel for the appellants placed reliance upon Ayyasamy case to contend that there are no serious allegations in the plaint to decline reference of the matter to arbitration. It was submitted that mere allegations of fraud were not sufficient to detract from the performance of the obligation of the parties in terms of the agreement and refer the matter to arbitration.”

(V) In the case of *HRD Corporation (Marcus Oil and Chemical Division) vs. Gail (India) Limited (Formerly Gas Authority of India Limited)*, the Supreme Court, in para 12, observed as under:-

“12. After the 2016 Amendment Act, a dichotomy is made by the Act between persons who become “ineligible” to be appointed as arbitrators and persons about whom justifiable doubts exit as to their independence or impartiality. Since ineligibility goes to the root of the appointment, Section 12(5) read with the

Seventh Schedule makes it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes “ineligible” to act as arbitrator. Once he becomes ineligible, it is clear that, under Section 14(1)(a), he then becomes de jure unable to perform his functions inasmuch as, in law, he is regarded as “ineligible”. In order to determine whether an arbitrator is de jure unable to perform his functions, it is not necessary to go to the Arbitral Tribunal under Section 13. Since such a person would lack inherent jurisdiction to proceed any further, an application may be filed under Section 14(2) to the Court to decide on the termination of his/her mandate on this ground. As opposed to this, in a challenge where grounds stated in the Fifth Schedule are disclosed, which give rise to justifiable doubts as to the arbitrator’s independence or impartiality, such doubts as to independence or impartiality have to be determined as a matter of fact in the facts of the particular challenge by the Arbitral Tribunal under Section 13. If a challenge is not successful, and the Arbitral Tribunal decides that there are no justifiable doubts as to the independence or impartiality or the arbitrator/arbitrators, the Tribunal must then continue the arbitral proceedings under Section 13(4) and make an award. It is only after such award is made, that the party challenging the arbitrator’s appointment on grounds contained in the Fifth Schedule may make an application for setting aside the arbitral award in accordance with Section 34 on the aforesaid grounds. It is clear, therefore, that any challenge contained in the Fifth Schedule against the appointment of Justice Doabia and Justice Lahoti cannot be gone into at

this stage, but will be gone into only after the Arbitral Tribunal has given an award. Therefore, we express no opinion on items contained in the Fifth Schedule under which the appellant may challenge the appointment of either arbitrator. They will be free to do so only after an award is rendered by the Tribunal”.

(VI) In the case of *NIIT Limited vs. Ashish Deb and anr.(supra)*, the Division Bench of Madras High Court, in para 13, observed as under :-

“13. Though the respondents/plaintiffs have challenged the validity of the agreement on the ground that a fraud was played on them, the same also can be gone into by the arbitrator in view of powers given under Sec. 16 of the Act. This aspect was not considered by the learned Judge while rejecting the Application filed under Section 8 of the Act by the appellant/defendant. Hence we are inclined to interfere with the order passed by the learned Judge.”

(VII) In the case of *Mukeshkumar Rajkumar Agrawal vs. Rajkumar Avinashchand Agarwal (supra)*, the learned Single Judge of Madhya Pradesh High Court, in para 11, observed as under :-

“11. In my opinion, the words in clause (a) of sub-section (6) of section 11 of the Act are confined to total failure of the action on the part of the parties and it does not include wrong action

of a party which may even be illegal. Once, the parties have appointed an arbitrator or arbitrators right or wrong, there is procedure provided in the Act to challenge his authority. The applicant cannot by-pass that procedure and directly file an application under section 11 of the Act before the Chief Justice or the person or institution designated by him. This is clear from section 12 of the Act read with section 13 thereof. That apart, the jurisdiction of the Arbitration Tribunal can be challenged under section 16(1) of the Act. Therefore, once the arbitrator has already been appointed there is no occasion for the Chief Justice or his designate to exercise his powers under section 11 of the Act. The arbitrator is already seized of the matter and it is for him to decide whether he was validly or invalidly appointed.”

33. The learned Counsel appearing for the respondent no.2 has adopted the arguments advanced by learned Counsel for the respondent no.1 and opposed the grant of any relief to the Appellants.

34. Mr. Godbole, learned Counsel appearing for the respondent no.3 submitted that respondent no.3 has acted perfectly in accordance with the Board Resolution after taking legal advice. The Company Secretary has taken all the steps. He submitted that there is no allegation of fraud or misuse of

authority appointing Arbitrator.

35. Mr. Tamboly, learned Counsel appearing for respondent nos. 4 to 8 submitted that there is no error of law in the view adopted by the learned Single Judge and it is reasonable and sound view in the facts of the case and in accordance with the settled position of law.

36. In Rejoinder, Mr. Jagtiani the learned Senior Counsel for the appellants further submitted that the appointment of Arbitrator was illegitimate. It is the act of collusion between the rival faction and the respondent no.3. It is an arbitrary action which does not have sanctity of law. Respondent no.3 was required to do ministerial acts of plenary in nature only. The Counsel vehemently raised an issue as to why a personal claim against Ravi Arya was raised and not against the Company. The Counsel submitted that certain issues cannot be gone into before the Arbitral Tribunal, therefore, suit was filed which is perfectly maintainable.

37. We have perused the record, impugned order and considered the submissions advanced. It is necessary to refer to certain relevant provisions of the Arbitration and Conciliation

Act, 1996. Section 11 of the said Act refers to “Appointment of Arbitrators”. Section 12 refers to “Grounds for challenge”.

38. The provisions of Sections 13(1), (2), (3) and (5) of the said Act, read as under:

“13. Challenge procedure – (1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.

(2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section (3) of Section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.

(3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(4)

(5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34”.

39. Section 16 refers to “Competence of arbitral tribunal

to rule on its jurisdiction”.

40. By Communication dated 30 April 2018, a notice for invocation of arbitration in respect of appointment of Arbitrator pursuant to clause 16 of the shareholders agreement dated 25 March 2009, was issued through Advocates and Solicitors. We have perused the order on objection of Ravi Arya against the constitution of Arbitral Tribunal (Exh. CC at page 249 of Vol. II). The Arbitral Tribunal has referred to Article 16 of the Arbitration Clause, which reads as under:

“Article 16: Arbitration -

Any Dispute between the Parties under this Agreement, may be settled under the Arbitration and Conciliation Act, 1996, including any statutory modifications, amendments, re-enactment thereof from time to time (“**Arbitration Act**”), by reference to arbitration under the provisions of the Arbitration and Conciliation Act, 1996. The Company and the acquirer shall appoint one arbitrator of each, and the two arbitrators so appointed, shall together appoint a third arbitrator, who shall act as the umpire, in such disputes. The place of arbitration shall be Mumbai or any other place to be mutually agreed between the parties to the Dispute”

[Emphasis supplied]

41. The Claimant (the acquirer) has nominated an Arbitrator, as also the respondent no.1 company, has also nominated an Arbitrator. Both the Arbitrators then appointed a Third / Presiding Arbitrator in consonance with procedure laid down in the Shareholders Agreement.

42. Article 10 of the Agreement refers to the Board of Directors and the Quorum.

43. After going through these basic documents and considering an order on objection dated 28 September 2018, the Arbitral Tribunal held that constitution of Arbitral Tribunal was legal and proper. The question is as to whether in the light of these orders and opinion expressed by the Arbitral Tribunal, a suit could be filed to raise issues concerning legitimacy and illegality in the constitution of Arbitral Tribunal.

44. We have also perused the Minutes of the 3rd Meeting dated 28 September 2018 of the Arbitral Tribunal which read as under:

“Today is the Third Meeting of Arbitral Tribunal.

The Tribunal pronounced the Order on

objection of Ravi Arya Group against constitution of Arbitral Tribunal and held that the constitution of Arbitral Tribunal is legal and proper and Tribunal will proceed accordingly.

At this stage, Mr. Jagtiani, Senior Advocate appearing for Ravi Arya stated that Ravi Arya Group would not participate further in the proceedings and left the Conference Room”.

45. We have perused consent given by Mr. Justice Mohit Shah to act as an Arbitrator and the Disclosure under Section 12(1) of the Act of 1996 and the 6th Schedule appended thereto.

46. Relevant part of Resolution in the Board Meeting which was held on Arbitrators and Arya Iron Steel Pvt. Ltd. on 15 March 2018, is relevant for the purpose. The Board resolved to authorize and appoint Mr. Vijay Maniyar, Company Secretary of the Company – respondent no.3 and Mr. Pravesh Pandey, GM Corporate Affairs and Commercials of the Company, to represent the company and to do all or any of the acts mentioned thereunder, duties and things in India. Clause 1 in the said authorization reads as under:

“1. To initiate and / or defend legal proceedings on our behalf in any of the courts and / or tribunals in

India including but not limited to the Supreme Court of India, High Courts, District Courts, Magistrate Courts, City Civil Courts, Arbitration proceedings, DRT proceedings and any other proceedings and to sign, verify, depose, file pleadings including but not limited to plaint, written statement, caveats, application for arrest and other replies, rejoinders, to file petitions including arbitration petitions, suits, counter-claims, applications, appeals, revision applications, reviews, complaints, affidavits and/or other proceedings in any court or other authorities and for these purposes to declare, swear / affirm, plaints, petitions, including arbitration petitions, statement of claim, replies, counter-statements, written statements, rejoinders, affidavits, counter-claims and / or any other proceedings.”

47. It also authorizes to initiate and/or defend legal proceedings. Clause 2 of the authorization, reads as under:

“To appoint, advocates, arbitrators, solicitors, counsel in all proceedings for and against the Company and to sign Vakalatnama on our behalf and to discharge them or replace them.”

48. The relevant part of authorization is reproduced at page 127 of the proceedings at Vol. I, which is quoted below:

“AND WE HEREBY confirm that all acts, deeds and things lawfully done or caused to be done by our said representative shall be construed as acts, deeds, and

things done by ourselves and we undertake to ratify all and whatsoever our said representative shall lawfully do or cause to be done on our behalf by virtue of these presents.”

49. We may reproduce observations made in paragraphs 21 and 23 in the case of *Oriental Insurance Company Ltd. Vs. Narbheram Power and Steel Private Ltd.*¹¹ which read as under:

“21. In *A. Ayyasamy v. A. Paramasivam*, (2016) 10 SCC 386 : (2017) 1 SCC (Civ) 79, a two-Judge Bench was concerned with the issue as to whether the plea of fraud can be adequately taken care of by the arbitrator.

Sikri, J., analysing the facts, opined: (SCC p. 408, para 28)

“28. We, therefore, are of the opinion that the allegations of purported fraud were not so serious which cannot be taken care of by the arbitrator. The courts below, therefore, fell in error in rejecting the application of the appellant under Section 8 of the Act. Reversing these judgments, we allow these appeals and as a consequence, application filed by the appellant under Section 8 in the suit is allowed thereby relegating the parties to the arbitration.”

Chandrachud, J., in his concurring opinion, after referring to many an authority and literature in the field of arbitration, came to hold: (SCC p. 419, para 53)

“53. The Arbitration and Conciliation Act, 1996, should in my view be interpreted so as to bring in

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line the principles underlying its interpretation in a manner that is consistent with prevailing approaches in the common law world. Jurisprudence in India must evolve towards strengthening the institutional efficacy of arbitration. Deference to a forum chosen by parties as a complete remedy for resolving all their claims is but part of that evolution. Minimising the intervention of courts is again a recognition of the same principle.”

He has further held that the mere allegation of fraud in the factual scenario was not sufficient to detract the parties from the obligation to submit their disputes to arbitration keeping in view the letter and spirit of the 1996 Act. The decision, in our considered view, is not applicable to the case at hand.

23. *It does not need special emphasis that an arbitration clause is required to be strictly construed. Any expression in the clause must unequivocally express the intent of arbitration. It can also lay the postulate in which situations the arbitration clause cannot be given effect to. If a clause stipulates that under certain circumstances there can be no arbitration, and they are demonstrably clear then the controversy pertaining to the appointment of arbitrator has to be put to rest.”*

50. The issue raised by learned Senior Counsel for the appellants is as to whether respondent no.3 had authority to invoke the arbitration clause as per Article 16 of the Shareholders Agreement. The Counsel alleged that there is clear cut case of collusion between the members of the PA Group and the Company Secretary of respondent no.3 who

exceeded his authority and proceeded to appoint Arbitrator to make the Promoters personally liable, without involving the Company and the said act is also intentional one and is a product of collusion between the parties. In the facts, we find that the appellants have challenged the constitution of the Arbitral Tribunal. The question is as to whether the same could be done in the facts of the case, by filing a suit and/or whether such an issue could be raised before the Arbitral Tribunal itself? The appellants had raised objection against the constitution of the Arbitral Tribunal. The Arbitral Tribunal heard the advocates of the parties and held that constitution of Arbitral Tribunal is legal and proper by an order dated 28 September 2018. In view of this, whether the issue regarding the legitimacy and legality in the facts and in view of the legal position as stated above before us, could be gone into in the proceedings of this nature. The learned Single Judge by the impugned order has referred to the Minutes of the Meetings held on 25 July 2018 and 14 September 2018. The learned Single Judge has also referred to the view of the Arbitral Tribunal while deciding the objection raised by Ravi Arya Group stating that it was ill-founded and cannot be upheld. In view of the provisions of Section 13(4) and (5) of the Arbitration and Conciliation Act, 1996 which states that if

challenge in any procedure agreed upon by the parties or under the procedure under Sub-section (2) is not successful, the Arbitral Tribunal shall continue the proceedings and make an award. The parties are not remediless in a situation and in case the award is made under Sub-section (4) of Section 13, remedy is prescribed to the party for filing an application as stated in Section 34 of the Arbitration and Conciliation Act, 1996. The relevant provisions of Section 34(2)(v) of the said Act, read as under:

**“34. Application for setting aside arbitral award--
(1).....**

(2) An arbitral award may be set aside by the Court only if---

(a) the party making the application furnishes proof that ---

(i)

(ii)

(iii)

(iv)

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or”

51. In the facts of this case, we find that the view adopted by the learned Single Judge is a legal and proper and we do not see any error in the view adopted by the learned Single Judge. The appellants are not remediless. It may be appropriate to observe that in the facts of the case, the only remedy available, would be to challenge the award in case the appellants are aggrieved, by resorting to provisions of Section 34 of the Arbitration and Conciliation Act, 1996.

52. On the ruling of Arbitrator on jurisdiction, no appeal is prescribed under Section 37(2)(a) of the Act. The only remedy prescribed is under Section 34 of the Act. We are therefore, of the view that there is no case made out to interfere in the present Appeal. The Appeal is dismissed.

N.M.JAMDAR, J.

CHIEF JUSTICE