***** **HIGH COURT OF DELHI AT NEW DELHI**

+ **IA Nos.6207/2014 in C.S.(OS) No.962/2014**

Decided on : DECEMBER 22, 2014

VIKRAM BAKSHI AND ANR ..... Plaintiffs

Through: Mr.Mukul Rohatgi and
Mr.Neeraj Kishan Kaul,
Senior Advocates with
Mr. Rishi Sood, Advocate
for P-1 and P-2.

versus

MC DONALDS INDIA PVT LTD AND ORS ..... Defendants

Through: Mr.Harish Salve and
Mr.Rajiv Nayar,
Senior Advocates with
Mr.Rahul P. Dave,
Mr.Varij Sharma,
Ms. Shaista Arora and
Mr. Sumit Chopra, Advocates for D-1.

CORAM:
HON'BLE MR. JUSTICE V.K. SHALI

V.K. SHALI, J.

1. This order shall dispose of IA No.6207/2014 (u/Order 39 Rule 1 & 2 CPC) by virtue of which the plaintiffs have prayed for an ad interim injunction against the arbitration proceedings initiated by defendant No.1 before the London Court of International Arbitration.

2. Briefly stated, the facts are that the plaintiff No.1 is an Indian citizen and resides & carries on business within the jurisdiction of this court. The plaintiff No.2 is a company incorporated by the plaintiff No.1. The plaintiff No.1 is the duly authorized signatory of plaintiff No.2 vide Board Resolution dated 05.09.2013 to file the suit for mandatory injunction and declaration.

3. The defendant Nos.1 & 2 are also stated to be companies carrying on business within the jurisdiction of this court. It is alleged that the plaintiffs are the registered holders and absolute owners of 1,45,600 equity shares of the defendant No.2/Company. Defendant No.1 also holds the same number of equity shares. It is further alleged that the defendant No.1 holds 17,73,021 number of preferential shares of and in the defendant No.2/Company comprising 100% of the preferential capital of the Company but it is under an obligation to the plaintiffs to exercise 50% of the voting rights attached to such preferential shares as per the directions of the plaintiff No.1 and in terms of Article 6A(vi) of the Articles of Association of the Company. It is further alleged that pursuant to the Joint Venture Agreement ('JVA' for short) dated 31.03.1995 between the plaintiff No.1 and the defendant No.1 with

McDonalds' corporation as confirming party, the defendant No.2 was incorporated on 29.06.1995. It has also been alleged that McDonalds Corporation is a Delware corporation and a company duly registered in the State of Delaware in the United States of America which is the holding company of defendant No.1. After the Joint Venture Company was incorporated i.e. the defendant No.2, the JVA was entered into between the plaintiffs and the defendant No.1. The relevant terms and conditions of the JVA are as under:

> "4. Ownership The JV parties shall own the following percentages of share in JV Company:
>
> Partner 50%
> McDonald's 50%
>
> Such shares shall be paid up in full when issued. The JV parties undertake to cause their shares to be voted at any time so as to comply with the provisions of this Agreement.
>
> ……
>
> 7. Managing Director The JV parties shall promptly cause the nomination and election of partner as the sole Managing Director of JV Company.
>
> ……
>
> e) Re-election of Managing Director - The Managing Director shall be elected every two (2) years. McDonald's agrees to vote for the reelection of Partner as Managing Director for so long as:
>
> 1) he resides in the National Capital Region of Delhi and spends substantially all of his business time in the performance of his obligations under this Agreement and the Opening License Agreements executed hereunder:

2) He and the Investing Company (as defined below), in combination, own at least 50% of the equity shares of JV Company;

3) He discharges the responsibilities of management of JV Company in a competent and faithful manner;

4) He is not in breach of any term of this Agreement or any other agreement between the JV parties or their affiliates or subsidiaries.

32. McDonald's Option to Purchase Shares: Mc Donald's, any of its wholly-owned subsidiaries or affiliates as designed by the McDonald's, or any person or entity designated by McDonald's, may purchase all of the shares of JV Company owned or controlled by Partner at a purchase price determined in accordance with Paragraph 26 above if any of the following events shall occur:

a) Partner personally fails to maintain his principal residence in the National Capital Region of Delhi or fails to devote his full business time and best efforts to JV Company;

b) Partner terminates or suffers the termination of his relationship as Managing Director of JV Company, other than by reason of his death or incapacity. In the even to Partner's death or incapacity, paragraph 29(d) shall govern; or

c) upon expiration or termination of this Agreement.

35. Termination by Non defaulting party - The parties agree that any of the following events constitutes material default of this Agreement:

a) Failure to make the investment required by Paragraph 3;

b) Failure of the other JV Party to vote shares in JV Company for the election of Directors and/or the Managing Director in accordance with Paragraphs 6 and 7, or to otherwise vote in a shareholders meeting in accordance with paragraph 4;

c) The transfer of shares in JV company or encumbrance of shares in JV company by other JV Party in violation of Paragraphs 5, 27, 28, 29 or 30;

d) …….. …….. …….. ……..

e) …….. …….. …….. ……..

f) …… …… …….. …….

In the event of such material default, the non-defaulting Party shall give written notice of default to the defaulting Party, and may terminate this Agreement if the event of default remains unremedied sixty (60) days after the date of such notice; provided, however, that no such remedy period shall be required if the default involves 35(c), (f) and (g).

36. Termination by McDonald's The parties further agree that any of the following events constitutes material default of this Agreement:

(a) Partner shall fail to serve as Managing Director in accordance with Paragraph 7;

(b) Partner or JV company shall use the property in violation of Paragraph 23;

(c) Partner shall knowingly or intentionally violate the covenants respecting competition and conflicts of interest contained in paragraphs 24 and 25;

(d) Partner shall assign any interest of this Agreement in violation of Paragraph 40 (e);

(e) Partner breaches covenants contained in Paragraphs 10, 13, 45 or 46 or representations or warranties therein are found to be untrue;

(f) Repeated delays or failures to make delivery of the reports required by Paragraph 14;

(g) Any Operating License Agreement shall be terminated by reason of default by JV Company.

In the event of such material default, McDonald's shall give written notice of default to Partner, and may terminate this Agreement if the event of default remains unremedied sixty

(60) days after the date of such notice; provided, however, that no such remedy period shall be required if the default involves Paragraph 36 (d).

37. Effect of Termination. Upon termination of this Agreement:

(a) McDonald's or a designee may elect either to purchase all shares owned and controlled by Partner in JV company at a purchase price determined as of the date of notice of termination in accordance with Paragraph 26 above or,

(b) McDonald's may elect not to purchase all shares owned by Partner in JV Company, and in that event, the JV Parties agree that:

(i) the Operating License Agreements shall be terminated or assigned as directed by McDonald's;

(ii) the JV Parties agree to vote promptly in a General Meeting of Shareholders for dissolution and liquidation of JV Company;

(iii) the JV Parties shall cause JV Company to discontinue use of and return all property, information and materials to McDonald's;

(iv) the JV Parties agree that in liquidating JV Company and in turn in disposing of existing leaseholds, freeholds and other assets, McDonald's or a company designated by it shall have a right of first refusal to acquire any such leasehold, freehold or other asset.

(v) the JV Parties shall cause JV Company to cease the production of McDonald's food products and the operation of McDonald's restaurants.

38. Termination for failure to receive or maintain Government approval. If, at any time during the term of this Agreement, the parties are unable to obtain and maintain in force from the appropriate governmental agencies:

(a) …….. ……. …… …….

(b) …….. ……. …… …….

39. Right to reject Governmental changes. McDonald's may terminate this Agreement if:

(a) Any governmental agency grants approval for this Agreement, the Operating License Agreements and/or any related documents, but such approval is granted subject to conditions not acceptable to McDonald's; or

(b) If the terms and conditions of this Agreement, the Operating License Agreements and/or any related document are required to be in any way altered or modified to such an extent as not to be acceptable to McDonald's.

The JV Parties agree to cooperate in good faith to obtain any such government approvals, if required, and to negotiate any amendments hereof that may be required in order to obtain such approval, provided that in no event shall McDonald's be obligated to accept any amendment which it may deem unacceptable.

40. Miscellaneous

a. Governing Law. This Agreement shall be construed in accordance with an governed by this laws of India and will be subject to the jurisdiction of the courts in New Delhi, India, except for any Indian choice of law or conflicts of law rules which might direct the application of the laws of any other jurisdiction.

b. Arbitration. On demand of either JV Party, any unresolved dispute which may arise in connection with paragraphs 35, 36, 37, 38 or 39 of this Agreement shall be submitted for arbitration to be administered by the London Court of International Arbitration (the "LCIA"). Such arbitration proceedings shall be conducted in London, England and shall be conducted before a panel of three (3) arbitrators and shall be conducted in accordance with the then current commercial arbitration rules of the LCIA for international arbitrations. Partners and McDonald's shall each appoint one arbitrator

and the two arbitrators so appointed shall appoint a third arbitrator to act as Chairman of the tribunal. If a JV Party fails to nominate an arbitrator within thirty (30) days from the date when the claimant's request for arbitration has been communicated to the other JV Party, such appointment shall be made by the LCIA. The two arbitrators thus appointed shall attempt to agree upon the third arbitrator to act as Chairman. If the two arbitrators fail to nominate the Chairman within thirty (30) days from the date of appointment of the second arbitrator to be appointed, the Chairman shall be appointed by the LCIA. The JV Parties shall have the right to the broadest investigation of the facts surrounding the dispute, provided that any dispute between the parties relating to such investigation shall be submitted to the arbitral tribunal for resolution. The arbitrators shall have the right to award or include in their award any relief which they deem proper in the circumstances, including without limitation, money damages (with interest on unpaid amounts from date due), specific performance, injunctive relief, legal fees and costs. The award and decision of the arbitrators shall be conclusive and binding upon the JV Parties and judgment upon the award may be entered in any court of competent jurisdiction. Partners and McDonald's waive and right to contest the validity or enforceability of such award. The JV Parties further agree to be bound by the provisions of any applicable limitation on the period of time in which claims must be brought.

c. Force Majeure. No party shall be treated as being in default under this Agreement by reason of its failure or delay due to strikes, lockouts, casualties, acts of God, war, governmental regulation or control, or other causes beyond the reasonable control of the parties.

d. No Agency relationship. Nothing in this Agreement shall be construed to imply the existence of a partnership between the JV parties other than as shareholders in JV company, or to make any JV party the representative or agent of any other JV party. No JV party shall so hold itself out, nor shall any JV party be liable for or bound by any act or omission of any other JV party.

e. Non-assignability. Neither this Agreement nor any rights hereunder may be assigned or sublicensed, directly, indirectly, voluntarily or by operation of law by any party without first receiving the prior written consent of the other.

f. Further assurances. The parties agree to entre into and execute any and all such further agreements or documents as may be necessary or desirable to carry out the purpose of this Agreement.

g. Required approvals. The parties agree to cooperate in good faith to secure all governmental approvals required to permit the performance of the JV parties under this Agreement to conduct the business contemplated hereunder.

h. Approval by Board of Directors of McDonald's This agreement is subject to the approval of the Board of Directors of the Confirming Party. The Confirming Party shall promptly notify partner of any action taken by the Board of Directors of the Confirming Party concerning this Agreement.

i. Notices All notices required hereunder shall be in writing and may be given:

(1) by personal service or,

(2) by certified or registered mail, postage prepaid, return receipt requested,

(3) by commercial courier for express delivery, return receipt requested or,

(4) by telecopy (evidenced by a machine generated receipt) if immediately confirmed in writing by mailing a copy thereof by certified or registered air mail, prepaid postage, return receipt requested. All notices shall be deemed given when received."

4. It has been alleged in the plaint that plaintiff No.2 is not a party to the Joint Venture Agreement or the arbitration agreement. It has also been stated that on 11.12.1998 a supplemental agreement was executed and on 06.08.2013, the defendant No.1 circulated a note on the same date and voted against the re-election of the plaintiff No.1 as the Managing Director of the defendant No.2. It is stated that the plaintiff No.1 after the execution of the 'JVA' till the time the note dated 06.08.2013 was circulated acted as the Managing Director of the JV company and he was looking after its business in India. It is also alleged that the defendant No.1 issued a 'Call Option' notice dated 16.08.2013 purporting to offer to buy out all the shares owned and controlled by the plaintiff No.1. On account of the Call Option notice, the plaintiff on 09.09.2013 filed CP No.110/ND of 2013 before the Company Law Board (hereinafter referred to as "the Board"). Vide its order dated 16.09.2013, the Board directed defendant No.1 to maintain status quo over the shareholding pattern of the company and the right of call option.

5. It is stated that on 22.09.2013, the defendant No.1 filed an application under Section 45 of the Arbitration and Conciliation Act, 1996 being CA No.94/2013 before the Board praying that the

proceedings of the company petition be stopped and the parties be referred to have the disputes adjudicated through arbitration as there was a clause in the JVA to have the disputes/differences between the parties i.e. the plaintiff No.1 and the defendant No.1 resolved through the London Court of International Arbitration (LCIA). It is stated that vide order dated 30.12.2013 the Board refused to stay the arbitral proceedings at the request of the plaintiff at the ad interim stage notwithstanding the pendency of the application under Section 45 of the Act. It is stated that the plaintiffs preferred an appeal against the order dated 30.12.2003 but he did not pursue the said appeal because in the meantime the defendants had withdrawn their application under Section 45 of the Arbitration and Conciliation Act, 1996.

6. It has been alleged that the defendant No.1 terminated the JVA vide letter dated 28.11.2013 and made a request for arbitration to defendant No.3 who sent a communication to the plaintiffs on 29.11.2013 and thereafter filed the petition under Section 9 of the Act being OMP No.1196/2013. This petition was also dismissed as withdrawn. It is now alleged, since the Company Law Board is already seized of the Company Petition filed by the plaintiffs, dealing with the question of

mismanagement of the JV Company as well as oppression of management, therefore, the present suit for injunction to refrain the defendants from proceeding with the arbitration proceedings had been filed.

7. The defendant No.1 in order to make the company petition infructuous, is alleged to have chosen to initiate arbitration proceedings before the London Council of International Arbitration giving rise to a situation whereby there will be a conflict of judgment and also by putting the plaintiff to a forum non convenience. It has accordingly been contended that the plaintiff was constrained to file the present suit for declaration and mandatory injunction whereby the plaintiff has sought a declaration that there is no arbitration agreement between the plaintiffs and the defendant No.1 and also for declaring that the defendant No.3 is not entitled to payment of any charges and mandatorily stop the continuation of the arbitration proceedings.

8. The learned counsel for the defendants has neither filed the written statement nor any reply to the application seeking ad interim stay. On the contrary, arguments were advanced on the basis of the documents

purported to have been filed by the plaintiffs and the averments made by them in the plaint.

9. I have heard Mr.Mukul Rohatgi and Mr.Neeraj Kishan Kaul, the learned senior counsel for the plaintiffs and Mr.Harish Salve and Mr.Rajiv Nayar, the learned senior counsel for the defendant No.1 respectively.

10. The first contention of the Mr.Mukul Rohatgi, the learned senior counsel for the plaintiffs has been that the present suit is maintainable under Section 9 of CPC and the same is not barred under Section 5 of the Limitation Act, 1963. The learned senior counsel in support of his contention has relied upon the judgment of the apex court in *World Sport Group (Mauritius)Ltd. V. MSM Satellite (Singapore) Pte.Ltd.,*[1] as well as *Devinder Kumar Gupta (Dr.) v. Realogy Corporation & Anr*[2].

11. Per contra, Mr.Salve contended that the present suit is not maintainable as the suit challenging the validity of an arbitration agreement is barred under Section 5 of the Arbitration and Conciliation Act, 1996. It was contended that one of the main objectives of the Act is

[1] *2014 (1) Arb.Law Reporter 197 (SC)*

[2] *2011 (125) DRJ 129 (DB)*

to minimize the supervisory roles of courts in the arbitral proceedings and since Section 5 of the Arbitration and Conciliation Act, 1996 is applicable to Part II of the Act also, therefore, the civil court's jurisdiction is barred. Reliance in this regard was placed on *Chatterjee Petrochem (Mauritius) Co.and Anr.vs.Haldia Petrochemicals Ltd*[3]. So far as the judgments relied upon by the learned counsel for the plaintiffs are concerned, they were sought to be distinguished.

12. It was contended by Mr.Salve, the learned senior counsel for defendant No.1, that the validity of an arbitration agreement to which Part II of the Act applies can be decided only at two stages. Firstly, by the arbitral tribunal when the arbitration proceedings have been initiated without the intervention of the court, as is the present case or by the court acting pursuant to Section 45 of the Act or under Section 48 of the Act when the award is brought for enforcement.

13. It was contended that the only remedy available to the plaintiffs is before the arbitral tribunal and not before the civil court to challenge the validity of the arbitration agreement. Reliance in this regard was placed on *Devinder Kumar Gupta's case (supra)* on which the learned senior

[3] *2013 (4) Arb.L.R. 456 (SC)*

counsel for the plaintiffs had also relied. It was contended that as in the instant case, arbitration proceedings are initiated without the intervention of the court it is the arbitrators only who can decide the question of validity of an arbitration agreement. Reliance in this regard was placed on *National Insurance Co. Ltd.vs.Boghara Polyfabs Pvt. Ltd*[4].

14. It was also urged that the *Kompetenz Kompetenz* rule implies a positive and negative effect which is equally important. The positive effect being that the arbitrators must be the first judges to rule on their own jurisdiction and the negative effect which prevents the courts from adjudicating such questions in the first instance. The reference in this regard was made to *Chloro Controls India Pvt. Ltd v. Severn Trent Water Purification Inc. and Ors.*[5].

14A. It was also contended that the plaintiff had not disputed the arbitration agreement. When a petition under Section 9 of the Act was filed with regard to grant of interim relief by the respondent/defendant, the same was not opposed by the plaintiff.

[4] *2009 (1) SCC 267*

[5] *(2013) 1 SCC 641*

15. It was also contended by Mr. Salve that assuming that the present suit is maintainable, still there are facts which would show that the present suit is an abuse of the process of law and the plaintiffs do not deserve to be granted any relief at this ad interim stage.

16. In this regard, the fact of Joint Venture Agreement and the factum of plaintiffs and the defendant No.1 each owning 50% equity in the defendant No.2 has not been denied, but it has been stated that the plaintiffs pursuant to their 50% share of the equity have invested only a sum of Rs.14.56 crores while as the defendant No.2 has invested about Rs.200 crores and hence owns 92.95% of the total share capital. Thus, the filing of the present suit by the plaintiff is only an abuse of the processes of law.

16A. It was also contended that the clause 29B of the joint venture agreement permitted the plaintiff No.1 to invest the majority of their investment in the defendant No.2 through plaintiff No.2, which is controlled by plaintiff No.1. Pursuant to a supplemental agreement dated 11.12.1998, the defendant No.2 and the plaintiff No.2 became party to the JVA as if original parties thereto which made the arbitration clause applicable to plaintiff No.2 as well as between the parties.

17. The plaintiffs though have taken a stand that there is no arbitration agreement between the plaintiff No.2 and the defendant No.2, which is factually incorrect, however the said submission was not pressed during the course of arguments.

18. It has been stated by Mr.Rohatgi, the learned senior counsel that on 09.09.2013, the plaintiffs had filed a Company Petition before the Company Law Board on account of oppression and mismanagement principally seeking reinstatement of plaintiff No.1 as the Managing Director of the defendant No.2 in view of his non (re)-election as the Managing Director on 06.08.2013 by seeking restoration of the status quo as on 16.07.2013 as well as other ancillary reliefs which were not granted in their favour. In addition to this, it was also the grievance of the plaintiffs that the defendants should challenge the pattern of shareholding of the defendant No.2 and the Company Law Board on 16.09.2013 was pleased to pass an ad interim order which is still in force directing *inter alia* the defendant No.1 to maintain status quo as regards to the shareholding, board pattern and the 'Call Option' despite the fact that the obligations between the parties are contractual in nature.

19. It is the case of the defendants that pursuant to the material defaults and repudiation of the JVA by the plaintiffs which was causing prejudice to the defendant No.1, on 28.11.2013, it terminated the JVA. Pursuant to clause 37(a) upon the termination of the JVA, the defendant No.1 was elected to purchase all the shares held and controlled by the plaintiffs (directly and indirectly through the plaintiff No.2) in the defendant No.2 which election is distinct from call option under clause 32. The plaintiffs' prayer to restrain the defendants from challenging the shareholding pattern in the company petition to which the interim order relates is not applicable to the termination of an agreement.

Arbitral proceedings are vexatious and oppressive as well as waiver of arbitration because of withdrawal of application under Section 45 of the Arbitration and Conciliation Act, 1996.

20. The second submission made by Mr.Rohatgi, the learned senior counsel is that the plaintiffs have already filed a company petition before the Company Law Board challenging the action of the defendants being oppressive and they are indulging in mis-management and also removing the plaintiff No.1 from the post of Managing Director. During the process of the said proceedings, the defendants have been directed to

maintain status quo with regard to the exercise of any 'Call Option' and not to change the holding of share pattern. It is contended that while the said order of status quo was pending, the defendants have terminated the agreement and invoked the arbitration clause and initiated the arbitration proceedings in London. Therefore, the arbitral proceedings are not only vexatious, but also oppressive inasmuch as the petition before the Company Law Board continues to be pending adjudication and defendants have started the arbitration proceedings which would make the proceedings initiated by the plaintiff as infructuous.

21. It is also contended that the defendants had earlier filed a petition under Section 45 of the Act before the Company Law Board which was subsequently withdrawn and, therefore, withdrawal of that petition itself was a tacit acquiescence on the part of the defendants to concede to the jurisdiction of the Company Law Board. It was also contended that it amounted to abandonment of its right to have the matter adjudicated through arbitration. The learned counsel for the plaintiffs in support of his contention has placed reliance on *Essel Sports Pvt.Ltd v.BCCI (DB)*[6]*;*

[6] *2011 (178) DLT 465*

V.O.Tractoroexport v.Tarapore &Co.[7]*; and CG Holdings Private Limited v.Ramasamy Athapppan*[8]. It was also contended that the defendants had filed an application under Section 9 of the Act which was also dismissed without grant of any effective relief to the petitioners.

22. The learned senior counsel for the defendants has vehemently contested the submission. It was contended that merely because the application under Section 45 of the Act which was filed by the defendants was withdrawn, does not tantamount to waiver or abandonment of its rights to go for arbitration. It is contended on behalf of the defendants that the company petition as a matter of fact has become infructuous and nothing survived in the company petition because the JVA itself was terminated. Therefore, the only remedy which was open to the defendants was to go back to arbitration.

23. It is further contended that it is the case of the plaintiffs themselves that no part of the company petition can be said to be the subject matter of arbitration as both the arbitral tribunal and the Company Law Board are operating in different fields and, therefore, neither the withdrawal of

[7] *(1969) 3 SCC 562*

[8] *(2012) 170 Comp.Case 93*

the application under Section 45 of the Act nor the continuance of the arbitration proceedings before the arbitral tribunal can be said to be oppressive and vexatious. It could also not be treated as a waiver of its right to have the dispute regarding the agreement adjudicated by the Arbitral Tribunal.

FORUM NON CONVENIENS

24. The next argument of Mr.Rohatgi, the learned senior counsel was that the forum of LCIA is a forum non convenience. It is on account of the fact that the plaintiff No.1 is an Indian and plaintiff No.2 is a company incorporated in India. Similarly, the defendant Nos.1 & 2 are incorporated in India. They are working and operating within the territorial limits of India. They are governed by the Indian law and the cause of action has arisen in India, the company law petition between the parties is pending in India, the governing laws are Indian laws, therefore, the holding of arbitral proceedings in London is essentially a forum non convenience so far as the plaintiffs are concerned. It was contended that there is no concept of comity of courts involved in the matter because arbitral proceedings are yet to be started and, therefore, it will be just and proper in case the proceedings before the LCIA, which is nothing but

duplication of the proceedings initiated by the plaintiffs in India should not be permitted to continue and the same deserve to be stayed. It was also stated that the arbitration proceedings initiated are oppressive and vexatious.

25. Mr.Salve and Mr.Nayar, the learned senior counsel for the defendants, have contested this submission of the forum non convenience as being not applicable to the present case. It is contended that the plaintiffs have expressly agreed to the seat of arbitration as London. It was contended that once the parties entered into an agreement with their eyes open, they are presumed to have incurred on themselves inconvenience inherent in the deal and the said inconvenience cannot be avoided or abandoned on the pretext of forum non convenience. It was also contended by the respondent that area of adjudication in the two proceedings is totally different and does not overlap. Reliance in this regard was placed on *M/s AEG Aktiengesellschaft v.Insotex (India) Ltd* quoted with approval in Devinder Kumar Gupta's case.[9]

[9] *2011 (125) DRJ 129 (DB).*

ARBITRATION AGREEMENT BEING VOID AND IN OPERATIVE & INCAPABLE OF PERFORMANCE

26. The last but not the least contention of Mr.Rohatgi, the learned counsel for the plaintiffs, has been that Section 45 of the Act, which reads as under:

> "45.Power of judicial authority to refer parties to arbitration.- Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, **unless it finds that the said agreement is null and void, inoperative or incapable of being performed."**

27. It is a non obstante clause of Section 45 which lays down that a party must not be referred to international arbitration unless and until the judicial forum finds that the arbitration agreement is null and void, inoperative or incapable of being performed. It is contended that the reference of the dispute to the LCIA is not absolute in itself on the basis of the so called agreement having been entered into between the plaintiffs and the defendant No.2 for the simple reasons that the plaintiffs in the instant case have sought a declaration that the arbitral clause in question

is null and void and this is the relief by way of a declaration which is sought by the plaintiffs in the present suit.

28. It was further contended that in any case as on date, the arbitral agreement between the parties is incapable of being made operational for the reason that the dispute with regard to the holding of the parties is pending before the Company Law Board which has admittedly passed an order of status quo to be maintained by the defendants with regard to the share holding pattern and thus if the share holding pattern itself cannot be changed by the defendants, during the pendency of the company law petition, they ought not to have terminated the 'JVA' so as to invoke the arbitral proceedings at London. Therefore the case of the plaintiffs falls in one of the exceptions contemplated in Section 45 of the Act and thereby the plaintiffs are entitled to *ex parte ad interim* injunction during the examination of the merits of their suit.

29. This contention of the plaintiffs was contested by the learned counsel for the defendants that the arbitration agreement was null and void or incapable of operation. On the contrary, it is stated that the question of arbitration agreement being null and void can be decided only by the tribunal itself where the present plaintiffs can raise a plea and

there is certainly no incapacity attached to the operational aspect of the arbitration agreement because it is the case of the plaintiffs themselves that the arbitration agreement as well as the petition before the Company Law Board are the proceedings which operate in different fields.

30. I have carefully considered the submissions made by the respective sides, gone through the judgments cited by the learned counsel for the parties and also gone through the record.

JURISDICITON OF CIVL COURT

31. The first question which arises for consideration is with regard to the jurisdiction of the civil court. Sections 9 & 20 of the CPC read as under:

> "**Section 9 - Courts to try all civil suits unless barred**
>
> The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.
>
> [Explanation I].-A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

[Explanation II .-For the purposes of this section, it is immaterial whether or not any fees are attached to the office referred to in Explanation I or whether or not such office is attached to a particular place.]

…….

Section 20 - Other suits to be instituted where defendants reside or cause of action arises

Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction --

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry or business, or personally work for gain, as aforesaid, acquiesce in such institution ; or

(c) the cause of action, wholly or in part, arises.

[Explanation] .--A corporation shall be deemed to carry on business at its sole or principal office in [India] or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place."

32. The contention of the learned senior counsel for the plaintiffs is that the civil court has the jurisdiction and for this purpose they have made an averment in para No.35 of the plaint to state as under:

> "35. The cause of action for this suit arose on 29th November, 2013, when the defendant No.1 filed the RFA with the defendant No.3. the cause of action also arose on various dates between 30 December, 2013 and 10 March 2014, when despite protests and despite the non-existence of the arbitration agreement the plaintiffs were forced to engage in correspondence with the defendant No.3 and the defendant No.1. The cause of action arose again on the appointment of the third arbitrator by the defendant No.3 on 10 March 2014. The cause of action further arose on 14 March 2014, when the defendant No.3 called upon the plaintiffs to make a payment of GBP 30,000 and cause of action also arose on 24 March 2014 when the plaintiffs have been called to participate in the arbitral proceedings."

33. Accordingly, it has been prayed by them that the Delhi High Court has the jurisdiction. The learned senior counsel for the plaintiffs in order to support his contention that the present suit is maintainable in a civil court has relied upon the judgment of *World Sport Group (Mauritius) Ltd. V. MSM Satellite (Singapore) Pte.Ltd.*[10] *and Devinder Kumar Gupta (Dr.) v. Realogy Corporation & Anr.*[11]

34. The contention of Mr.Salve, learned senior counsel for the defendants, has been that this being a matter involving adjudication of dispute between the parties by an international arbitration, therefore,

[10] *2014 (1) Arb.Law Reporter 197 (SC)*

[11] *2011 (125) DRJ 129 (DB).*

Section 5 read with Section 45 of the Arbitration and Conciliation Act, 1996 exclude the jurisdiction of the civil court. Section 5 reads as under:

> **"Section 5 - Extent of judicial intervention**
>
> Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."

35. Section 45 which forms Part II of Chapter I of the enforcement of certain foreign awards lays down the powers of a judicial authority to refer the parties to arbitration. Section 45 reads as under:

> "Section 45 - Power of judicial authority to refer parties to arbitration
>
> Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, **unless it finds that the said agreement is null and void, inoperative or incapable of being performed."**

36. Mr.Salve, the learned senior counsel for the defendants, in order to support his contention that the jurisdiction of the civil court in matters of

this nature is essentially minimal and in a way excluded relied upon the judgment in *Chatterjee Petrochem Co. vs.Haldia Petrochemicals Ltd.*[12].

37. In Chatterjee Petrochem's case (supra) was pronounced on 10.12.2013. The facts of the case were that on 21.03.2012, the appellant/CPMC filed a request for arbitration in International Chamber of Commerce (ICC), Paris in relation to an agreement of restructuring which was entered into between Chatterjee Petrochem (Mauritius) Company {CPMC}, Government of West Bengal, West Bengal Industrial Development Corporation {WBIDC} and Haldia Petrochemcials Limited {HPL} on 12.01.2002. As per the agreement, Govt. of West Bengal was to cause WBIDC to transfer the existing shareholding of CPMC to ensure that CPMC holds 51% of the total paid up capital of HPL. Clause 15 of the agreement provided for reference of all the disputes in anyway relating to the said agreement or to the business of or affairs of HPL as per the Rules of the ICC, Paris. The respondent HPL on the other hand claimed that the arbitration agreement contained in clause 15 of the agreement dated 12.01.2002 was void and /or unenforceable and/ or has become inoperative and/or incapable of being performed.

[12] *2013 (4) Arb.L.R. 456 (SC)*.

38. A dispute arose between the parties regarding allotment of shares and the appellant filed Company Petition No.58 of 2009 before the Company Law Board (CLB) on the grounds of oppression and mismanagement. The appellant also sought transfer of 155 million shares in favour of Chatterjee Petrochem (India) Pvt.Ltd {CPIL}, the Indian counter part of CPMC as was decided in the agreement. The Company Petition was disposed of by CLB upholding the decision of the company to allot 155 million shares to the IOC. The transfer of 155 million shares to CPIL by WBIDC was also confirmed. The CLB further directed the Government of West Bengal and WBIDC to transfer 520 million shares held by them in HPL to Chatterjee Group. The Government of West Bengal preferred an appeal against the said order before the Calcutta High Court which set aside the order of the CLB on the ground that CPIL was not a member of HPL and the CLB could not have enforced its right under private contract entered into between CPIL and WBIDC for transfer of shares as the same could not be the subject matter of a petition under Section 397 of the Companies Act.

39. Aggrieved by the same, the appellant preferred an appeal before the Supreme Court in which vide judgment dated 30.09.2011, the court

held that the act of the appellant transferring shares to IOC has changed the private character of the company and was not an act of oppression on the part of the company. Subsequent thereto, the appellant sought to invoke the arbitration clause contained in the arbitration agreement dated 12.01.2002 and made a request for arbitration. The respondent No.1/HPL filed a suit before the High Court of Calcutta praying that the arbitration clause in the agreement be declared as void.

40. It was brought in evidence before the civil court that apart from the basic agreement dated 12.01.2002 which contained the arbitration clause, it was followed by two supplemental agreements dated 08.03.2002 and 30.07.2004 and, therefore, the arbitration clause had become null and void, inoperative or incapable of being performed and permanent injunction was sought against the appellant restraining initiation or continuation of the arbitration proceedings.

41. The learned single Judge of the Calcutta High Court held that the parties have altered their obligations by a new agreement dated 08.03.2002 with the term that Calcutta Courts will only have the jurisdiction. This was affirmed on 30.07.2004 and once the arbitration agreement dated 12.01.2002 was substituted by agreements dated

08.03.2002 & 30.07.2004, the said subsequent agreements completely extinguished the rights of the parties existing under the agreement dated 12.01.2002 and also destroyed the arbitration clause.

42. It was in this background that the Supreme Court was called upon to decide the question with regard to the validity and applicability of clause 15 of the principal agreement dated 12.01.2002 and it was held that the agreements dated 08.03.2002 and 30.07.2004 show that there has been no alteration in the nature of rights and responsibilities of the parties involved in the contract and the principal clause under the agreement dated 12.01.2002 was still valid and therefore, the appeal was allowed and the court observed that the civil court's jurisdiction is barred. It was specifically observed in para 29 of the judgment that Section 5 of the Arbitration and Conciliation Act, 1996 will be applicable to international agreements also and accordingly it was held that the learned single Judge and the Division Bench had committed an error in arriving at a conclusion that the civil suit was maintainable. On the contrary it was held that the civil suit is not maintainable and the appellant is entitled to invoke the international arbitration clause for settling the disputes in their favour.

43. In *World Sport Group's case (supra)*, which was decided much latter in point of time than the *Chatterjee Petrochem's case (supra)*, the question had arisen again as to whether the civil court's jurisdiction is barred in that given situation or not. The appeal had been filed against the order dated 17.09.2010 of the Division Bench of the Bombay High Court.

44. The facts of the case were that on 30.11.2007 the Board of Control for Cricket in India (BCCI) invited tenders for IPC media rights for a period of ten years from 2008 to 2017 on a worldwide basis. Amongst the tenders submitted, the bid of World Sport Group India (WSG) was accepted by the BCCI. By a pre-bid arrangement, however, the respondent was to get the media rights for the sub continent for the period from 2008 to 2010. On 21.01.2008, BCCI and the respondent entered into a media rights licence agreement for the period from 2008 to 2012 for a sum of USD 274.50 million. After the first IPL season, the BCCI terminated the agreement dated 21.01.2008 between BCCI and the respondent for the Indian sub continent and commenced negotiations with the WSG India. On 14.03.2009, the respondent filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 against the BCCI

before the Bombay High Court praying for injunction against the BCCI from granting the rights under the agreement dated 21.01.2008 to any third party. Pursuant to the negotiations between the BCCI and WSG India, BCCI entered into an agreement with the appellant whereunder the media rights for the Indian sub-continent for the period 2009 to 2017 were awarded to the appellant for a value of Rs.4,791.08 crores. On 25.03.2009, a new media rights licence agreement between the BCCI and the respondent for the Indian sub-continent for the same contract value of Rs.4,791.08 crores. BCCI and WSG, however, were to continue with the rest of the world media rights.

45. On 25.03.2009, the appellant and the respondent also executed the deed for provision for facilitation services whereunder the respondent was to pay a sum of Rs.425 crores to the appellant as the facilitation fees. Clause 9 of the facilitation deed dated 25.03.2009 provided that the governing law between the parties shall be the laws of England and Wales with regard to choice of law principles.

46. Subsequent thereto, a dispute had arisen between the parties and on 09.08.2010, the learned single Judge of Bombay High Court dismissed the application for temporary injunction of the respondent stating that it

would be for the arbitrator to consider whether the facilitation deed was void on account of fraud and misrepresentation and that the arbitration must, therefore, proceed and the court could not intervene in matters governed by the arbitration clause.

47. The respondent challenged the order of the learned single Judge before a Division Bench of Bombay High Court and by the impugned order, the Division Bench allowed the appeal and passed an order of temporary injunction restraining the arbitration by ICC.

48. Aggrieved by the said order, the appellant filed the appeal. It was in this background that the apex court came to the conclusion that Section 45 of the Arbitration and Conciliation Act, 1996 does not empower the court to decline a reference to arbitration on the ground that another suit on the same issue is pending. The court is obliged to refer the parties to arbitration as the language of Section 45 makes it clear that anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is

null and void, inoperative or incapable of being performed. Thus, in case it finds the agreement is falling in any of the three categories, it shall refuse to refer the parties to the international arbitral tribunal. These words have been noticed by the Apex Court in number of judgments to be significantly different than the domestic arbitration. Unlike in the domestic arbitration (Section 8 & 11), no application is required to be filed under Section 45 of the International Arbitration. Further, in case of domestic arbitration, no such power is available to withhold the arbitration on any reason whatsoever.

49. Though the *Chatterjee Petrochem's case (supra)* clearly lays down that the civil court does not have the jurisdiction to entertain a suit in which injunction stood against a party to an arbitration agreement and necessarily a party has to be referred to arbitration, but, at the same time, the court in a latter case of *World Sport Group's case (supra)* also lays down that the reference of the dispute to an arbitrator is not an absolute proposition because Section 45 of the Arbitration and Conciliation Act, 1996 is carrying three provisos namely that the agreement should not be null and void, inoperative or incapable of being enforced etc.

50. Thus, both the *Chatterjee Petrochem's case (supra)* and *World Sport Group (Mauritius) Ltd.'s case (supra)* are taking a diametrically opposite view. The former stating that the civil court will not have the jurisdiction in case of an international arbitration agreement while as the latter view holds to the contrary.

51. If such is the situation where there are two contrary views expressed by the apex court, it will be open to the court to follow either of the two depending upon the facts of the case in hand, but, there must be some rationale to follow a particular judgment.

52. This view that the civil court has to prima facie satisfy that in the case of international arbitration the agreement is not null and void or invalid or incapable of performance gets further reinforced by *World Sport Group's case (supra)* where the court has been held to be having jurisdiction. This being the latest judgment and the facts of the said case being at *pari materia* with the facts of the present case makes the court take a view that it can be said that the civil court does not have the jurisdiction.

53. The Apex Court in *Shin-Etsu Chemical Co. Ltd. vs. Aksh Optifibre Ltd.*[13] also by a majority held that in case of international arbitration if a party invokes the jurisdiction of a civil court, it is obligated by the statute by way of a preliminary hearing and prima facie decide whether the agreement between the parties to decide the dispute by an arbitral tribunal, is null and void or is incapable of performance or inoperative. The only point of difference between the majority and minority judgment was as to whether it is to be done by taking a *prima facie* view of the matter or it is to be done by the court after permitting the parties to adduce evidence on merits. The former holding that it is only prima facie view while as the latter taking the view that it has to be on merits.

54. Even in *Devinder Kumar Gupta's case's (supra)* also on which both the learned senior counsel have placed reliance by interpreting the judgment in their own way, one fact is noticeable, that it refers to the judgment of the Supreme Court in *Abdul Gafur vs.State of Uttarakhand*[14] and states that there is a presumption of civil court having jurisdiction,

[13] *(2005) 7 SCC 234*

[14] (2008) 10 SCC 97

though in this case the court had held that civil court does not have the jurisdiction to entertain the suit.

55. I have purposely not placed reliance on Devinder Kumar Gupta's case because this is a Division Bench Judgment of our own High Court while as we already have catena of judgments from the Supreme Court and that too covering whole spectrum and holding that the courts have or have not the jurisdiction depending on the facts and circumstances of the case. Therefore, the approach of the court has been governed more by the peculiar facts of the case which was being decided at that point of time. So far as the facts of the present case are concerned, I feel they are more akin to the facts of the *World Sport Group's case (supra)* incidentally being the last in the series, seems to be more appropriate to be applied to the facts of the present case.

56. The contention of Mr.Salve, the learned senior counsel, that World Sport Group's case does not take note of Section 5 of the Act is immaterial because Section 45 itself visualizes contingencies which confer the power to the court to decide whether agreement is null and void, inoperative or incapable to be performed.

57. In the back drop of the above judgments and preponderance of view by the apex court in *World Sport Group's case (supra)* and *Shin-Etsu Chemical Co. Ltd.'s case (supra)*, I do not feel that the view expressed in *Devinder Kumar Gupta's case* or *Chatterjee Petrochem Co.'s case (supra)* or the other judgments cited by the respondents that the Arbitration and Conciliation Act does not provide a remedy to a person claiming non-existence of an arbitration agreement except by submitting to the jurisdiction of the arbitral tribunal. Similarly, I feel that the observation of the apex court in *Bharat Aluminum Co.'s case*[15], National Insurance Company's case[16] and *Chloro Controls India Pvt. Ltd's case*[17] to hold that the party be relegated to arbitral tribunal for deciding the applicability of proviso to Section 45 cannot be seen in isolation because the observation has to be reconciled with the observation of the same court in *Shin-Etsu Chemical Co. Ltd.'s case (supra)* and *World Sport Group's case (supra)* where the apex court has held that the jurisdiction of civil court is not completely ousted.

[15] *(2012) 9 SCC 552*

[16] *2009 (1) SCC 267*

[17] *(2013) 1 SCC 641*

58. There is another aspect which will show that the civil court's jurisdiction cannot be said to be ousted in the instant case. The Bombay High Court has in case titled ***Rakesh Malhotra vs. Rajinder Kumar Malhotra***, Company Appeal No.10/2013 decided along with a batch of other Company Appeal of 11 to 13, 16 to 19, on 20.08.2014, held that the disputes under Section 397 to 402 which pertain to oppression and mismanagement, are not referable to arbitration.

59. In the present case also the petitioner has gone to the Company Law Board for allegations of oppression and mismanagement while as the respondents have invoked the arbitration clause after allegedly revoking the agreement itself. I feel that the dispute between the parties falls in the proviso to Section 45 of the Arbitration and Conciliation Act, 1945 and as the agreement *prima facie* is incapable of performance or inoperative at least till the time the question of oppression and mismanagement is decided by the Company Law Board, hence the civil court's jurisdiction is not barred.

FORUM NON-CONVENIENS

60. Another factor for holding that the civil court has the jurisdiction is that the LCIA is forum non- conveniens. The learned senior counsel Mr.

Rohatgi had contended that the anti-arbitration restraint order deserves to be granted on account of the fact that the forum where the arbitration proceedings are to take place is a **forum non-conveniens** as it is stationed in London while as most of the parties are stationed in India and carrying on business in India except defendant No.2, which happens to be a company incorporated in USA. It has been contended that its interest will be sufficiently protected by other defendants. Further, governing law is Indian law between the parties. Even after the award is passed, it has to be executed in India under Indian laws because the business is being carried out in India. Thus, the arbitration proceedings being conducted in London are oppressive and vexatious.

61. Mr. Salve, the learned senior counsel for the defendants has contended that forum non-conveniens plea cannot be relied upon by the plaintiffs on account of the fact that when the arbitration agreement was signed, it was done by the defendants with their eyes open and after having signed the agreement, it does not lie in their mouth to have the civil suit filed in India and contend that the place of arbitration adjudication between the parties is a forum non-conveniens. He has

placed reliance on case titled *M/s AEG Aktiengesellschaft v.Insotex (India) Ltd.*[18]

62. I have considered the submission made by the learned senior counsel for the parties. However, I feel that there is merit in the submission made by Mr. Rohatgi that the plaintiffs are entitled to an injunction on account of the place of arbitration proceedings being in London and, therefore, being a forum non- conveniens. This is on account of the fact that all the parties are Indians except one, the area of operation of business is in India meaning thereby, the cause of action itself has arisen in India. The governing law between the parties is the Indian law and that being the position, the place of arbitration being London becomes a forum non- conveniens to the plaintiffs. The contention of Mr.Salve, learned senior counsel, that the said agreement with regard to the venue of arbitration was signed with the eyes open and hence does not become forum non conveniens because the court, in such a situation where the venue agreed has absolutely no special reason to be selected like carrying out the business, or applicability of the laws, will not permit one of the parties to use its dominant partner to the detriment of the opposite side.

[18] In CA No.7055/1996 decided by the Supreme Court on 10.04.1996

63. Consequently, the arbitration proceedings can be stayed on the ground that they have become not only vexatious but oppressive also and the court cannot be mute spectator to this.

CONFLICTING DECISIONS

64. As on date, the CLB and the civil court are already seized of the matter. So far as the civil court is concerned, a declaration is sought that the arbitration agreement is null and void, inoperative or incapable of being performed. So far as the company law petition is concerned, the plaintiffs have prayed that they are being subjected to mismanagement and oppression by the respondents and, therefore, their interest be protected. In the second suit which has been filed by the private respondents, there is already a stay which is operating in favour of the plaintiffs and, therefore, the continuation of the arbitration proceedings in London can give rise to a judgment which may be in conflict with the judgment which is either granted by the Company Law Board or by the civil court and, therefore, the proceedings before the arbitral tribunal deserve to be stayed.

WAIVER OF ARBITRATION CLAUSE

65. Another reason why this court holds that the civil court will have jurisdiction of the matter is on account of the waiver or abandonment of arbitration clauses between the parties.

66. It is not in dispute that the plaintiffs had filed a company petition on 09.09.2013 before the Company Law Board seeking reinstatement of the petitioner as the MD of the defendant No.2 as he had not been reelected as the MD for which elections were held on 06.08.2013. He has also prayed that the petition deserves to be entertained on account of his plea of oppression and mismanagement. The Tribunal had passed an ad interim order during the pendency of the petition directing the parties to maintain status quo as regards the shareholding, board pattern and call option. The said order is continuing as on date.

67. During the pendency of the said company petition, the respondents filed an application under Section 45 of the Arbitration and Conciliation Act, 1996. The said Section mandates the court to refer the parties to the alternative dispute resolution mechanism which has to be by way of arbitration tribunal. Curiously enough, this application was withdrawn by the respondent. After the withdrawal of the application, the respondent

terminated the agreement and invoked the arbitration clause. It is also not out of place to mention here that the respondent had also filed separately an application under Section 9 of the Arbitration and Conciliation Act, 1996 seeking enlarged relief against the plaintiff in order to protect its interest. This application was also not pressed.

68. Both these facts that is the fact of filing the application under Section 45 and its subsequent withdrawal and also the filing of an application under Section 9 of the Arbitration and Conciliation Act, 1996 seeking ad interim relief and not bringing it to its logical conclusion clearly shows the intention of the respondents that they were submitting to the jurisdiction of the Company Law Board and the jurisdiction of the Indian Courts. Whether it is treated as waiver or abandonment is a question of fact which I feel, *prima facie*, the defendants were unable to satisfy with the continuation of the proceedings in India and therefore chose to withdraw the application.

69. The contention of the learned senior counsel Mr.Nayar is that assuming though not admitting the jurisdiction of the civil court, it has been urged that the filing of the suit by the plaintiff is an abuse of the processes of law on account of the fact that though in the joint venture

respondent No.2 and the plaintiff No.1 through plaintiff No.2 have 50% equity in respondent No.2, but the quantum of funds invested by the two are having huge variation, the former has investment of Rs.200 crores while as the latter has investment of Rs.14.56 crores. Thus the respondent has more than 92% of share capital, therefore, the suit may not be entertained. The question of holding of each of the party may not be relevant at this stage so far as the question of abuse of the processes of law is concerned. Merely because somebody's financial stake is less than that of the other party does not make his action as suspect or abuse of the processes of law if such a party seek redressal of its grievance or a legal right.

70. The learned senior counsel for the respondents has also referred to the judgments in *Modi Entertainment Network*[19], *Enercon (India) Ltd*[20] and *Essel Sports Pvt. Ltd.*[21] to contend that in all these three judgments, the anti-suit injunction which has been granted by the civil court is not anti-arbitration injunction and, therefore, the injunction which has been granted in the said three suits could not be made the basis for staying the

[19] (2003) 4 SCC 341

[20] AIR 2014 SC 3152

[21] ILR (2011) V DELHI 585

arbitration proceedings which have already been commenced by the arbitral tribunal at the LCIA.

71. No doubt, the three cases referred to hereinabove to which reference has been made by the learned senior counsel for the defendants, the injunction which was granted was an anti-suit injunction to be initiated or to be continued by the civil court but merely because that was an anti-suit injunction granted by the civil court, does not mean that anti-arbitration injunction cannot be granted by a court on the same principles provided not only the plaintiff satisfies the three requirements which a party is expected to satisfy in an ordinary suit for grant of *ad interim* injunction and over and above also satisfies the court that any of the three contingencies which are envisaged in Section 45 of the Act is available to him. Meaning thereby, that if a party is able to show that in a given particular case any of the three contingencies of the agreement being null and void, inoperative or incapable of being performed is satisfied by a party in addition to the other three conditions, which are prerequisites for grant of an ad interim injunction, an anti-arbitration injunction can also be granted.

72. In the instant case, as has been observed hereinabove that because of the pendency of the company law petition initiated by the present

plaintiffs, where there are allegations of mismanagement and oppression pending before the Company Law Board for the last more than a year and an *ad interim* order having been passed restraining the defendants from proceeding ahead with the change in the share pattern of the holding of the company that tantamounts to having made the arbitration agreement inoperative or incapable of performance though for a limited purpose or for a limited time, the plaintiff is in my view entitled to an anti arbitration injunction.

CONCLUSION

73. For the reasons mentioned above, I am of the considered opinion that the plaintiff has been able to satisfy all the three requirements for grant of ad interim injunction namely the plaintiff has got prima facie good case that the balance of convenience is in favour of the plaintiff, that the plaintiff will suffer irreparable loss in case ad interim injunction against the respondents from continuing with the arbitration proceedings, is not granted. Further, in addition to satisfying the above three requirements, the plaintiff has also been able to prima facie show to this court that the arbitration agreement between the parties is inoperative or incapable of performance on account of the fact that the plaintiff has

already filed a suit for oppression and mismanagement in Company Law Board in India which has directed the defendants to maintain status quo with regard to the shareholding pattern of the defendant No.1 during the pendency of the petition. Secondly, the dispute which is pending between the parties before the Company Law Board with regard to the oppression and mismanagement will have certain overlapping disputes with the disputes sought to be raised by the defendants on the assumption that they were well within their right to terminate the joint venture agreement and refer the dispute for adjudication before the arbitral tribunal. This is notwithstanding the fact that according to the defendants the plaintiffs have allegedly taken the view in the pleadings of this suit and company petition that they operate in different circumstances.

74. According to the defendants, there is no overlapping of the disputes sought to be raised by the parties before the two forums. But, in my considered opinion, there is bound to be possibility of conflict in decisions even if it is assumed that the disputes sought to be raised in two forums are not overlapping. To top it all, the disputes sought to be raised before the arbitral tribunal are suffering from forum non conveniens. This is on account of the fact that the parties except one of the defendants

are carrying on business in India, cause of action has accrued in India, the governing law between the parties is Indian, the award, if at all, will be passed in favour of the defendants, has to be enforced in India according to the Indian laws, therefore, simply by having the arbitral tribunal located at a place outside India, it becomes forum non conveniens and, therefore, it makes the very carrying on of the arbitration proceedings by the defendants when the company law petition is pending, as oppressive and vexatious. I, therefore, restrain the defendants from pursuing the arbitration proceedings before the arbitral tribunal till the disposal of the suit or alternatively till the stay is not vacated by the Company Law Board.

75. The IA No.6207/2014 accordingly stands disposed of.

CS(OS) No.962/2014 & IA Nos.6858/2014 & 7079-7083/2014

1. List the matter before the Joint Registrar for completion of pleadings on 08.01.2015.

V.K. SHALI, J.

DECEMBER 22, 2014