Bombay High Court
Prakash Cotton Mills Pvt. Ltd vs Vinod Tejraj Gowani on 28 August, 2014
Bench: R.D. Dhanuka

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

ARBITRATION APPLICATION NO.107 OF 2012

1. Prakash Cotton Mills Pvt. Ltd.
a company incorporated and registered
under the provisions of the Companies Act,
1913 and having its registered office

off Ganpatrao Kadam Marg, Lower Parel,
Mumbai - 400 013.

2. Bharat Barrel And Drum Manufacturing
Company Private Ltd.

a company incorporated and registered
under the provisions of the Companies Act,
1913 and having its registered office
off Ganpatrao Kadam Marg, Lower Parel,
Mumbai - 400 013. ... Applicants

V/s.

1. Vinod Tejraj Gowani
2. Hitesh Tejraj Gowani
Both of Mumbai, Indian Inhabitants

residing at Gowani Villa, Near Jaslok
Hospital, Peddar Road, Mumbai-400 026
and having his office address at 501,
Commerce House, 140, Nagindas Master
Road, Fort, Mumbai 400 023.

3. M/s Kanha & Company
a partnership firm registered under
the provisions of the Indian Partnership
Act, 1932, and having its registered office
at Prakash Cotton Mills Compound,
off Ganpatrao Kadam Marg, Lower Parel,

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Mumbai - 400 013. ... Respondents.

WITH ARBITRATION APPLICATION (L) NO.1180 OF 2014

1. Prakash Cotton Mills Pvt. Ltd.

a company incorporated and registered under the provisions of the Companies Act, 1913 and having its registered office off Ganpatrao Kadam Marg, Lower Parel, Mumbai - 400 013.

Company Private Ltd.

2. Bharat Barrel And Drum Manufacturing a company incorporated and registered under the provisions of the Companies Act, 1913 and having its registered office off Ganpatrao Kadam Marg, Lower Parel, Mumbai - 400 013. ... Applicants V/s.

1. Vinod Tejraj Gowani

2. Hitesh Tejraj Gowani Both of Mumbai, Indian Inhabitants residing at Gowani Villa, Near Jaslok Hospital, Peddar Road, Mumbai-400 026 and having his office address at 501, Commerce House, 140, Nagindas Master Road, Fort, Mumbai 400 023.

Mr Virag Tulzapurkar, senior Advocate a/w Nikhil Sakhardande, Atul Daga, Ms Vedangi Tulzapurkar i/b M/s Wadia Ghandy & Co. for Applicants.

Mr F. E. D'vitre, senior Advocate a/w S. V. Doijode, P. A. Kapadi, R.H. Daulat i/b M/s Doijode & Associates for respondent No.1 and 3 in ARBAP No.107/12 and for respondent No.1 in ARBAP (l) No.1180/14.

Mr D. D. Madon, senior Advocate a/w S. V. Doijode, P. A. Kapadi, R.H. Daulat i/b M/s Doijode & Associates for respondent No.2.

CORAM : R.D.DHANUKA J.

JUDGMENT RESERVED ON : AUGUST 13, 2014.

JUDGMENT PRONOUNCED ON : AUGUST 28, 2014 Judgment :

By these two arbitration applications, the applicants seek appointment of sole arbitrator. Since the issues involved in both the proceedings are common, both the applications were heard together and are being disposed of by a common order. Some of the relevant facts for the purpose of deciding these two applications are as under.

2. On 25/03/1997 the applicants entered into an agreement with respondent Nos.1 and 2. The said

agreement was described as 'Deed of Partnership.' It is the case of the applicants that by the said agreement the applicants and respondent Nos.1 and 2 constituted a partnership firm M/s Kanha & Company being respondent No.3 therein comprising of four partners. The agreement to agree joint development of the properties described therein was amongst the applicants, respondent Nos.1 and 2 and respondent No.3 and in any event for the benefit of respondent No.3. The said document is duly registered with the office of Sub Registrar of Assurances of Bombay.

3. Dispute arose between the parties. On 10/04/2008 the applicants addressed a letter to respondent Nos.1 and 2 and contended that under the said Partnership Deed dated 25/03/1997, the applicants had pooled their Asmita 3/45 .. 4 .. ARBAP-107-12 @ ARBAP(L)1180/14 properties situated at Lower Parel in the partnership firm of M/s Kanha & Co. as their capital contribution in full and the funds required for the development and construction to be carried out on the said properties were to be brought in by respondent Nos.1 and 2 alone into the partnership firm which was to be treated as their capital contribution. In the said letter it was alleged that it was over ten years since the execution of the partnership deed and there had been no movement on the part of respondent Nos.1 and 2 to get plans for development of the said properties approved, obtain IOD and Commencement Certificate for commencing construction on the said properties as provided in the said partnership deed. The applicants informed that they needed to meet and discuss on the issue if the party have to maintain cordial relation.

4. Vide their letter 29/04/2011 addressed to respondent Nos.1 and 2, the applicants contended that under the agreement dated 25/03/1997, the parties had agreed to undertake joint development subject to the fulfillment of certain terms and conditions stated therein and though substantial time of more than 14 years had passed from the time the parties had entered into an agreement, there was unreasonable postponement, delay and failure on the part of respondent Nos.1 and 2 in the performance of their obligation and respondent Nos.1 and 2 had repudiated the performance of their contract.

The applicants conveyed that the said agreement dated 25/03/1997 had stood/stands at an end.

5. The applicants issued a public notice on 15/07/2011 and 18/07/2011 stating that the applicants are the sole and absolute owners of Asmita 4/45 .. 5 .. ARBAP-107-12 @ ARBAP(L)1180/14 the PCM property and the BDD property respectively and no one should deal with respondent Nos.1 and 2 or any other person in respect of those properties.

6. On 19/07/2011, the applicants received a letter from respondent Nos.1 and 2 alleging that the Parel properties had been brought into the common hotch-potch and ownership as well as possession of the said properties is with the partnership firm. It is contended by respondent Nos. 1 and 2 that the partnership firm continued to be in existence and had not come to an end.

7. On 30/09/2011 applicants through their advocates issued a notice to respondent nos.1 and 2 and contended that under an agreement dated 25/03/1997 the parties had agreed to enter into partnership for the joint development of properties as more particularly set out therein. It is stated that under the agreement the applicants had executed an agreement to agree to undertake joint

development of the said properties subject and upon the fulfillment of certain terms and conditions by respondent Nos.1 and 2. It is stated that the agreement consists of two separate and independent contracts one pertaining to entering into partnership and the other pertaining to an agreement to agree to jointly develop the said properties. The applicants alleged various defaults on the part of respondent Nos.1 and 2 under the said agreement in the said letter. It is stated in the said letter that the said letter was without prejudice to any of their rights, remedies and contentions and the applicants invoked arbitration in terms of Clause 34 of the agreement dated 25/03/1997. It is stated that the reference to arbitration inter alia Asmita 5/45 .. 6 .. ARBAP-107-12 @ ARBAP(L)1180/14 concerns the dispute with respect to the determination of the agreement to agree to jointly develop the said properties and the damages to which the applicants were entitled to for the alleged failure on the part of respondent Nos.l and 2 to perform their obligation under the said agreement.

8. It is also stated that clause 31 and 35 provide for independent arbitration distinct from clause 34. Disputes, if any, covered by clauses 31 and 35, are separate and distinct and do not fall within clause 34. The applicants named Mr Justice B.N. Srikrishana, former Judge of Supreme Court as the sole arbitrator for the settlement of disputes which had arisen between the applicants and respondent Nos.1 and 2 with respect to termination of agreement to agree for joint development of the said properties. Applicants requested respondent Nos.1 and 2 to confirm the name of the sole arbitrator within 14 days from the date of the notice and informed that if the same was not confirmed, the applicant would be constrained to adopt legal proceedings in that regard. There is no reply to the said notice from the respondent Nos.1 and 2.

9. In the month of October, 2011 the applicants filed proceedings under Section 9 of the Arbitration and Conciliation Act (944/11) for interim measures in this Court. By an order dated 04/10/2011, this Court granted certain interim measures. On 5/10/2011 the applicants through their advocates issued a notice to respondent Nos.1 and 2 without prejudice to their rights, remedies and contentions and invoked arbitration in terms of Clause 31 r/w 35 of the agreement stating that the same was with respect to the dissolution of the firm prior to the commencement of any work of Asmita 6/45 .. 7 .. ARBAP-107-12 @ ARBAP(L)1180/14 development of the said property. The applicants dissolved the partnership constituted between the parties as and from the date of the notice. In the said notice it was stated that reference to arbitration inter alia concerns the dissolution of the firm of M/s Kanha and Co. and for the settlement of their accounts which amongst other issues, were proposed to be raised before the sole arbitrator in the proposed arbitration proceedings. It is further stated that invocation of arbitration under clause 31 of the agreement and all proceedings thereunder was independent of and without prejudice to their rights and contentions pertaining to arbitration under Clause 34 of the agreement and all proceedings thereunder. A copy of the said letter was also forwarded to Mr M. L. Bhakta, advocate and solicitor.

10. On the same day, the applicants through their solicitor also sent a separate letter to Mr M. L. Bhakta, advocate and solicitor in terms of clause 31 of the agreement r/w clause 35 and requested him to act as sole arbitrator in the matter pertaining to the dissolution of the firm and to decide various issue arising therefrom. By letter dated 07/10/2011 Mr M. L. Bhakta informed the advocates of the applicants about his unwillingness to act as sole arbitrator in the matter. By letter dated 14/10/2011 the applicants through their solicitors informed respondent Nos.1 and 2 about such

communication of Mr Bhakta, advocate and solicitor and named Shri Justice C. K. Thakkar, former Judge of the Supreme Court as the sole arbitrator pertaining to the dissolution of the firm and issues arising therefrom.

11. By letter dated 25/10/2011 the respondents through their solicitors called upon the applicants to inform under which provisions of the Asmita 7/45 .. 8 .. ARBAP-107-12 @ ARBAP(L)1180/14 Deed and/or Arbitration and Conciliation Act 1996, the applicants were entitled to nominate an arbitrator in case of one arbitrator embodied in clause 31.

12. By letter dated 01/11/2011 through their solicitors, the applicants to respondent Nos.1 and 2 through their solicitors once again called upon respondent Nos.1 and 2 to accept the name of Shri Justice C.K.

Thakkar, former Judge of Supreme Court as arbitrator.

13. On 15/03/2012 the applicants filed arbitration application (107/12) inter alia praying for appointment of Mr Justice B.N. Srikrishna former Judge of Supreme Court or any other Judge of High Court to adjudicate the disputes and difference that have arisen between the parties in respect of agreement dated 25/03/1997.

14. On 30/07/2014 the applicants filed arbitration application (l) No.1180 of 2014 under Section 11(6) of the Arbitration and Conciliation Act 1996 inter alia praying for appointment of Mr Justice C. K. Thakkar former Judge of the Supreme Court or any other retired Judge of Supreme Court or any other retired Judge of High Court to adjudicate the dispute and differences in respect of the agreement or to take the necessary measures to secure an appointment of arbitrator in accordance with the agreement.

15. Both the arbitration applications are opposed by the respondents. The respondents have filed affidavit in reply in both the applications. The applicants have filed rejoinder in arbitration application No.107/12 and are Asmita 8/45 .. 9 .. ARBAP-107-12 @ ARBAP(L)1180/14 permitted to agree on the basis of denial in arbitration application (l) No.1180 of 2014. Clause 31, 34 and 35 of the Partnership Deed dated 25/03/1997 which are relied upon by both parties in the aforesaid two arbitration applications are extracted as under :

> 31. In the event of any of the parties hereto desiring to seek dissolution of the Partnership firm before commencement of development of the said two properties then the same shall be referred to the arbitration of Mr M. L. Bhakta, Solicitor of M/s Kanga & Co. and his decision on the issue shall be binding on all the parties.
>
> 34. All disputes, claims and questions whatsoever which may arise during the continuance of the Partnership between the parties hereto touching these presents or the construction or application thereof or any clauses or thing herein contained or in respect of any account, valuation of assets and the duties and responsibilities hereunder or as to any act or omission of any party or as to any other matter in

> anywise relating to this Partnership or the business or affairs thereof or the rights, duties and liabilities of any party under these presents shall be referred to Arbitration in accordance with the provisions of Arbitration and Conciliation Act, 1996 or any statutory reenactment or modification thereof for the time being in force. All arbitration proceedings shall take place at Mumbai and the courts in Mumbai shall alone have the jurisdiction in the matter.
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> 35. Without prejudice to Clause 34 above, the parties hereto have mutually agreed between themselves that all the disputes, claims and questions whatsoever arising during the continuance of this partnership between the parties hereto touching these presents shall be referred to the sole arbitration of Shri M. L. Bhakta, Solicitor of M/s Kanga & Co., Advocates and Solicitors who has been mutually appointed as an arbitrator by the parties hereto.

16. Mr Tulzapurkar learned senior counsel for the applicants submits that prior to the date of dissolution of the partnership firm, the applicants Asmita 9/45 .. 10 .. ARBAP-107-12 @ ARBAP(L)1180/14 issued a notice on 30/09/2011 to respondent Nos.1 and 2 invoking arbitration agreement recorded in clause 34 of the agreement and had named Mr Justice B. N. Srikrishna former Judge of the Supreme Court as the sole arbitrator for resolving the disputes and differences arisen with respect to the termination of the agreement to agree for joint development of the suit properties. It is submitted that since the respondents did not nominate any arbitrator or did not concur with the name of the learned arbitrator named by the applicants, this application filed under Section 11(6) of the Arbitration and Conciliation Act 1996 is maintainable. Learned senior counsel submits that no development on the plots in question commenced. It is submitted that when the applicants invoked clause 34 of the agreement, firm was not admittedly dissolved. It is submitted that since the firm is not a legal entity, firm is not a necessary party to the application filed under Section 11. Learned senior counsel submits that under clause 34 of the agreement there is no named arbitrator prescribed. Even if there would have been a named arbitrator and if such named arbitrator would have refused to act as arbitrator and if any vacancy would have arisen, such vacancy has to be supplied.

17. Mr Tulzapurkar learned senior counsel invited my attention to the defence raised in affidavit in reply filed by the respondents on the issue of limitation and on merits. Learned senior counsel placed reliance on the Judgment of Supreme Court in case of National Insurance Company Vs. Boghara Polyfab Pvt. Ltd. (2009) 1 SCC 267 and in particular paragraph 22 to 22.3 and submits that the issue on merits raised by the respondents in the reply has to be decided by the arbitral tribunal exclusively and cannot be Asmita 10/45 .. 11 .. ARBAP-107-12 @ ARBAP(L)1180/14 decided by Chief Justice or his designate under Section 11 of the Arbitration and Conciliation Act 1996.

18. In so far as issue of limitation raised by the respondents in the affidavit in reply is concerned, learned senior counsel submits that even the issue whether the claim is a dead (long-barred claim) or a live claim, such issue can be decided either by Chief Justice or his designate or the same can be left to the decision of the arbitral tribunal. Learned senior counsel submits that the limitation issue raised by the respondents is mixed question of fact and law, the same can be decided only by the

arbitral tribunal in this case. Paragraphs 22 to 22.3 of the judgment of Supreme Court in case of National Insurance Company (supra) read thus :

> " 22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in SBP & Co. This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is (i) issues which the Chief Justice or his Designate is bound to decide; (ii) issues which he can also decide, that is issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.
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> 22.1 The issues (first category) which Chief Justice/his designate will have to decide are:
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> (a) Whether the party making the application has approached the appropriate High Court.
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> (b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.
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> 22.2 The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the arbitral tribunal) are:
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> (a) Whether the claim is a dead (long barred) claim or a live claim.

(b) Whether the parties have concluded the contract/ transaction by recording satisfaction of their mutual rights and obligation or by receiving the final Asmita 11/45 .. 12 .. ARBAP-107-12 @ ARBAP(L)1180/14 payment without objection.

22.3 The issues (third category) which the Chief Justice/his designate should leave exclusively to the arbitral tribunal are:

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration."

19. Mr Tulzapurkar learned senior counsel placed reliance on the judgment of Supreme Court in case of State of Goa Vs. Praveen Enterprises (2012)12 Supreme court Cases 581 in support of his submission that the issue of limitation is not an issue that has to be decided in an application under Section 11 of the Act. Paragraphs 35 and 36 of the said judgment read thus :

> " 35. The difference between a dead/stale claim and a mere time barred claim was explained by this Court in Indian Oil Corporation Ltd. v. SPS Engineering Ltd.

MANU/SC/0122/2011 : 2011 (2) SCALE 291 thus:

" 14. When it is said that the Chief Justice or his designate may choose to decide whether the claim is a dead claim, it is implied that he will do so only when the claim is evidently and patently a long time barred claim and there is No. need for any detailed consideration of evidence. We may elucidate by an illustration: If the contractor makes a claim a decade or so after completion of the work without referring to any acknowledgement of a liability or other factors that kept the claim alive in law, and the claim is patently long time barred, the Chief Justice or his designate will examine whether the claim is a dead claim (that is, a long time barred claim). On the other hand, if the contractor makes a claim for payment, beyond three years of completing of the work but say within five years of completion of work, and alleges that the final bill was drawn up and payments were made within three years before the claim, the court will not enter into a disputed question whether the claim was barred by limitation or not. The court will leave the matter to the decision of the Tribunal. If the distinction between apparent and obvious dead claims, and claims involving disputed issues of limitation is not kept in view, the Chief Justice or his designate will end up deciding the question of limitation in all applications under Asmita 12/45 .. 13 .. ARBAP-107-12 @ ARBAP(L)1180/14 Section 11 of the Act.

36. The issue of limitation is not an issue that has to be decided in an application under Section 11 of the Act. SBP & Co. and Boghara Polyfab held that the Chief Justice or his designate will not examine issues relating to limitation, but may consider in appropriate cases, whether the application was in regard to a claim which on the face of it was so hopelessly barred by time, that it is already a dead/stale claim which did not deserve to be resurrected and referred to arbitration. The said decisions do not support the Respondent's contention that the details of all claims should be set out in the application under Section 11 of the Act and that details of all counter claims should be set out in the statement of objections, and that a claim or a counter claim which is not referred to or set out in the pleadings in the proceedings under Section 11 of the Act, cannot be entertained or decided by the arbitral tribunal."

20. Learned senior counsel submits that whether development on the plots in question commenced by the respondents or not and consequently whether clause 31 of the agreement would apply or not, this issue also can be decided by the arbitral tribunal.

21. Learned senior counsel submits that the applicants have invoked clause 34 of the agreement in so far as arbitration application No.107 of 2012 is concerned and clause 31 in so far as arbitration application (l) No.1180 of 2014 is concerned. Both the clauses invoked by the applicants in both these matters are part of the same agreement i.e. Partnership Deed dated 25/03/1997. The intention of both the parties that the dispute arising under the agreement has to be referred to the arbitrator is ex-facie clear. The respondents cannot be allowed to raise such issue about non existence of arbitration agreement contrary to the arbitration agreement forming part of the Partnership Deed. The Courts are required to aid and support the arbitral process and not to bring to a grinding halt.

In support of this submission learned senior counsel placed reliance on Judgment of Supreme Court in case Asmita 13/45 .. 14 .. ARBAP-107-12 @ ARBAP(L)1180/14 of Enercon (India) Ltd. and Others Vs. Enercon GMBH And Another (2014)5 SCC 1 and in particular paragraphs 76, 77, 80, 81, 83, 88 to 96 which read thus :

> "76. On the other hand, Dr. Singhvi has submitted, as noticed earlier, that the intention of the parties to arbitrate is clear. Even if the existence of the main contract is under dispute, the court is concerned only with the arbitration agreement i.e. the arbitration clause. The submission of Dr. Singhvi is that the absence of IPLA will not nullify the arbitration clause.
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> 77. We find considerable merit in the submissions made by Dr. Singhvi. It cannot be disputed that there is a legal relationship between the parties of a long standing. Section 44 of the Indian Arbitration Act, 1996 applies to arbitral awards of differences between persons arising out of legal proceedings. Such a relationship may be contractual or not, so long it is considered as commercial under the laws in force in India. Further, that legal relationship must be in pursuance of an agreement, in writing, for arbitration, to which the New York Convention applies. The court can decline to make a reference to arbitration in case it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. There are no pleadings to that effect in the plaint. The Daman Trial Court findings that the contract is null and void and not based on free consent were rendered in the absence of relevant pleadings. There is a mention in one of the e-mails that Dr. Wobben has taken advantage of his friendship with Mr. Yogesh Mehra. But that seems to be more of a sulk than a genuine grievance. Even if one accepts the truth of such a statement, the same is not reflected in the pleadings. Therefore, no serious note could be taken of that statement at this stage.
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> 80. It must also be noticed here that the relationship between the parties formally commenced on 12th January, 1994 when the parties entered into the first SHA and TKHA. Even under that SHA, Article XVI inter alia provided for resolution of disputes by arbitration. The TKHA also contained an identically worded arbitration clause, under Article XIX. This intention to arbitrate has continued without waiver. In the face of this, the question of the concluded contract becomes irrelevant, for the purposes of making the reference to the Arbitral Tribunal. It must be clarified that the doubt raised by the Appellant is that there is no concluded IPLA, i.e. the substantive contract. But this can have no effect on the existence of a binding Arbitration Agreement in view of Clause 3.

The parties have irrevocably agreed to resolve all the disputes through Arbitration. Parties can not be permitted to avoid arbitration, without satisfying the Court that it would be just and in the interest of all the parties not to proceed with arbitration. Furthermore in arbitration proceedings, courts are required to aid and support the arbitral process, and not to bring it to a grinding halt. If we were to accept the submissions of Mr. Nariman, we would be playing havoc with Asmita 14/45 ..

15 .. ARBAP-107-12 @ ARBAP(L)1180/14 the progress of the arbitral process. This would be of no benefit to any of the parties involved in these unnecessarily complicated and convoluted proceedings.

81. In the facts of this case, we have no hesitation in concluding that the parties must proceed with the Arbitration. All the difficulties pointed out by Mr. Rohinton Nariman can be addressed by the Arbitral Tribunal.

83. The concept of separability of the arbitration clause/agreement from the underlying contract is a necessity to ensure that the intention of the parties to resolve the disputes by arbitration does not evaporate into thin air with every challenge to the legality, validity, finality or breach of the underlying contract. The Indian Arbitration Act, 1996, as noticed above, under Section 16 accepts the concept that the main contract and the arbitration agreement form two independent contracts. Commercial rights and obligations are contained in the underlying, substantive, or the main contract. It is followed by a second contract, which expresses the agreement and the intention of the parties to resolve the disputes relating to the underlying contract through arbitration. A remedy is elected by parties outside the normal civil court remedy. It is true that support of the National Courts would be required to ensure the success of arbitration, but this would not detract from the legitimacy or independence of the collateral arbitration agreement, even if it is contained in a contract, which is claimed to be void or voidable or unconcluded by one of the parties.

88. In our opinion, the Courts have to adopt a pragmatic approach and not a pedantic or technical approach while interpreting or construing an arbitration agreement or arbitration clause. Therefore, when faced with a seemingly unworkable arbitration clause, it would be the duty of the Court to make the same workable within the permissible limits of the law, without stretching it beyond the boundaries of recognition. In other words, a common sense approach has to be adopted to give effect to the intention of the parties to arbitrate. In such a case, the court ought to adopt the attitude of a reasonable business person, having business common sense as well as being equipped with the knowledge that may be peculiar to the business venture. The arbitration clause cannot be construed with a purely legalistic mindset, as if one is construing a provision in a statute. We may just add here the words of Lord Diplock in The Antaios Compania Neviera SA v. Salen Rederierna AB which are as follows: If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.

We entirely agree with the aforesaid observation.

89. This view of ours is also supported by the following judgments which were relied upon by Dr. Singhvi:

89.1 In Visa International Limited (supra), it was inter alia held that:

Asmita

25....No party can be allowed to take advantage of inartistic drafting of arbitration clause in any agreement as long as clear intention of parties to go for arbitration in case of any future disputes is evident from the agreement and material on record including surrounding circumstances.

26. What is required to be gathered is the intention of the parties from the surrounding circumstances including the conduct of the parties and the evidence such as exchange of correspondence between the parties....

89.2 Similar position of law was reiterated in Nandan Biomatrix Ltd. (supra), wherein this Court observed inter alia as under:

> 28. This Court in Rukmanibai Gupta v. Collector, Jabalpur has held (at SCC p. 560, para 6) that what is required to be ascertained while construing a clause is "whether the parties have agreed that if disputes arise between them in respect of the subject-matter of contract such dispute shall be referred to arbitration, then such an arrangement would spell out an arbitration agreement".

29. In M. Dayanand Reddy v. A.P. Industrial Infrastructure Corpn. Ltd., this Court has held that: (SCC p. 142, para 8)

8. ... an arbitration clause is not required to be stated in any particular form. If the intention of the parties to refer the dispute to arbitration can be clearly ascertained from the terms of the agreement, it is immaterial whether or not the expression arbitration or 'arbitrator' or 'arbitrators' has been used in the agreement.

(original emphasis supplied)

30. The Court is required, therefore, to decide whether the existence of an agreement to refer the dispute to arbitration can be clearly ascertained in the facts and circumstances of the case. This, in turn, may depend upon the intention of the parties to be gathered from the correspondence exchanged between the parties, the agreement in question and the surrounding circumstances. What is required is to gather the intention of the parties as to whether they have agreed for resolution of the disputes through arbitration. What is required to be decided in an application under Section 11 of the 1996 Act is: whether there is an arbitration agreement as defined in the said Act.

90. It is a well recognized principle of arbitration jurisprudence in almost all the jurisdictions, especially those following the UNCITRAL Model Law, that the Courts play a supportive role in encouraging the arbitration to proceed rather Asmita 16/45 .. 17 .. ARBAP-107-12 @ ARBAP(L)1180/14 than letting it come to a grinding halt. Another equally important principle recognized in almost all jurisdictions is the least intervention by the Courts. Under the Indian Arbitration Act, 1996, Section 5 specifically lays down that: "

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". Keeping in view the aforesaid, we find force in the submission of Dr. Singhvi that the arbitration clause as it stands cannot be frustrated on the ground that it is unworkable.

91. Dr. Singhvi has rightly submitted that the un-workability in this case is attributed only to the machinery provision. And the arbitration agreement, otherwise, fulfils the criteria laid down under Section 44 of the Indian Arbitration Act, 1996. Given that two Arbitrators have been appointed, the missing line that "the two Arbitrators appointed by the parties shall appoint the third Arbitrator" can be read into the arbitration clause. The omission is so obvious that the court can legitimately supply the missing line. In these circumstances, the Court would apply the officious bystander principle, as explained by MacKinnon, LJ in Shirlaw v. Southern Foundries () to interpret the clause. In Shirlaw, it was held that:

prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course! In construing an arbitration clause, it is not necessary to employ the strict rules of interpretation which may be necessary to construe a statutory provision. The court would be well within its rights to set right an obvious omission without necessarily leaving itself open to the criticism of having reconstructed the clause.

92. Further, we find support in this context from the following extract of Halsbury's Laws of England (Vol. 13, Fourth Edition, 2007 Reissue): The words of a written instrument must in general be taken in their ordinary or natural sense notwithstanding the fact that such a construction may appear not to carry out the purpose which it might otherwise be supposed the parties intended to carry out; but if the provisions and expressions are contradictory, and there are grounds, appearing on the face of the instrument, affording proof of the real intention of the parties, that intention will prevail against the obvious and ordinary meaning of the words; and where the literal (in the sense of ordinary, natural or primary) construction would lead to an absurd result, and the words used are capable of being interpreted so as to avoid this result, the literal construction will be abandoned.

93. Mr. Rohinton Nariman had very fairly submitted that it is permissible for the Court to construe the arbitration clause in a particular manner to make Asmita 17/45 .. 18 .. ARBAP-107-12 @ ARBAP(L)1180/14 the same workable when there is a defect or an omission in it. His only caveat was that such an exercise would not permit the Court to re-write the contract. In our opinion, in the

present case, the crucial line which seems to be an omission or an error can be inserted by the Court. In this context, we find support from judgment of this Court in Shin Satellite Public Company Ltd. (supra), wherein the 'offending part' in the arbitration clause made determination by the arbitrator final and binding between the parties and declared that the parties have waived the rights to appeal or an objection against such award in any jurisdiction. The Court, inter-alia, held that such an objectionable part is clearly severable being independent of the dispute that has to be referred to be resolved through arbitration. By giving effect to the arbitration clause, the court specifically noted that the "it cannot be said that the Court is doing something which is not contemplated by the parties or by 'interpretative process', the Court is rewriting the contract which is in the nature of 'novation' . The intention of the parties is explicit and clear; they have agreed that the dispute, if any, would be referred to an arbitrator. To that extent, therefore, the agreement is legal, lawful and the offending part as to the finality and restraint in approaching a Court of law can be separated and severed by using a 'blue pencil'."

94. There is another reason which permits us to take the aforesaid view and accept the submission made by Dr. Singhvi that while construing the arbitration agreement/clause the same can be construed to make it workable, as such an approach is statutorily provided for. For this submission, Dr. Singhvi has rightly relied upon the provision contained in Sections 10 and 11 of the Indian Arbitration Act, 1996. The object of these two provisions is to avoid failure of the arbitration agreement or the arbitration clause if contained in contract. Under Section 10(1), there is freedom given to the parties to determine the number of Arbitrators, provided that such number shall not be an even number. The arbitration clause in this case provides that the arbitral tribunal shall consist of three arbitrators. Further, it must also be noticed that the Respondents have been trying to seek adjudication of disputes by arbitration. As noted earlier, the Respondent No. 2 in its email dated 13 th March, 2008 clearly offered that the third and the presiding arbitrator be appointed by the respective arbitrators of the Appellants and the Respondents. On the other hand, the attitude of the Appellants is to avoid arbitration at any cost.

95. In this context, reliance placed by Dr. Singhvi upon MMTC Limited (supra) is justified. In MMTC, the provisions contained in Sections 10(1) and (2) of the Indian Arbitration Act, 1996 have been held to be machinery provisions by this Court. It was further held that the validity of an arbitration agreement does not depend on the number of arbitrators specified therein. The Court declined to render the arbitration agreement invalid on the ground that it provided an even number of arbitrators. In the present case, Mr. Rohinton Nariman had rightly not even emphasised that the arbitration agreement itself is illegal. The learned sr. Counsel only emphasised that the arbitrators having expressed the view that the arbitration clause is unworkable, the parties ought not to be sent to the Asmita 18/45 .. 19 .. ARBAP-107-12 @ ARBAP(L)1180/14 arbitration.

96. Similarly, other provisions contained in Sections 8, 11 and 45 of the Indian Arbitration Act, 1996 are machinery provisions to ensure that parties can proceed to arbitration provided they have expressed the intention to Arbitrate. This intention can be expressed by the parties, as specifically provided under Section 7 of the Indian Arbitration Act, 1996 by an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement. Such intention can even be expressed in the pleadings of the parties such as statements of claim and

defence, in which the existence of the agreement is alleged by one party and not denied by the other. In view of the above, we are of the opinion that the parties can be permitted to proceed to arbitration."

22. In so far as issue raised by the respondents in the affidavit in reply in arbitration application (l) No.1180 of 2014 that the named arbitrator i.e. M.L. Bhakta, advocate having recused to act as arbitrator and thus no other arbitrator can be appointed at all, learned senior counsel submits that neither under clause 31 nor under clause 35, any qualification is prescribed for appointment of an arbitrator. It is submitted that though the named arbitrator has refused to act as an arbitrator, such vacancy has to be supplied and the arbitration agreement does not come to an end. Learned senior counsel submits that there is no such provision under any of the arbitration agreement thereby barring the appointment of arbitrator in the event of the named arbitrator refusing to act as arbitrator. Vacancy thus having arisen in view of Mr M. L. Bhakta advocate refusing to act as arbitrator has to be supplied under Section 15 read with Section 11 of the Arbitration and Conciliation Act 1996. In support of this submission Mr Tulzapurkar learned senior counsel placed reliance on the judgment of Supreme Court in case of SAN-A Trading Company Ltd. Vs. I. C. Textiles Ltd. (2012) 7 Supreme Court Cases 192 in support of his submission that unless the agreement specifically debars appointment of any other arbitrator in case the named Asmita 19/45 .. 20 .. ARBAP-107-12 @ ARBAP(L)1180/14 arbitrator refused to act such vacancy can be supplied under Section 11(6) by following the procedure laid down under the provisions. Paragraphs 4 and 13 to 19 of the Judgment read thus.

4. Clause 6 of the Deed provides as under :

> " In case of any dispute, difference or issues arising under or in any manner concerning or in connection with this Deed, the same shall be resolved by arbitration by Mr Manabu Nonoguchi, Area Manager, Sales Department, Murata Machinery Ltd., Textile Machinery Department, 3 rd Floor, Osaka Green Building, 2-6-26, Kitahama, chuoku, Osaka 5410041, Japan, on principles of equity and good conscience (ex equo et bono), whose award shall be final and binding.

13. In the present case, the named arbitrator under the contract viz. Mr Manabu Nonoguchi, Area Manager, Sales Department, Murata Machinery Ltd., Textile Machinery Department, Japan, vide his letter dated 19/06/2003 expressed his inability to discharge his role as arbitrator.

14. Section 15 of the Act providing for termination of mandate and substitution of arbitrator, reads as under :

> 15. Termination of mandate and substitution of arbitrator - (1) In addition to the circumstances referred to in Section 13 or Section 14, the mandate of an arbitrator shall terminate ---
>
> (a) where he withdraws from office for any reason; or

(b) by or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the Arbitral Tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the Arbitral Tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the Arbitral Tribunal."

15. Under clause (a) of Section 15(1), when the arbitrator withdraws from office for any reason, a substitute arbitrator can be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced. The procedure for filling the vacancy arising out of the arbitrator's withdrawal from office is provided under Section 15. It says that in addition to the grounds covered by Sections 13 and 14, the mandate of an arbitrator shall terminate when he withdraws from his office for any reason or under an agreement of the parties. The Section provides that the substitute arbitrator is to be appointed Asmita 20/45 .. 21 .. ARBAP-107-12 @ ARBAP(L)1180/14 according to the same rules which were applicable to the appointment of the arbitrator who is to be replaced. Sub-section (2) of Section 15 contemplates appointment of the substitute arbitrator in place of the arbitrator who refuses to act as an arbitrator, as per the rules applicable to the appointment of the arbitrator.

16. Sub-section (2) of Section 11 of the Act provides that in the absence of any agreed procedure for appointment of the arbitrator or arbitrators, sub-

section (6) of Section 11 would apply whereunder a party may request the Chief Justice or any person or institution designated by him to take necessary measures, unless the agreement on the appointment procedure provides other means for securing the appointment. By virtue of sub-section (12) of Section 11, in international commercial arbitration, the reference to Chief Justice in sub-

section (6) shall be construed as a reference to the Chief Justice of India.

17. The submission of the learned counsel for the respondent that as the named arbitrator has refused to act as an arbitrator, the arbitration agreement itself comes to an end, cannot be accepted because Section 15 provides for a remedy for appointment of another arbitrator when the arbitrator appointed by the parties as provided in the agreement refuses to act an arbitrator. Settlement of dispute between the parties through medium of an independent person in whom both parties repose confidence is the basic foundation on which the law of arbitration stands and is founded.

18. When the agreement provides for reference of a dispute to a particular individual and such agreed arbitrator refuses to act, the next appointment could be made as agreed by the parties, but where no such procedure is prescribed authorizing appointment of another arbitrator then the agreement clause cannot operate. It, therefore, follows that in case where the arbitration clause provides for appointment of a sole arbitrator and he had refused to act, then the agreement clause stands exhausted and then the provisions of Section 15 would be attracted and it would be for the Court under Section 11(6) to appoint an arbitrator on the procedure laid down in Section 11(6) being followed unless there is an agreement in the contract where the parties specifically debar appointment of any other arbitrator in case the named arbitrator refuses to act.

19. In the present case, I do not find any such stipulation in the contract entered into between the parties whereunder the parties have specifically debarred appointment of a fresh arbitrator if the named arbitrator refuses to act and perform his function as arbitrator. In the absence of any specific condition debarring appointment of a fresh arbitrator, it cannot be said that the arbitration clause in the contract agreement stands obliterated on the named arbitrator's refusal to perform his function."

23. Mr Tulzapurkar learned senior counsel also placed reliance on the Asmita 21/45 .. 22 .. ARBAP-107-12 @ ARBAP(L)1180/14 Judgment of Supreme Court in case ACC Ltd. Vs. Global Cements Ltd. (2012) 7 SCC 71 in support of the aforesaid proposition. Paragraphs 1, 2 3, 5, 16 to 18 and 21 to 22 of the said judgment read thus :

> "1. The question that falls for consideration in this case is whether on the death of a named arbitrator, the arbitration agreement survives or not.
>
> 2. At the very outset, let us refer to the relevant arbitration clause in the agreement dated 16.12.1989, which reads as follows:
>
> 21. If any question or difference or dispute shall arise between the parties hereto or their representatives at any time in relation to or with respect to the meaning or effect of these presents or with respect to the rights and liabilities of the parties hereto then such question or dispute shall be referred either to Mr. N.A.
>
> Palkhivala or Mr. D.S. Seth, whose decision in the matter shall be final and binding on both the parties.
>
> (Emphasis added)
>
> 3. The Petitioner submits that both Shri N.A. Palkhivala and Shri D.S. Seth are no more and therefore the arbitration clause in the agreement does not survive. It was pointed out that Shri N.A. Palkhivala was named in the agreement since he was the Chairman of the Petitioner company and Shri D.S. Seth was named in the agreement since he was the Director of the company. Both of them were nominated as arbitrators since they were closely associated with the company and also due to their

eminence, impartiality and familiarity in all commercial transactions and the corporate laws. The Petitioner submits that since the arbitrators are no more, the arbitration clause in the agreement has no life and hence there is no question of entertaining the application preferred Under Section 11 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') filed by the Respondent.

5. Bombay High Court entertained the application preferred by the Respondent Under Section 11 of the Act. The Court took the view that Clause 21 of the Agreement did constitute an agreement to refer disputes to arbitration and also took the view that in the absence of any prohibition or debarment, there is no reason for the court to presume an intent on the part of the parties to the effect that a vacancy that arises on account of a failure or inability of a named arbitrator to act cannot be supplied by the court Under Section 11. The court took the view unless the parties have expressly precluded such a course being followed, give effect to the policy of the law, which is to promote the efficacy of arbitration and the efficacy of commercial arbitration must be preserved particularly when business dealings are based on an agreement which provides recourse to arbitration. The designated Judge of the High Court appointed Mr. Justice S.N. Variava, former Judge of this Court as an arbitrator to adjudicate Asmita 22/45 .. 23 .. ARBAP-107-12 @ ARBAP(L)1180/14 the dispute and difference between the parties. Legality of that order is under challenge before us.

16. The scope of Sections 11(6) and 15 came up for consideration before the learned designate of the Chief Justice of India in San-A Trading Company Ltd. v. IC Textiles Ltd. and the learned Judge held as follows: ... It therefore follows that in case where the arbitration clause provides for appointment of a sole arbitrator and he had refused to act, then the agreement clause stands exhausted and then the provisions of Section 15 would be attracted and it would be for the court Under Section 11(6) to appoint an arbitrator on the procedure laid down in Section 11(6) being followed unless there is an agreement in the contract where the parties specifically debar appointment of any other arbitrator in case the named arbitrator refuses to act.

17. Section 11(6) would not apply only if it is established that parties had intended not to supply the vacancy occurred due to the inability of the arbitrator to resolve the dispute or due to whatever reasons but that intention should be clearly spelt out from the terms of the arbitration clause in the Agreement.

18. The legislative policy embodied in Sections 14 and 15 of the Act is to facilitate the parties to resolve the dispute by way of arbitration. The arbitration clause if clearly spells out any prohibition or debarment, the court has to keep its hands off and there is no question of persuading or pressurising the parties to resolve the dispute by a substitute arbitrator. Generally, this stands out as an exception and that should be discernible from the language of the arbitration clause and the intention of the parties. In the absence of such debarment or prohibition of appointment of a substitute arbitrator, the court's duty is to give effect to the policy of law that is to promote efficacy of arbitration.

21. We have carefully gone through the arbitration clause in the Agreement dated 16.12.1989 and, in our view, the words "at any time" which appear in Clause 21, is of considerable importance. "At any time" expresses a time when an event takes place expressing a particular state or condition that is when the dispute or difference arises. The arbitration Clause 21 has no nexus with the life time of the named arbitrator. The expression "at any time" used in the arbitration clause has nexus only to the time frame within which the question or dispute or difference arises between the parties be resolved. Those disputes and differences could be resolved during the life time of the named arbitrators or beyond their life time. The incident of the death of the named arbitrators has no nexus or linkage with the expression "at any time" used in Clause 21 of the Agreement. The time factor mentioned therein is the time within which the question or dispute or difference between the parties is resolved as per the Agreement. Arbitration clause would have life so long as any question or dispute or difference between the parties exists unless the language of the clause clearly expresses an intention to the contrary. The question may also arise in a given case that the named arbitrators may refuse to arbitrate disputes, in such a Asmita 23/45 .. 24 .. ARBAP-107-12 @ ARBAP(L)1180/14 situation also, it is possible for the parties to appoint a substitute arbitrator unless the clause provides to the contrary. Objection can be raised by the parties only if there is a clear prohibition or debarment in resolving the question or dispute or difference between the parties in case of death of the named arbitrator or their non-availability, by a substitute arbitrator.

22. We are of the view Clause 21 does not prohibit or debar the parties in appointing a substitute arbitrator in place of the named arbitrators and, in the absence of any prohibition or debarment, parties can persuade the court for appointment of an arbitrator under Clause 21 of the agreement."

24. Mr Tulzapurkar learned senior counsel submits that though the applicants have invoked two separate clauses of the agreement for different causes of action, same arbitrator can be appointed in both the matters. It is submitted that though the applicants have pleaded in the arbitration application that there are two separate agreements i.e. i) agreement to agree jointly develop the properties and ii) the agreement that parties shall constitute themselves into a partnership firm, both these agreements are referred under the agreement dated 25/03/1997. My attention is invited to clause 4.4 and 4.5 of the arbitration application No.107/12.

25. Mr D'vitre learned senior counsel appearing for respondent Nos.1 and 3 in arbitration application No.107/12 submits that arbitration application No.107/12 is not maintainable on the ground that the application has been filed on the premise that there are two separate and independent agreements, one pertaining to an agreement to agree to jointly develop the suit property and the other pertaining to constitution of the partnership. It is submitted that admittedly in arbitration application No.107/12 the applicants seek appointment of arbitrator for adjudication of the dispute i.e. a declaration that the agreement to agree to jointly develop the suit properties Asmita 24/45 .. 25 .. ARBAP-107-12 @ ARBAP(L)1180/14 contemplated under the said agreement stood duly and validly determined and terminated by the letter dated 29/04/2011 and that applicant No.1 has become sole and absolute owner of PCM property and applicant No.2 has become sole and absolute owner of BBD property. Learned senior counsel submits that since there is no separate agreement to agree to jointly develop the suit properties as alleged by the applicants, there does not exist any arbitration agreement under any such alleged agreement. Arbitration application thus

invoking alleged arbitration agreement in a non-existent document , is not maintainable.

26. Mr D'vitre learned senior counsel invited my attention to the averments made in paragraphs 4.4, 4.5, 4.13, 4.16, 4.17, 5.1, 6.3 of the arbitration application (107/12) in support of his submission that arbitration agreement does not exist since there is no agreement is entered into between the parties to agree to jointly develop the suit properties as pleaded by the applicants.

27. Mr D'vitre learned senior counsel invited my attention to the letter dated 29/04/2011 issued by the applicants which refers to an agreement dated 25/03/1997 and not any partnership deed. Learned senior counsel invited my attention to notice invoking alleged arbitration agreement issued on 30/09/2011 and submits that even in the said notice the applicants have alleged two independent contracts which contracts do not exist.

28. Mr D'vitre learned senior counsel placed reliance on judgment of Supreme Court in case of The Union of India Vs. Kishorilal Gupta And Asmita 25/45 .. 26 .. ARBAP-107-12 @ ARBAP(L)1180/14 Brothers; AIR 1959 Supreme Court 1362 and would submit that since the original alleged agreement does not exist, arbitration agreement also does not exist. Paragraph 10 of the said judgment of the Supreme Court reads thus :

> " 10. The following principles relevant to the present case emerge from the aforesaid discussion : (1) An arbitration clause is a collateral term of a contract as distinguished from its substantive terms; but none the less it is an integral part of it; (2) however comprehensive the terms of an arbitration clause may be, the existence of the contract is a necessary condition for its operation; it perishes with the contract; (3) the contract may be non est in the sense that it never came legally into existence or it was void ab initio; (4) though the contract was validly executed, the parties may put an end to it as if it had never existed and substitute a new contract for it solely governing their rights and liabilities thereunder; (5) in the former case, if the original contract has no legal existence, the arbitration clause also cannot operate, for along with the original contract, it is also void; in the latter case, as the original contract is extinguished by the substituted one, the arbitration clause of the original contract perishes with it; and (6) between the two falls many categories of disputes in connection with a contract, such as the question of repudiation, frustration, breach etc. In those cases it is the performance of the contract that has come to an end, but the contract is still in existence for certain purposes in respect of disputes arising under it or in connection with it. As the contract subsists for certain purposes, the arbitration clause operates in respect of these purposes."

29. Mr D'vitre, learned senior counsel placed reliance on the Judgment in case of Young Achievers Vs. IMS Learning Resources Pvt. Ltd. 2013(12) SCC 535 and in particular paragraph 2, 5 and 7 and submits that since the alleged agreement does not exist, arbitration agreement alleged to be forming part of such non existent agreement also does not exist.

Paragraphs 2, 5 and 7of the Judgment of the SC in case of read thus .

2. Mr. Manu T. Ramachandran, Learned Counsel appearing for the Appellant raised the following question of law:

> a) Whether an arbitration clause is a collateral term in the contract, which relates to resolution of disputes, and not performance and even if the performance of the contract comes to an end on account of repudiation, Asmita 26/45 .. 27 .. ARBAP-107-12 @ ARBAP(L)1180/14 frustration of breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract?
>
> b) Whether the impugned judgment is contrary to the law settled by this Hon'ble Court in Branch Manager, Magma Leasing and Finance Limited and Anr. v. Potluri Madhavilata and Anr. MANU/SC/1672/2009 :
>
> (2009) 10 SCC 103 and National Agricultural Cooperative Marketing Federation India Ltd. v. Gains Trading Ltd. MANU/SC/2675/2007 : (2007) 5 SCC 692?
>
> c) Whether the Hon'ble High Court is correct in holding that the law settled by this Hon'ble Court in The Branch Manager, Magma Leasing and Finance Limited and Anr. v. Potluri Madhavilata and Anr. MANU/SC/1672/2009 : (2009) 10 SCC 103 and National Agricultural Cooperative Marketing Federation India Ltd. v. Gains Trading Ltd. MANU/SC/2675/2007 : (2007) 5 SCC 692 is applicable in case of unilateral termination of agreement by one of the parties and not in mutual termination for accord and satisfaction of the earlier contract?

5.We are of the view that survival of the arbitration clause, as sought by the Appellant in the agreements dated 01.04.2007 and 01.04.2010 has to be seen in the light of the terms and conditions of the new agreement dated 01.02.2011. An arbitration clause in an agreement cannot survive if the agreement containing arbitration clause has been superseded/novated by a later agreement. The agreement dated 01.04.2010 contained the following arbitration clause:

> 20. Arbitration All disputes and questions whatsoever which may arise, either during the substance of this agreement or afterwards, between the parties shall be referred to the arbitration of the managing director of IMS Learning Resources Pvt. Ltd. Or his nominee and such arbitration shall be in the English language at Mumbai. The arbitration shall be governed by the provisions of the Arbitration and Conciliation Act, 1996 or any other statutory modification or re-enactment thereof for the time being in force and award or awards of such arbitrator shall be binding on all the parties to the said dispute.

7. The exit paper would clearly indicate that it is a mutually agreed document containing comprehensive terms and conditions which -admittedly does not contain an arbitration clause. We are of the view that the High Court is right in taking the view that in the case on hand, is not a case involving assertion by the Respondent of accord a satisfaction in respect of the earlier contracts

dated 01.04.2007 and 01.04.2010. If that be so, it could have referred to arbitrator in terms of those two Asmita 27/45 .. 28 .. ARBAP-107-12 @ ARBAP(L)1180/14 agreements going by the dictum in Union of India v. Kishorilal Gupta and Bros. MANU/SC/0180/1959: AIR 1959 SC 1362. This Court in Kishorilal Gupta's case (supra) examined the question whether an arbitration clause can be invoked in the case of a dispute under a superseded contract. The principle laid down is that if the contract is superseded by another, the arbitration clause, being a component part of the earlier contract, falls with it. But where the dispute is whether such contract is void ab intio, the arbitration clause cannot operate on those disputes, for its operative force depends upon the existence of the contract and its validity. The various other observations were made by this Court in the above-mentioned judgment in respect of "settlement of disputes arising under the original contract, including the dispute as to the breach of the contract and its consequences". Principle laid down by the House of Lords in Heyman v. Darwins Limited was also relied on by this Court for its conclusion. The Collective bargaining principle laid down by the US Supreme Court in Nolde Bros. case (supra) would not apply to the facts of the present case..

30. Without prejudice to the submission on maintainability of arbitration application, learned senior counsel submits that even otherwise the reliefs claimed by the applicants which the applicants seek to claim in arbitration proceedings are ex-facie barred by limitation. Learned senior counsel submits that since the suit properties are already transferred in favour of the partnership firm long back i.e much prior to three years of the applicants invoking alleged arbitration agreement, the claims proposed to made in the arbitration proceedings are dead claims and the learned designate of the Hon'ble Chief Justice shall accordingly refuse to appoint an arbitrator to adjudicate upon such dead claims.

31. On the issue of limitation, the learned senior counsel submits that Art. 58 of Schedule-I of the Limitation Act 1963 is attracted in case of a relief for declaration which provides for three years period to the claims of the applicants. The applicants not having invoked alleged arbitration agreement within three years from accrual of cause of action, the claim is ex-facie barred Asmita 28/45 .. 29 .. ARBAP-107-12 @ ARBAP(L)1180/14 by law of limitation.

32. Mr D'vitre learned senior counsel submits that since the applicant seeks to claim right, title and interest in the immovable property in the arbitration proceedings, declaration on title made if any by the learned arbitrator would affect rest of the world and thus such declaration would be in rem. It is submitted that thus the dispute in respect of title in immovable property cannot be referred to arbitration. Issue of arbitrability can be considered in this application even at this stage. Learned senior counsel placed reliance on the judgment of the Supreme Court in case of Booz Allen and Hamilton Inc. vs. SBI Home Finance Limited and others (2011) 5 SCC 532 and in particular paragraphs 32 to 38, 44 and 46, 49 to 51 and 53 which reads thus :-

> 32. The nature and scope of issues arising for consideration in an application under Section 11 of the Act for appointment of arbitrators, are far narrower than those arising in an application under Section 8 of the Act, seeking reference of the parties to a suit to arbitration. While considering an application under Section 11 of the Act, the Chief Justice or his designate would not embark upon an examination of the issue

of 'arbitrability' or appropriateness of adjudication by a private forum, once he finds that there was an arbitration agreement between or among the parties, and would leave the issue of arbitrability for the decision of the arbitral Tribunal. If the arbitrator wrongly holds that the dispute is arbitrable, the aggrieved party will have to challenge the award by filing an application under Section 34 of the Act, relying upon Sub-Section 2(b)(i) of that section.

33. But where the issue of 'arbitrability' arises in the context of an application under Section 8 of the Act in a pending suit, all aspects of arbitrability have to be decided by the court seized of the suit, and cannot be left to the decision of the Arbitrator. Even if there is an arbitration agreement between the parties, and even if the dispute is covered by the arbitration agreement, the court where the civil suit is pending, will refuse an application under Section 8 of the Act, to refer the parties to arbitration, if the subject matter of the suit is capable of adjudication only by a public forum or the relief claimed can only be granted by a special court or Tribunal.

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34. The term 'arbitrability' has different meanings in different contexts. The three facets of arbitrability, relating to the jurisdiction of the arbitral tribunal, are as under:

(i) whether the disputes are capable of adjudication and settlement by arbitration? That is, whether the disputes, having regard to their nature, could be resolved by a private forum chosen by the parties (the arbitral tribunal) or whether they would exclusively fall within the domain of public fora (courts).

(ii) Whether the disputes are covered by the arbitration agreement? That is, whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the 'excepted matters' excluded from the purview of the arbitration agreement.

(iii) Whether the parties have referred the disputes to arbitration? That is, whether the disputes fall under the scope of the submission to the arbitral tribunal, or whether they do not arise out of the statement of claim and the counter claim filed before the

arbitral tribunal. A dispute, even if it is capable of being decided by arbitration and falling within the scope of arbitration agreement, will not be 'arbitrable' if it is not enumerated in the joint list of disputes referred to arbitration, or in the absence of such joint list of disputes, does not form part of the disputes raised in the pleadings before the arbitral tribunal.

35. The Arbitral tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of arbitral tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the Legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by a public fora (courts and Tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes.

36. The well-recognized examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences;

(ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

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37. It may be noticed that the cases referred to above relate to actions in rem. A right

in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals.

Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself. (Vide: Black's Law Dictionary).

38. Generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to sub-ordinate rights in personam arising from rights in rem have always been considered to be arbitrable.

44. Approving the decision of the Calcutta High Court in Keventer Agro Ltd. v. Seegram Company Ltd. Apo 498 of 1997 etc. dated 27.1.1998), this Court held that disputes relating to specific performance of a contract can be referred to arbitration and Section 34(2)(b)(i) will not be attracted. This Court held:

"36. Further, as pointed in the Calcutta case, merely because there is need for exercise of discretion in case of specific performance, it cannot be said that only the civil court can exercise such a discretion. In the above case, Ms. Ruma Pal, J. observed:

' ...merely because the sections of the Specific Relief Act confer discretion on courts to grant specific performance of a contract does not means that parties cannot agree that the discretion will be exercised by a forum of their choice. If the converse were true, then whenever a relief is dependent upon the exercise of discretion of a court by statute e.g. the grant of interest or costs, parties should be precluded from referring the dispute to arbitration."

This Court further clarified that while matters like criminal offences and matrimonial disputes may not be subject matter of resolution by arbitration, matters incidental thereto may be referred to arbitration:

" 35. ..... Reference is made there to certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, which cannot be referred to arbitration. It has, however, Asmita 31/45 .. 32 .. ARBAP-107-12 @

ARBAP(L)1180/14 been held that if in respect of facts relating to a criminal matter, (say) physical injury, if there is a right to damages for personal injury, then such a dispute can be referred to arbitration (Keir v. Leeman) . Similarly, it has been held that a husband and wife may, refer to arbitration the terms on which they shall separate, because they can make a valid agreement between themselves on that matter ...."

46. An agreement to sell or an agreement to mortgage does not involve any transfer of right in rem but create only a personal obligation. Therefore if specific performance is sought either in regard to an agreement to sell or an agreement to mortgage, the claim for specific performance will be arbitrable. On the other hand, a mortgage is a transfer of a right in rem. A mortgage suit for sale of the mortgaged property is an action in rem, for enforcement of a right in rem. A suit on mortgage is not a mere suit for money. A suit for enforcement of a mortgage being the enforcement of a right in rem, will have to be decided by courts of law and not by arbitral tribunals.

*** The scheme relating to adjudication of mortgage suits contained in Order 34 of the Code of Civil Procedure, replaces some of the repealed provisions of Transfer of Property Act, 1882 relating to suits on mortgages (Section 85 to 90, 97 and 99) and also provides for implementation of some of the other provisions of that Act (Section 92 to 94 and 96). Order 34 of the Code does not relate to execution of decrees, but provides for preliminary and final decrees to satisfy the substantive rights of mortgagees with reference to their mortgage security.

49. A decree for sale of a mortgaged property as in the case of a decree for order of winding up, requires the court to protect the interests of persons other than the parties to the suit/petition and empowers the court to entertain and adjudicate upon rights and liabilities of third parties (other than those who are parties to the arbitration agreement). Therefore, a suit for sale, foreclosure or redemption of a mortgaged property, should only be tried by a public forum, and not by an arbitral tribunal. Consequently, it follows that the court where the mortgage suit is pending, should not refer the parties to arbitration.

50. The Appellant contended that the suit ultimately raises the following core issues, which can be decided by a private forum: (i) Whether there is a valid mortgage or charge in favor of SBI? (ii) What is the amount due to SBI? and (iii) Whether SBI could seek eviction of Appellant from the flat, even if it is entitled to enforce the mortgage/charge? It was submitted that merely because mortgage suits involve passing of preliminary decrees and final decrees, they do not get excluded from arbitrable disputes. It is pointed out that the arbitral tribunals can also make interim awards deciding certain aspects of the disputes finally which can be equated to preliminary decrees granted by courts, and the final award made by the arbitrator, after detailed accounting etc. could be compared to the final decree by courts. It is therefore contended that there is no impediment for the parties to mortgage suits being referred to arbitration under Section 8 of the Act.

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51. If the three issues referred by the Appellant are the only disputes, it may be possible to refer them to arbitration. But a mortgage suit is not only about determination of the existence of the mortgage or determination of the amount due. It is about enforcement of the mortgage with reference to an immovable property and adjudicating upon the rights and obligations of several classes of persons (referred to in para 27 (ii) above), who have the right to participate in the proceedings relating to the enforcement of the mortgage, vis-à-vis the mortgagor and mortgagee. Even if some of the issues or questions in a mortgage suit (as pointed out by the Appellant) are arbitrable or could be decided by a private forum, the issues in a mortgage suit cannot be divided. Conclusion

53. Having regard to our finding on question (iv) it has to be held that the suit being one for enforcement of a mortgage by sale, it should be tried by the court and not by an arbitral tribunal. Therefore we uphold the dismissal of the application under Section 8 of the Act, though for different reasons.

33. Relying upon the judgment of Supreme Court in Booz Allen and Hamilton Inc.(supra) case it is submitted that lack of inherent incapability of the arbitral tribunal to decide a particular dispute which is in rem has to be considered by the Chief Justice or his Designate under section 11 while considering the application for appointment of an arbitrator.

34. Learned senior counsel then submits that since the parties had confidence in Mr M. L. Bhakta advocate who was the named arbitrator under clause 31 of the Partnership Deed and since he has recused himself to act as an arbitrator, no arbitration agreement exist.

35. The next submission of Mr D'vitre learned senior counsel that since the applicants have issued subsequent notice invoking clause 31 of the partnership deed for appointment of arbitrator and has filed arbitration application bearing (L) No.1180 of 2014, the applicants have deemed to have waived their right to seek appointment of arbitrator under Clause 34 of the Asmita 33/45 .. 34 .. ARBAP-107-12 @ ARBAP(L)1180/14 alleged agreement.

36. Mr Madon, learned senior counsel appearing for respondent no.2 submits that the notice issued by the applicants in Arbitration Application No. 107 of 2012 invoking clause 34 of the partnership deed itself is wrong. The applicant at the most could have invoked clause 31 of the said partnership deed. It is submitted that the partnership firm stood dissolved prior to the date of filing of arbitration application no.107 of 2012. It is submitted that in the notice dated 30th September, 2011 the applicants have indirectly sought dissolution of the firm and thus only clause 31 could be invoked by the applicants and not clause 34 in Arbitration Application No.107 of 2012.

37. In so far as Arbitration Application (L) No. 1180 of 2014 is concerned, it is submitted by the learned senior counsel that the arbitration application itself is barred by law of limitation. It is submitted that since the claims proposed to be made as are apparent from the notice and from the averments made in the arbitration application are ex-facie time barred, no arbitrator can be appointed in the said application. It is submitted that after dissolution of the firm, matter can be decided by the civil court only and not by arbitration as per clause 31 of the partnership deed.

38. Mr Sakhardande, learned counsel appearing for the petitioner with Mr Tulzapurkar, learned senior counsel in rejoinder submits that whether the agreement in question is a concluded agreement or is an agreement to enter into a development agreement, this issue can be always be referred to the arbitration. The Hon'ble Chief Justice or his designate, in Asmita 34/45 .. 35 .. ARBAP-107-12 @ ARBAP(L)1180/14 this proceedings, has to consider the existence of the arbitration agreement. Reliance is placed on the judgment of the Supreme Court in case of Enercon (India) Limited and others vs. Enercon GMBH and another. (supra) in particular paragraphs 83 in support of this submission that even if a contract is unconcluded, dispute can still be referred to arbitration.

39. In so far as judgment of Supreme Court in case of in case of Kishorilal Gupta (supra) relied upon by Mr D'vitre learned senior counsel is concerned, Mr Sakhardande, distinguished the said judgment on the ground that the said judgment was under the provisions of the Indian Arbitration act 1940 and not under 1996 Act. It is submitted that the issue as to whether contract was concluded or not can be raised by the respondents if they so desire under section 16 of the Arbitration and Conciliation Act before the arbtiral tribunal.

40. Mr Sakhardande also distinguished the judgment of the Supreme Court in case of Young Achievers (supra) on the ground that the contract in their case was superceded or novated which is not the case in this matter. In so far as issue of limitation raised by the respondents is concerned, the learned counsel led emphasis on the judgment of Supreme Court in case of State of Goa vs. Praveen Enterprises (supra) and submits that there are disputed question on facts and the issue of limitation being mixed question of facts and law has to be decided by the arbitral tribunal and not by Chief Justice of His Designate in this proceedings.

41. Mr Sakhardande, learned counsel for the applicants submits that Asmita 35/45 .. 36 .. ARBAP-107-12 @ ARBAP(L)1180/14 the relief which the applicant may claim in the arbitration proceedings about declaration of title in respect of the immovable property cannot be construed as relief in rem but it would be by and between the parties to the agreement and would be a private dispute between the parties. The applicants would not seek any declaration in rem. Learned counsel distinguished the judgment of the Supreme Court in case of Booz Allen (supra) on this ground.

42. Learned counsel then submits that clause 34 of the agreement is very wide and can be invoked during the continuation of partnership. In so far as clause 35 is concerned, the same is without prejudice to clause 34 of the agreement. It submitted that whether development had commenced or not for the purpose of invocation of clause 31 of the contract is concerned, the said issue can be decided by the arbitral tribunal.

43. Learned counsel placed reliance on the judgment of the Supreme Court in case of Olympus Superstructures Pvt. Ltd. vs. Meena Vijay Khetan and others AIR 1999 SC 2102 in support of the submission that the court has to see the intention of the parties before referring the dispute to the arbitration which intention is clear under clauses 31 as well as 34 of the contract. Learned counsel distinguished the judgment of the Supreme Court in case of State of Goa vs. Praveen Enterprises and relied upon paragraph 33 in support of the submission that it is not necessary to refer claims in the notice.

44. I shall first decide whether arbitration agreement exists which is invoked by the applicants in both the above arbitration application filed Asmita 36/45 .. 37 .. ARBAP-107-12 @ ARBAP(L)1180/14 under Section 11(6) of the Arbitration and Conciliation Act 1996. The principal contention raised by the respondents in arbitration application No.107 of 2012 is that the applicants have invoked alleged arbitration in an agreement to agree to jointly develop the suit properties which agreement itself does not exist and thus arbitration agreement also does not exist.

45. In para 1.1 of the arbitration application the applicants have referred to arbitration clause i.e. clause 34 contained in agreement dated 25/03/1997. In the said paragraph the agreement dated 25/03/1997 is described as " the said agreement". The said arbitration clause as well as the said agreement dated 25/03/1997 has been subsequently referred in various subsequent paragraphs of the arbitration application. It is stated that the applicants invoked arbitration in terms of clause 34 of the said agreement. In paragraph 4.4 of the application, it is stated that it was agreed to agree to jointly develop the suit property upon the fulfillment and performance of the terms and conditions by respondent Nos.1 and 2. To effectuate the said understanding, it was further agreed that applicants and respondent Nos.1 and 2 shall constitute themselves into a partnership firm which would be the special purpose vehicle to jointly develop the suit property. In paragraph 4.5, it is stated that the said agreement recorded two separate independent contracts i.e. one pertaining to an agreement to jointly develop the suit property and the other pertaining to constitution of a partnership firm being respondent No.3. In paragraph 5.1 it is alleged by the applicants that respondent Nos.1 and 2 committed gross breaches of the said agreement.

46. In paragraph 6.3, the applicants have referred to the cert

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copy of the agreement dated 25/03/1997 containing the arbitration clause i.e. clause 34 therein under the Rule 21(a). In paragraph 6.3, the applicants have set out the reliefs which the applicants seek to claim in arbitration i.e. a declaration that the agreement to agree to jointly develop the suit property stood duly and validly determined and terminated by letter dated 29/04/2011 and various other reliefs mentioned therein.

47. A perusal of the notice invoking arbitration agreement and also the averments in the arbitration application, makes it clear that applicants have referred to clause 34 which is an arbitration agreement recorded in the agreement dated 25/03/1997. It is the case of the applicants that the said agreement dated 25/03/1997 comprised of two separate and independent agreements. It is not the case of the respondents that there was any other agreement other than the agreement dated 25/03/1997. In my view, there is thus no substance in the submission of the learned senior counsel appearing for the respondents that the agreement referred by the applicants in the notice invoking arbitration agreement and in the arbitration application, does not exist or that the arbitration agreement does not exist or that the arbitration application No.107 of 2012 is not maintainable. In my view, clause 34 which records an arbitration agreement is part of the agreement dated 25/03/1997, which agreement admittedly is not in dispute.

48. Supreme Court in case of Enercon (India) Ltd. (supra) has held that parties cannot be permitted to avoid arbitration without satisfying the Court that it would be just and in the interest of all the parties not to proceed with arbitration. The Courts are required to aid and support the arbitral Asmita 38/45 .. 39 .. ARBAP-107-12 @ ARBAP(L)1180/14 process and not to bring it to a grinding halt. Court has to adopt a pragmatic approach and not a pedantic or technical approach while interpreting and construing an arbitration agreement or arbitration clause. It would be the duty of the Court to make the same workable within the permissible limits of the law without stretching it beyond the boundaries of recognition.

49. It is not in dispute that this Court has already considered interim measures in the arbitration petition filed by the applicants under Section 9 of the Arbitration and Conciliation Act and has granted ad interim reliefs. In so far as Judgment of Supreme Court in case of Young Achievers (supra) relied upon by Mr D'vitre learned senior counsel is concerned, the Supreme Court has considered a situation where the existing agreement between the parties containing arbitration clause was superceded/novated by a later agreement which did not contain an arbitration agreement. However, in this case, the applicants are placing reliance on the arbitration agreement recorded in clause 34 of the agreement dated 25/03/1997 which was in force on the date of invocation of arbitration agreement by the applicants. The Judgment of Supreme Court in case Young Achievers (supra) in my view would not assist the respondents and is clearly distinguishable with the facts of this case.

50. In so far as Judgment of Supreme Court in case of Union of India Vs. Kishorilal Gupta (supra) relied upon by Mr D'vitre learned senior counsel is concerned, it is held by Supreme Court that if the original contract has no legal existence, the arbitration clause also cannot operate.

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In my view, this judgment will not apply to the facts of this cas

applicants have invoked clause 34 which records an arbitration agreement which forms part of agreement dated 25/03/1997 which agreement existed when the notice dated 30/09/2011 was issued by the applicants.

51. In so far as submission of Mr D'vitre and Mr Madon learned senior counsel appearing for respondents that the claim proposed to be made by the applicants in arbitration is ex facie barred by law of limitation and thus no arbitrator shall be appointed in these two applications is concerned, in my view plea of limitation is a mixed question of fact and law. Supreme Court in case of National Insurance Co. (supra) has held that whether the claim is a dead/long barred claim or a live claim, such issue may be decided by the Chief Justice or his designate or he can leave such issue to the decision of the arbitral tribunal. In case of State of Goa (supra) the Supreme Court has held that if the distinction between apparent and obvious dead claims and claims involving disputed issue of limitation is not kept in view, the Chief Justice or his designate will end up deciding the question of limitation in all applications under Section 11 of the Act. It is held that the issue of limitation is not an issue that has to be decided in an application under Section 11 of the Act. I am respectfully bound by the Judgments of Supreme Court in case of National Insurance Co. and State of Goa (supra). In my view the issue of limitation can be decided by the arbitral tribunal. It is made clear that no views are expressed as to whether claims that would be made before the arbitral tribunal by the applicants are live claims or are barred by law of limitation.

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52. Next submission of Mr D'vitre learned senior counsel is that the claim in respect of title in the

immovable property cannot be referred to arbitration as the decision thereon would be decision in rem is concerned, in my view, a perusal of the notice invoking arbitration agreement and the averments made in the arbitration application No.107/12 makes it clear that the applicants seek to claim a declaration that the applicant No.1 and applicant No.2 are sole and absolute owners of and in exclusive physical possession of the PCM and BBD property respectively. Such reliefs are sought to be claimed against the respondent Nos.1 and 2. In my view such reliefs cannot be considered as relief in rem. If any declaration about title in respect of the immovable property sought against respondent Nos.1 and 2 individually cannot be considered as a proceeding in rem.

53. In so far as judgment of Supreme Court in case of Booz Allen and Hamilton Inc. (supra) relied upon by Mr D'vitre learned senior counsel is concerned, it is held by the Supreme Court that actions in personem referred to actions determining the rights and interest of the parties themselves in the subject matter of the case, whereas actions in rem referred to actions determining the title to property and the rights of the parties not merely amongst themselves but also against all persons at any time claiming an interest in that property. From the averments made in paragraphs 6.3 of the arbitration application it appears that the applicants seek to make various other claims also In my view, the claims proposed to be made as indicated in the arbitration application are in personam and not in rem.

54. In my view, under Section 11 of the Act, the Chief Justice or his Asmita 41/45 .. 42 .. ARBAP-107-12 @ ARBAP(L)1180/14 designate can appoint an arbitrator and cannot decide the scope of reference of dispute before the arbitral tribunal. Be that as it may, the issue of arbitrability sought to be raised by learned senior counsel cannot be allowed to be raised at this stage in this application under Section 11 of the Arbitration and Conciliation Act. At this stage, the Chief Justice or his designate has to examine whether an arbitration agreement exists or not. If the applicants make any claim before the arbitral tribunal and if the respondents seek to oppose such claims on the ground that the claims being not arbitrable, such issue can always be raised under Section 16 of the Arbitration and Conciliation Act 1996. In my view there is thus no substance in the submission of Mr D'vitre and Mr Madon learned senior counsel for the respondents that arbitrator cannot be appointed in view of the claim proposed to be made by the applicant which would be in the nature of an action in rem.

55. In so far as arbitration application No.107/12 is concerned, it is submitted by Mr Madon learned senior counsel that notice invoking alleged arbitration agreement under clause 34 of the agreement dated 25/03/1997 itself was wrong and the applicant at the most could have invoked clause 31 of the partnership deed since the partnership firm had been already dissolved prior to date of filing arbitration application No.107/12. It is not in dispute that when the notice dated 30/09/2011 was issued by the applicants, the partnership firm was not dissolved. The firm was dissolved by notice issued on 05/10/2011. In my view thus there is no substance in this submission of the learned senior counsel for the respondents. In my view the applicants have invoked clause 34 prior to the dissolution of the firm and has invoked Asmita 42/45 .. 43 .. ARBAP-107-12 @ ARBAP(L)1180/14 clause 31 after dissolution of the firm. Both these clause record arbitration agreement and have been rightly invoked by the applicants.

56. The next submission of Mr D'vitre and Mr Madon learned senior counsel is that the parties had confidence in Mr M. L. Bhakta advocate and solicitor who was a named arbitrator in clause 31 of the agreement dated 25/03/1997 and in view of his refusal to act as arbitrator, the arbitration agreement is exhausted and thus no arbitrator can be appointed is concerned, a perusal of clause 31 of the agreement dated 25/03/1997 makes it clear that no qualification of the person who is named as arbitrator is provided in the said clause. The said clause also does not create any bar from supplying vacancy in the event of the named arbitrator refusing to act as an arbitrator.

57. Supreme Court in case of SAN-A Trading Co. Ltd. (supra) has held that under Section 15(1)(a) of the Arbitration and Conciliation Act when the arbitrator withdraws from office for any reason, a substitute arbitrator can be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced. The procedure for filling the vacancy arising out of the aribtrator's withdrawal from office is provided under Section 15. It is held that in the absence of any agreed procedure for appointment of the arbitrator or arbitrators under Section 11(2), sub section 6 of Section 11 would apply where under a party may request the Chief Justice or any person or institution designated by him to take necessary measures unless the agreement on the appointment procedure provides other means for securing the appointment. Supreme Court has held that in such a situation, the Chief Justice or his designate can appoint an arbitrator on the Asmita 43/45 .. 44 .. ARBAP-107-12 @ ARBAP(L)1180/14 procedure laid down in Section 11(6) being followed unless there is an agreement in contract where the parties specifically debar appointment of any other arbitrator in case the named arbitrator refuses to act.

58. In case of ACC Ltd. (supra) Supreme Court has taken the similar view after adverting to its earlier judgment in case of SAN-A Trading (supra). A perusal of clause 31 in my view does not prohibit or debar the parties in appointing a substitute arbitrator in place of named arbitrator on his refusal to act as arbitrator and in the absence of any prohibition or debarment, this application filed by the applicant under Section 11(5) for appointment of substitute arbitrator is maintainable.

59. The last submission of the learned senior counsel appearing for respondents is that in view of the applicant issuing second notice for appointment of arbitrator and having filed arbitration application (l) No.1180/14, the applicants have deemed to have waived their right to pursue notice invoking clause 34 and filing of application No.107/12, a notice as well as arbitration application are not maintainable and the rights of the applicant if any under the same notice as well as arbitration application are waived. A perusal of clause 34 and clause 31 of the agreement dated 25/03/1997 clearly envisages that both the clauses operate at different stages and can be invoked by the parties according to the exigencies provided under both the said clauses occur. In my view there is thus no substance in this submission of the learned senior counsel for the respondents.

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60. Be that as it may, since both the applications were heard together and are being disposed of by this common order, I have proposed to appoint the same arbitrator for the purpose of deciding the disputes that would be raised by the applicants by invoking clause 34 and clause 31. I therefore pass the following order.

61. Shri Justice H.L. Gokhale, former Judge of the Supreme Court is appointed as sole arbitrator in both the arbitration applications. Arbitration applications are disposed of in aforesaid terms. There shall be no order as to costs.

(R.D.Dhanuka, J.) On oral application of Mr.Madon, learned senior counsel for the respondents, operation of this order is stayed for a period of eight weeks from today.

(R.D.Dhanuka, J.)

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