Andhra High Court
Thota Gurunath Reddy, S/O T. ... vs #Continental Hospitals Private ... on 22 December, 2017

THE HONBLE SRI JUSTICE V.RAMASUBRAMANIAN

Civil Revision Petition No.6610 of 2017

22-12-2017

Thota Gurunath Reddy, S/o T. Gurudatta Reddy, Hyderabad. Petitioner

#Continental Hospitals Private Limited, a company Having its registered office at Plot No.3, Ro

!Counsel for the Petitioner: Mr. S. Ravi, senior counsel
appearing on behalf of
Smt. K. Mamatha

^Counsel for Respondents: 1) Mr. K. Vivek Reddy, R-1
2) Mr. V.P. Singh for R-2
3) Mr. L. Preetham Reddy, R-8
4) Mr. Challa Gunaranjan, R-9

<GIST:

>HEAD NOTE:

? Cases referred
1. 2012 (128) DRJ 478
2. 2009 (113) DRJ 504
3. (1999) 5 SCC 651
4. 2017 (5) ALD 289
5. (2010) 15 SCC 733
6. (2016) 10 SCC 813
7. 2017 (7) SCC 678
8. 2014 (5) SCC 1
9. 2016 (10) SCC 386
10. 2015 SCC Online Calcutta 6583
11. 1986 (1) SCC 264
12. 1981 (3) SCC 333
13. 1994 (4) SCC 225
14. 2008 (3) SCC 363
15. (1997) 88 Comp Cas 759
16. (1998) 91 Comp Case 105
17. 2009 SCC Online Cal 90

HONBLE SRI JUSTICE V. RAMASUBRAMANIAN
Civil Revision Petition No.6610 of 2017
ORDER:

This Civil Revision Petition filed under Article 227 of the Constitution of India arises out of an order passed by the IV Additional District Judge, Ranga Reddy, not granting an interim order of

protection with respect to a Rights Issue, but adjourning the matter to a future date.

2. Heard Mr. S. Ravi, learned senior counsel appearing for the petitioner, Mr. K. Vivek Reddy, learned counsel appearing for the 1st respondent, Mr. V.P. Singh, learned counsel appearing for the 2nd respondent, Mr. L. Preetham Reddy, learned counsel appearing for the 8th respondent and Mr. Challa Gunaranjan, learned counsel appearing for the 9th respondent. Respondents 3 to 7 were served with notices in the suit as well as in the revision and they have not chosen to enter appearance.

3. The brief facts leading to filing of the above revision are as follows:

a) The petitioner herein is a Gastroenterologist and a Liver Specialist. He established the 1st respondent company and put up under the aegis of the 1st respondent company, a Multi- Specialty Tertiary Care Hospital that commenced its operations in the year 2013.

b) On 18-02-2015, three different agreements, styled as Share Purchase Agreement, Share Subscription Agreement and Share Holders Agreement were entered into by and between the 1st respondent herein and its promoters including the petitioner herein on the one hand and the 2nd respondent herein on the other hand.

c) Under these agreements, 51% of the paid up share capital of the 1st respondent company was acquired by the 2nd respondent and the Board of Directors of the 1st respondent got reconstituted.

d) Pursuant to the three agreements entered into between the parties on 18-02-2015, the 2nd respondent infused an amount of Rs.188.00 crores into the 1st respondent company in March, 2015.

e) Out of the said amount, a sum of Rs.80.00 crores was utilized for part payment of the term loan, a sum of Rs.10.00 crores was utilized for part payment of the working capital loan, a sum of Rs.16.60 crores was utilized for payment of interest on the term loan, a sum of Rs.20.20 crores was utilized for payment of other dues such as operational creditors, capex vendors etc., a sum of Rs.20.4 crores was utilized for payment to the petitioner herein, a sum of Rs.12.50 crores was utilized for discharging liabilities to the 9th respondent, from which money had been taken, a sum of Rs.14.20 crores was utilized to pay interest dues to the banks for the period after June, 2015 and a sum of Rs.15.00 crores was utilized towards capital expenditure.

f) It appears that the petitioner and others were also paid a sum of Rs.95.00 crores by the 2nd respondent, for the purchase of equity shares.

g) The authorized share capital of the 1st respondent company originally stood at Rs.181.00 crores divided into 18.10 crores of equity shares of Rs.10/- each. The paid up capital was Rs.139,38,27,920/- divided into 13,93,82,792 equity shares of Rs.10/- each.

h) Originally, the petitioner held 5,63,04,459 equity shares of Rs.10/- each in the 1st respondent company, which accounted for 38.63% of the total paid up capital. The 9th respondent herein,

which is also a company promoted by the petitioner herein, was a shareholder in the 1st respondent company, holding 1,19,93,109 equity shares of Rs.10/- each, amounting to 8.23% of the total paid up capital of the 1st respondent company.

i) After the execution of the agreements and the allotment of shares to the 2nd respondent in the 1st respondent company, the 2nd respondent acquired about 51% of the paid up share capital, thereby becoming a major shareholder.

j) A Rights Issue was made on 25-10-2016 for a sum of Rs.15.00 crores and the same became the subject matter of the proceedings before the National Company Law Tribunal. Before the National Company Law Tribunal, the 2nd respondent filed an application under Section 45 of the Arbitration and Conciliation Act, 1996 and the same was allowed. Therefore, the petitioner and others seem to have gone to the National Company Law Appellate Tribunal. But in the meantime, arbitration has also commenced at Singapore.

k) The Board of Directors went for a second Rights Issue in April, 2017 for a sum of Rs.10.00 crores and the same became the subject matter of the Interlocutory Application filed in the appeal pending before the National Company Law Appellate Tribunal.

l) By an e-mail dated 22-08-2017, a meeting of the Board of Directors of the 1st respondent company was called for to consider various items in the agenda, item-16 of which was in respect of a proposal to issue Capital Call to the shareholders. The meeting was scheduled to be held on 05-09-2017. The total amount for which the Capital Call was proposed to be made was Rs.140 crores.

m) On 11-09-2017, the petitioner, and respondents 8 and 9 herein exercised their right to Veto the proposal, in respect of agenda item 16 relating to the issue of Capital Call. But the company decided to proceed with the Board meeting, which was rescheduled to be held on 20-09-2017.

n) Therefore, the petitioner and respondents 8 and 9 herein filed a Civil Suit in O.S.No.1002 of 2017 praying for (1) a decree of declaration that the attempt of the defendants to dilute the plaintiffs shareholding by way of proposed Capital Call was void ab initio in view of the exercise of the Veto right by the plaintiffs; and (2) for a permanent injunction restraining the defendants from taking further action to infuse capital under the Proposed Capital Call.

o) Along with the plaint, the plaintiff filed an application in I.A.No.987 of 2017 for an interim order of injunction restraining the company from proceeding with agenda item 16 in the meeting of the Board scheduled to be held on 20-09-2017.

p) The Court below granted an interim order of status quo on 19-09-2017 till 06-10-2017. As a consequence, the agenda item 16 relating to the Proposed Capital Call was not taken up in the Board meeting held on 20-09-2017.

q) Subsequently, the petitioner and the other plaintiffs moved an application in I.A.No.1017 of 2017 for the extension of the order of status quo. But by an order dated 06-10-2017, the trial Court dismissed I.A.No.1017 of 2017 on the ground that the status quo order was passed in respect of the Board meeting to be held on 20-09-2017 and that therefore, there was no need to extend the status quo order after the Board meeting was over.

r) Thereafter, a fresh Board meeting was convened on 16-10- 2017 and the notice of the board meeting was issued by the Company Secretary of the 1st respondent by e-mail dated 15-10-2017. Objections were raised to the extremely short duration of the notice and a fresh application for injunction was also moved by the petitioner and other plaintiffs in I.A.No.1050 of 2017. But no orders were passed in the said application.

s) However, the 2nd respondent herein filed an application in I.A.No.1165 of 2017 under Section 45 of the Arbitration and Conciliation Act, 1996, on the ground that there was an arbitration agreement between the parties.

t) In the meantime, the Board of Directors met on 16-10-2017 and passed a resolution to proceed with the Capital Call as originally proposed. It was also resolved that the offer for Rights Issue was to be made for a period of 60 days including a period of 30 days commencing from 23-11-2017 to 22-12- 2017.

u) Pursuant to the said resolution, the 1st respondent company sent notice to the shareholders on 16-10-2017 to provide valuation report. The 2nd respondent alone submitted a valuation report through its consultants.

v) On the basis of the valuation report, a resolution was circulated on 15-11-2017 to the members of the Board of Directors. The resolution proposed to be passed by way of circulation, was to issue a total of 3,50,87,716 equity shares of a face value of Rs.10/- each at a premium of Rs.29.90/- per equity share (i.e. Rs.39.90/- as the Issue Price), to the existing shareholders in proportion to their percentage of shareholding. The period of offer was to be opened from 24-11-2017 to 23- 12-2017.

w) In view of the said turn of events, where a resolution was sought to be passed by circulation, the plaintiffs again moved the trial Court on 21-11-2017 for an order to be passed in their application for interim direction. But, instead of taking up I.A.No.1050 of 2017 filed by the plaintiffs for an injunction, the Presiding Officer of the Court, who was holding in-charge due to the absence of the regular incumbent, took up the application under Section 45 viz., I.A.No.1165 of 2017 and simply adjourned the matter to 12-12-2017.

x) Therefore, challenging the refusal of the Court below to take up their application for injunction and decide it one way or the other on 21-11-2017, the 1st plaintiff in the suit has come up with the above revision.

4. The grievance of the petitioner in brief is that after having granted an interim order of status quo on 19.09.2017 in respect of Agenda Item No.16 of the Board Meeting dated 20.09.2017 up to

06.10.2017, the Court below ought to have either extended the interim order of status quo on 6.10.2017 or granted a fresh interim order of injunction in I.A.No.1050 of 2017 in respect of the subsequent Board Meeting held on 16.10.2017 and the Circular Resolution passed on 15.11.2017, at least till a decision was rendered in the application under Section 45 of the Arbitration and Conciliation Act, 1996. The reliefs sought in the main suit were for a declaration that the attempt made by the defendants to dilute the shareholding of the plaintiffs by proposing a Capital Call was void ab initio, in view of the veto exercised by the plaintiffs and for a consequential decree of permanent injunction restraining the defendants from taking any further action for infusing capital under the proposed Capital Call. Therefore, the contention of the petitioner is that if an injunction is not granted, and the Capital Call goes through, the suit itself will become infructuous and the situation would become irreversible. Therefore, the petitioner has invoked the jurisdiction of this Court under Article 227, so that the subject matter of the dispute is kept alive.

5. The 1st respondent has filed a counter affidavit raising certain preliminary objections to the very maintainability of the revision. Therefore, before we take up for consideration, the contentions raised on merits and in law, we are obliged to deal with those preliminary objections.

Preliminary objections of respondent No.1 to the maintainability:-

6. The maintainability of the above revision is questioned by the 1st respondent on the following grounds. a. That the certified copy of the order of the Court below is not enclosed to the revision;

b. That there is no right of revision under Section 115 of CPC, wherever there is a right of appeal and in such cases, the remedy under Article 227 cannot be availed; c. That under Section 115(1) of CPC, a revision is maintainable only if the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings;

d. That the plaintiffs approached the court with unclean hands, suppressing previous proceedings and hence not entitled to any relief; and e. That even the suit filed by the petitioner was not maintainable in view of the existence of an Arbitration Agreement between the parties.

7. The first preliminary objection is that a certified copy of the impugned order is not enclosed to the main revision. But I do not think that the same could be a ground to throw the revision out. It has been repeatedly held that under Articles 226 and 227, the High Court exercises supervisory jurisdiction both on the administrative side and on the judicial side. The High Court has power to dispense with the production of the certified copies of the fair orders and decretal orders. Rule 41 of The Rules of the High Court of Judicature, A.P., Appellate Side prescribes that every Civil Revision Petition shall be accompanied by a typewritten or printed copy of the decree or order, which it is sought to revise, or typewritten or printed copy of the judgment, if any, on which the decree or order is passed, unless its production is dispensed with by the Court.

8. Therefore, the Appellate Side Rules of the High Court recognize the power of this Court to dispense with the production of the certified copy of the order. Hence, the first preliminary objection is liable to be rejected.

9. The second preliminary objection is that a revision would not lie under Section 115 of CPC, against an order, which is appealable. The contention of the 1st respondent is that the order under revision is appealable under Order XLIII Rule 1(r) of CPC.

10. But the expression Order appearing in Order XLIII Rule 1 should be understood to mean the formal expression of any decision of a Civil Court (which is not a decree), as provided in Section 2(14) CPC. In the case on hand there is no formal expression of any decision. A decision to postpone is not a decision tantamounting to an order. Order XLIII Rule 1 (r) provides for an appeal as against an order under Rules 1, 2, 2A, 4 and Rule 10 of Order XXXIX. The order impugned in this revision is not an order under any of these Rules. An order granting or finally refusing to grant an injunction, may be an order appealable under Order XLIII Rule 1 (r). But an order postponing the hearing, when there is an imminent danger to the subject matter of the suit, is not an appealable order. Therefore, the second preliminary objection is also to be rejected.

11. The third preliminary objection is that a revision would lie under Section 115(1) of CPC only if the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit. It is contended by the 1st respondent that the order under revision is not in the nature of an order indicated in Section 115(1), and hence, the revision was not maintainable.

12. But the above contention is thoroughly misconceived. What is actually relied upon by the 1st respondent is the proviso to subsection (1) of Section 115. Subsection (1) of Section 115 defines the contours of the revisional jurisdiction of the High Court. The proviso therein, carves out an exception. From out of the exceptions carved out in the proviso, one exclusion is made out in the proviso itself. It is this exclusion that talks about the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit.

13. In other words, the question of maintainability of the revision is to be determined only with reference to the substantial part of sub-section (1) of Section 115. While doing so, we must keep the proviso in mind. What is excluded from the proviso, need not be kept in mind, since it is not the case of either the petitioner or the 1st respondent that the case of the petitioner is governed by the proviso. Only if a case is governed by the proviso, the question of examining whether the case on hand is excluded from the proviso would arise. Hence the third preliminary objection is also rejected.

14. The next preliminary objection is based upon the so called suppression of facts. The failure of the plaintiffs to make a mention about the proceedings before NCLT is projected by the respondents 1 and 2 to claim that the plaintiffs did not come to court with cleans. But I do not think that the failure to make a mention about the proceedings before NCLT is vital. The mentioning or non mentioning was not to have a bearing upon the civil suit and hence this objection is also rejected.

Objection on the ground of existence of Arbitration Agreement

15. Another objection to the maintainability of the suit is the existence of an Arbitration Agreement between the parties.

16. There is no dispute on facts that the Shareholders Agreement dated 18.02.2015, contains an article under Article XIX under the heading Dispute Resolution, providing for reference of disputes to arbitration. It is also not disputed that the same is an International Commercial Arbitration. This is why the 2nd respondent has taken out an application in I.A.No.1165 of 2017 in the trial Court, under Section 45 of the Arbitration and Conciliation Act, 1996.

17. Apart from filing an application under Section 45 before the trial Court, the 2nd respondent is also armed with an order passed by the National Company Law Tribunal allowing an application under Section 45, when the first Rights Issue made on 25.10.2016 became the subject matter of proceedings before the National Company Law Tribunal.

18. But the application under Section 45 taken out by the 2nd respondent herein, is resisted by the petitioner and his co-plaintiffs on the ground that the right of the parties to seek certain reliefs before the civil Court is not excluded in the Shareholders Agreement and that on the contrary, there is a specific recognition of such a right under at least two articles of the Shareholders Agreement. In any case it is contended on behalf of the petitioner that the application under Section 45 has not yet been disposed of and that when the petitioner/plaintiff has a valid defense to the application under Section 45, the prayer for interim relief could not have been rejected.

19. But in response to the above submission, it is contended on behalf of respondents 1 and 2 that the relevant clause in the Shareholders Agreement, which enables the parties to seek certain equitable and injunctive reliefs, merely sets the standards to be applied by the Arbitrators while deciding the reliefs and that it does not set the forum before which the reliefs could be sought. Additionally, it is contended on behalf of respondents 1 and 2 that the moment an application under Section 45 is filed, the Court has to decide that application first, since a decision on the said application is virtually a decision on the jurisdiction of the Court. It is also contended that even in cases where the clauses of the Agreement are quite vague, so as to give an impression as though the jurisdiction of the civil Court is not barred, the Courts should err in favour of arbitration, after the adoption of the UNICETRAL Modal Law. It is also contended on behalf of respondents 1 and 2 that when the arbitration clause covers all disputes without exception and uses the phrase dispute shall be referred, there is no scope for providing an escape route.

20. Since the contentions on both sides, revolving around Section 45 of the Arbitration and Conciliation Act, 1996, raise certain finer aspects of the law on the point, it may be necessary to take a look at the relevant clauses in the Shareholders Agreement and the manner in which the Courts have looked at such clauses. Before I do that, I may have to record an interesting aspect in this case. Generally, an application under section 45 will be and can be resisted only the ground that the arbitration agreement is null and void, inoperative or incapable of being performed. But in this case, the application under section 45 is not resisted on these grounds, but on the ground that the parties have reserved a right to seek certain reliefs, before the civil court. Keeping this distinction in mind, let me now look at the clauses.

21. The Shareholders Agreement contains a total of 21 Articles and 9 Schedules. Article XVIII states that the agreement shall be governed by and construed in accordance with the Laws of India.

22. Article XIX contains detailed provisions for dispute resolution. It reads as follows:

Article XIX - Dispute Resolution:-

19.1 Notice In the event any Party is in breach of any of the terms of this Agreement, the other Party(ies) may serve written notice to require the party in breach to cure such breach within thirty (30) business Days of the receipt of such written notice thereof provided that time period for cure of breach shall exclude the time required by a Party to obtain any consent/approval from a Governmental Authority in relation to cure of such breach. 19.2 Amicable Resolution In the case of any dispute or claim (Dispute) of whatever nature arising under, out of or between the Parties, in connection with or relating to the enforcement, interpretation or performance of the terms and conditions of this Agreement, or any provision thereof, including any purported termination or invalidity hereof, or the breach (where such breach has not been cured by the Party in breach within thirty (30) Business Days of a written notice thereof), the Parties shall attempt to first resolve such Dispute through good faith negotiation and discussions between the Designated Shareholder and Parkway.

19.3 Arbitration If the Dispute is not resolved through such discussions within thirty (30) Business Days of the Dispute having arisen, then such Dispute shall be referred to and resolved in accordance with the Singapore International Arbitration Centre Rules (SIAC Rules), for the time being in force, at the request in writing of any Party to the Dispute to binding arbitration by a panel of three (3) arbitrators to be nominated by the Parties to the Dispute in accordance with the provisions of this Section 19.3. In the event a Dispute arises prior to the Effective Date, the Existing Shareholder(s) and the Company shall jointly nominate one (1) arbitrator, Parkway shall nominate one (1) arbitrator and the two (2) arbitrators so nominate by the Parties shall appoint the third arbitrator who (a) shall be of a nationality other than Indian or Singaporean; and (b) shall be the presiding arbitrator. In the event a Dispute arises after the Effective Date, Majority Shareholder and the Company shall jointly nominate one (1) arbitrator, the Minority Shareholder(s) shall nominate one (1) arbitrator and the two (2) arbitrators so nominated by the Parties shall appoint the third arbitrator who (a) shall be of a nationality other than Indian or Singaporean; and (b) shall be the presiding arbitrator. In the event the three (3) arbitrators are not appointed (in the manner contemplated above) within a period of thirty (30) days from the date on which the aforesaid written request was received by a Party to the Dispute, a panel of three (3) arbitrators shall be appointed (the Arbitration Board) in accordance with the SIAC Rules. In the event there is a conflict between the aforementioned procedure and the SIAC Rules, necessary modification (to the extent of conflict) should be made to the aforementioned procedure to ensure that to the maximum extent commercial intent of the Parties is implemented. All arbitration proceedings shall be conducted in the English language and the seat of arbitration shall be Singapore and venue of arbitration shall be Singapore. The arbitrators shall decide any such dispute or claim strictly in accordance with the governing Law specified in Article XVIII. Judgment upon any arbitral award rendered hereunder may be entered in any court having jurisdiction, or application may be made to such court for a judicial acceptance of the award and an order of enforcement, as the case may be.

19.4 Good Faith Each party shall co-operate in good faith to expedite (to the maximum extent practicable) the conduct of any arbitral proceedings commenced under this Agreement. 19.5 Final and Binding Subject to applicable Law, any award made by the Arbitration Board shall be final and binding on each of the Parties that were parties to the Dispute.

19.6 Interim Relief Nothing shall preclude a Party from seeking interim or permanent equitable or injunctive relief, or both, from any court having jurisdiction to grant the same. The pursuit of equitable or injunctive relief shall not be a waiver of the duty of the Parties to pursue any remedy for monetary damages through the arbitration described in this Article XIX.

23. If the Shareholders Agreement had just contained Article XIX alone, there would have been no cause for any confusion. But unfortunately for the parties and more unfortunately for the Courts, the Shareholders Agreement also contains an Article in Article XV, which reads as follows:

Article XV - Specific Performance Each of the parties shall be entitled to an injunction, restraining order, right for recovery, suit for specific performance or such other equitable relief as a court of competent jurisdiction may deem necessary or appropriate to restrain the other Parties from committing any violation or enforce the performance of the covenants, representations and obligations contained in this Agreement.

24. It can be seen from Article XV and Article 19.6 that both speak about injunction and equitable reliefs. In addition to injunction and equitable reliefs, Article XV also speaks about right for recovery and suit for specific performance.

25. In the light of Article XV and Article 19.6, the following questions may arise for consideration before the trial Court in the application under Section 45. I am recording this with a fair deal of caution, in view of the fact that I am not today dealing with an application under Section 45. All that I say is that certain crucial issues in relation to Articles XV and 19.6 may arise before the trial Court in the application under Section 45.

26. To be more precise, what I am now trying to find out is as to whether the petitioner has an arguable defense before the trial Court to the application under Section 45 or whether the defence raised by the petitioner to the application under Section 45 is a bogey to snatch an order of injunction. At the cost of repetition I should record that I am not called upon in this revision to decide the application of respondents 1 and 2 under Section 45. Even when arguments were advanced I cautioned the learned counsel on both sides not to argue the application under Section 45 before me, but to limit their submissions only to the extent of pointing out whether the defense of the plaintiffs to the application under Section 45 was substantial or just an apology of a defense. Therefore, my further discussion on Section 45 will only be to find out whether the petitioner and his co-plaintiffs have a reasonably arguable case in the application under Section 45 or not.

27. With this circumspection in mind, let me now formulate the issues that arise out of the Arbitration Clause and Article XV as follows:

1. Whether Article XV merely sets the standards or allows the freedom of choice of the forum?

2. Whether in the event of Article XV being construed to be in the twilight zone, the Court should err in favour of arbitration?

3. Whether the use of exception shall in Article 19.3 would eclipse Article XV?

4. Whether the moment an application is filed under Section 45, the enquiry into all other interlocutory applications, should compulsorily be put on hold?

28. The first issue is as to whether Article XV of the SHA merely sets the standards or allows the freedom of choice of the forum. According to the Learned Counsel for the Respondents 1 and 2 Article XV cannot be taken to be a licence to invoke the jurisdiction of the Civil Court, but should be taken to be an indication of the reliefs that the Arbitral Tribunal may grant, in an action for specific performance. In an action for specific performance before a Civil Court, the contours of the jurisdiction of the Civil Court to grant either the relief of specific performance or the relief of compensation are well defined and guided by the principles enunciated in Sections 20 and 21 of the Specific Relief Act, 1963. Therefore it is claimed by the Learned Counsel for the Respondents 1 and 2 that Article XV merely sets out the jurisdiction of the arbitrators to grant certain reliefs.

29. But the aforesaid contention is sought to be repelled by the Learned Senior Counsel for the Petitioner on the ground that if Article XV merely sets out the standards to be applied by the arbitral tribunal, the provisions thereof should have been incorporated in Article XIX under the Chapter Dispute Resolution. One more submission of the Learned Senior Counsel for the Petitioner is that Article 19.6 of the SHA, though captioned as Interim Relief, uses the phrase interim or permanent equitable or injunctive relief. But this contention is answered by the Learned Counsel for the Respondents 1 and 2 by contending that Article 19.6 speaks only about the reliefs that could be sought under Section 9 of the Arbitration and conciliation Act, 1996.

30. I have carefully considered the rival submissions. Prima facie it appears from two things namely, (a) the combined reading of Article XV and Article 19.6 and (b) the conduct of the 2nd Respondent herein that the Petitioner and his Co-plaintiffs have an arguable case in the application under Section 45. It is not as though the Petitioner and his Co-Plaintiffs have a hopeless and hollow defence to the application under Section 45.

31. Article XV which I have extracted earlier states that each of the parties shall be entitled to an injunction, restraining order, right of recovery, suit for specific performance or such other equitable relief as a Court of competent jurisdiction may deem necessary or appropriate. The expressions (i) Suit for specific performance and

(ii) Court of Competent Jurisdiction used in Article XV gives a handle sufficient for the petitioner and his Co-Plaintiffs to resist the application under Section 45.

32. In Clearwater Capital Partners (Cyprus) Ltd. Vs. Satyajit Singh Magithia , a Company incorporated in Cyprus entered into a Share Subscription Agreement (SSA) and a Shareholders Agreement (SHA) with the promoters and the shareholders of a company incorporated in India. When disputes arose, the Cyprus Company filed an application under Section 9 before the Delhi High Court, but an objection was taken that Indian Courts would not have jurisdiction under Section 9, when the venue of arbitration was to be Singapore and also when the Rules of The Singapore International Arbitration Council were to govern the arbitration. When the question of maintainability of the application under Section 9 was pending, the Indian company filed a suit for a declaration that the SSA and SHA were null and void. When the question of maintainability of the suit was raised, reliance was placed upon Article 17.13, whereby the parties agreed that each of them would be entitled to an injunction, restraining order, right of recovery, suit for specific performance or such other equitable relief. It was contended by the Indian Company that in the light of Article 17.13, the only remedy available was by way of suit. But there was already a Division Bench Judgment in Oval Investment Pvt. Ltd Vs. India Bulls Financial Services Ltd. holding a different view. Therefore the Learned Single Judge of the Delhi High Court held the suit to be not maintainable despite Article 17.13, for two reasons articulated in Para 26 of the Judgment in Clearwater Capital. The two reasons stated by the Learned Judge of the Delhi High Court in Clearwater Capital were (I) That he was bound by the decision of the Division Bench in Oval Investment and (ii) That no suit for such a relief can be entertained after the Cyprus Company had elected to refer the disputes to arbitration in terms of Article 17.9.1. In the case on hand the two impediments indicated by the Delhi High Court in Para 26 of its decision in ClearwaterCapital are not available. Another distinguishing factor between the decision in Clearwater Capital and the case on hand is that there was a very clear indication in the second part of Article 17.13 that the first part of the Article was not dealing with the choice of a forum but only the nature of the remedies. As we have stated earlier, the first part of Article 17.13 of the SHA that the Delhi High Court was dealing with in Clearwater Capital spoke about the entitlement of both parties to an injunction, right of recovery, suit for specific performance etc. The second part of Article 17.13 stated the following These injunctive remedies are cumulative and are in addition to any other rights and remedies the parties may have at law or in equity including without limitation a right for recovery of the amounts due under this Agreement and related cause and a right for damages.

33. Therefore the second part of Article 17.13 of the SHA that the Delhi High Court was dealing with, gave a clue about what the parties were ad idem on.

34. After all, the right of parties to seek appropriate remedies before Civil Courts is always available except where it is expressly or impliedly barred. This is in view of Section 9 of the Code of Civil Procedure, 1908.

35. What the Arbitration and Conciliation Act, 1996 does, is to enable the parties, by contract, to have their disputes resolved by a forum other than the Civil Court, to the exclusion of the Civil Court. This exclusion is also not an absolute exclusion but a limited one, since the entitlement of the parties to come to the Civil Court before the commencement or during the pendency of or after the conclusion of the arbitral proceedings, is recognised by the Arbitration Act itself. We must always keep in mind the distinction between (i) the bar of jurisdiction of a Civil Court and (ii) the exclusion

of jurisdiction of the Civil Court by contract between the parties. We must keep in mind that an Agreement in restraint of legal proceedings is void in view of Section 28 of the Indian Contract Act, 1872, but a contract to refer disputes to arbitration, is saved by the First Exception to Section 28.

36. Therefore it is important to see what the parties have agreed to and to see to what extent the parties, by contract, excluded the jurisdiction of the Civil Court.

37. But the Courts face a lot of difficulty in finding out, post facto, what the parties had actually agreed to at the time of entering into an agreement. This is due to the fact that no party to a dispute speaks the truth, the whole truth and nothing but truth, when they come to court. Therefore the Courts may have to be guided only by the attending circumstances or the past conduct of the parties to find out what they could have actually agreed upon, wherever there is a dispute on what they agreed upon.

38. In the case on hand the contention of the Petitioner and other Plaintiffs is that the right of the parties to go to the normal Civil Courts was not totally excluded and that the parties were made entitled under Article XV to go to the Civil Court for certain reliefs. But the contention of the Respondents 1 and 2 is that the parties intended to have all their disputes resolved only through arbitration.

39. In the light of the extremely opposite positions taken by the rivals on what they intended and understood by Article XV, It is not possible to jump to any conclusion without looking into the past conduct of the parties as to how each of them understood Article XV in the past.

40. If we do that, it could be seen that the 2nd Respondent approached the United States District Court for the Southern District of Texas, Houston Division in mid-October 2017 praying for the following reliefs:

60. A temporary restraining order barring Defendant and all of his affiliates, employees, agents, and entities which he controls, whether acting directly or indirectly, in the United States or abroad, from prosecuting the Civil Lawsuit or initiating or prosecuting any other action against Plaintiffs except in arbitration pursuant to the procedures agreed upon in Article 19 of the SHA, including specifically and without limitation his obligations under Sections 19.1, 19.2 and 19.3 of the SHA and ordering Defendant to immediately stay or dismiss the Civil Lawsuit;

61. A preliminary anti-suit injunction barring Defendant and all of his affiliates, employees, agents and entities which he controls, whether acting directly or indirectly, in the United States or abroad, from prosecuting the Civil Lawsuit or initiating or prosecuting any other action against Plaintiffs except in arbitration pursuant to the procedures agreed upon in Article 19 of the SHA, including specifically and without limitation his obligations under Sections 19.1, 19.2 and 19.3 of the SHA and ordering Defendant to immediately dismiss the Civil Lawsuit;

62. A permanent anti-suit injunction barring Defendant and all of his affiliates, employees, agents and entities which he controls, whether acting directly or indirectly, in the United States or abroad,

from prosecuting the Civil Lawsuit or initiating or prosecuting any other action against Plaintiffs except in arbitration pursuant to the procedures agreed upon in Article 19 of the SHA, including specifically and without limitation his obligations under Sections 19.1, 19.2 and 19.3 of the SHA and ordering Defendant to immediately stay or dismiss the Civil Lawsuit;

63. An order compelling specific performance of the agreement to arbitrate contained in Sections 19.1, 19.2 and 19.3 of the SHA;

64. An order compelling arbitration in accordance with the New York Convention, 9 U.S.C. 206;

65. An order awarding Plaintiffs all attorneys fees and costs of court incurred in bringing and prosecuting this action based on (i) Defendants prosecution of his foreign actions in bad faith, vexatiously, wantonly, and/or for oppressive reasons and/or

(ii) based on any and all other applicable authority; and

66. An order awarding Plaintiffs and any and all further relief, including injunctive, declaratory, compensatory, or any other relief the Court may deem just and proper consistent with or limited by the anti-suit injunction and order to compelling arbitration requested therein.

41. Interestingly the said civil action was initiated by the 2nd Respondent, only after the Petitioner went before the NCLT and came before the civil court. In the said civil action, before the United States Court, the 2nd Respondent pleaded in Paras 56 to 58, the scope of Article XV of the SHA as follows:

56. The SHA specifically states that specific performance shall be available to ensure compliance with the obligations of the SHA. Specifically, Section 15 of the SHA states that Each of the parties shall be entitled to an injunction, restraining order, right for recovery, suit for specific performance or such other equitable relief as a court of competent jurisdiction may deem necessary or appropriate to restrain the other Parties from committing any violation or enforce the performance of the covenants, representations and obligations contained in this Agreement. The obligation to arbitrate disputes pursuant to Sections 19.1, 19.2 and 19.3 is one of these obligations of the SHA that may be specifically enforced.

57. The same obligation to arbitrate is also enforceable by the Court pursuant to the New York Convention, 9 U.S.C. 200 et seq., which obligates the Court, upon petition, to enter an order directing that arbitration proceed in the manner provided for in the arbitration agreement. See 9 U.S.C. 206 (A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States.)

58. Plaintiffs are without an adequate remedy at law for these breaches of the SHA.

42. Therefore it is possible that what was agreed under Article XV of the SHA was to reserve the rights of the parties to approach the Civil Court for certain limited reliefs. By way of caution I wish to add here that I am not pronouncing a final opinion on the scope of Article XV. All that I am trying to point out is that the attempt of the Petitioner and his Co-plaintiffs to use Article XV as a shield to the application under Section 45 cannot be dismissed as completely frivolous. Therefore the very fact that the 2nd Respondent also approached a Civil Court, albeit for the enforcement of the arbitration clause, after the initiation of proceedings both before the NCLT and the Civil Court by the Petitioner, is an indication that Article XV did not merely set the standards but also allowed a freedom of choice of the forum in respect of certain reliefs. This is my prima facie view on the 1st issue regarding Article XV.

43 The 2nd issue revolving around Article XV is whether the Court should err in favour of arbitration in the event of Article XV being construed to be in the twilight zone.

44. This argument is advanced as an alternative argument by the learned counsel for the respondents 1 and 2. According to the learned counsel for the respondents 1 and 2, Article XV leaves no room for any ambiguity and that the same does not permit the parties to go to Civil Courts for certain reliefs, but merely sets out the standards for the arbitrators, in terms of the decision of the Supreme Court in Olympus Superstructures Pvt. Ltd. V. Meena Vijay Khetan , read with Section 20 of the Specific Relief Act, 1963. However, it is also contended by the learned counsel for the respondents 1 and 2 that in the event of this Court coming to a conclusion that Article XV is capable of sending different signals and also capable of being construed to be in the twilight zone, the Court should err in favour of arbitration.

45. As a proposition of law, I have no difficulty in accepting the same. As a matter of fact, I was a party to (and also the author of) a decision of the Division Bench of this Court rendered recently in Mohammed Imaduddin Farooqui v. Karkhana Zinda Tilismath , where it was held that if two interpretations are possible with reference to an arbitration agreement, after the 1996 Act, the one in favour of promoting arbitration is to be adopted than the one making the arbitration agreement a dead letter. In para-29 of the said decision, it was reiterated that after the advent of the Arbitration and Conciliation Act, 1996, Courts are bound to adopt an interpretation of the arbitration agreement that would promote arbitration and not to destroy arbitration. In support of the proposition that unless a clear intention is borne out of the arbitration agreement to keep some disputes out of the purview of arbitration, and only a few disputes within the purview of arbitration, an arbitration agreement should be interpreted according to the true intent and purpose, the Division Bench also relied upon two decisions of Foreign Courts and a statement of the law by two learned authors in their book. Paragraphs-30 to 34 of the decision of the Division Bench in Mohammed Imaduddin Farooqui may be extracted usefully as follows:

30. The principles of interpretation of an arbitration agreement that we have indicated above are accepted universally. In Green Field Ethanol Inc. v. Suncor Energy Products Inc., the Ontario Supreme Court indicated that when the arbitration clause is capable of two interpretations, one of which favours arbitration, the Court should follow that interpretation. The learned authors MJ Mustill and S.C. Boyd, in their The Law of Practice of Commercial Arbitration in England point out

that there is a presumption that the intention of the parties was that all disputes which relate to a specific transaction, will be subject to resolution by the same Tribunal.

31. In Fiona Trust and Holding Corp. v. Privalov, Lord Hoffmann indicated that the construction of an arbitration clause should start from the assumption that the parties, as rational businessman, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter, to be decided by the same Tribunal.

32. The most fundamental and the widely accepted principle of interpretation applicable to arbitration agreements, is the principle of interpretation in good faith. Interpretation in good faith is nothing but looking for the intention of the parties, rather than simply restricting oneself to examining the literal meaning of the terms used. Most of the Courts throughout the world especially from countries, who are parties to UNCITRAL, have rejected the principle of strict interpretation.

33. in Visa International Ltd. v. Continental Resources (USA) Ltd. , the Supreme Court pointed out that no party can be allowed to take advantage of inartistic drafting of arbitration clause in any agreement as long as clear intention of the parties to go for arbitration is evident from the agreement on record.

34. What was sought to be promoted by the UNCITRAL Model Law is the liberalisation of commercial arbitration by limiting the role of the Courts and by giving effect to the doctrine of autonomy. As observed by Singapore Court in HKL Group Co. Ltd. v. Rizq International Holdings Pte. Ltd. , when faced with a pathological arbitration clause, the Court would generally seek to give effect to that clause preferring an interpretation, which does so over one which does not.

46. Therefore, we would have easily thrown out the revision on the ground that there was no valid objection to the application under Section 45, if not for the fact that we are concerned in this case, not with the interpretation to the arbitration clause contained in Article XIX but with the stand-alone clause in Article XV. If Article XV had formed part of Article XIX, we could have easily come to the conclusion that the petitioner and other co-plaintiffs do not have a valid objection at all to the application under Section 45. But my trouble is that Article XV is capable of being projected as a stand-alone provision. Therefore, the question whether Article XV is in the twilight zone at all, is something that the parties may have to argue before the Trial Court in the application under Section 45. It is only if the Trial Court comes to the conclusion that Article XV is part of the arbitration clause and does not operate on a stand-alone basis that we can look at Article XV as being in the twilight zone so as to enable the Court to err in favour of arbitration.

47. The 3rd issue revolving around Article XV is as to whether the use of the expression shall in Article 19.3 would eclipse Article XV. A serious attempt was made to highlight the distinction between the words shall and may. But contracts are not to be read as statutes and the principles of interpretation of statutes may have no application to the same. Therefore, I do not think that the use of the expression shall in Article 19.3 would eclipse Article XV.

48. The last issue arising under Article XV is as to whether the enquiry into all other interlocutory applications should be compulsorily put on hold, the moment an application is filed under Section 45. Reliance is placed by the learned counsel for the respondents upon a decision of the Supreme Court in Learonal v. R.B. Business Promotions Pvt. Ltd. .

49. I have carefully considered the above submission. The decision in Learonal, arose out of application under Section 8, but the same having been dismissed by the High Court, the parties went before the Supreme Court. The dismissal of the application under Section 8 was on the ground that it was an International commercial agreement to which Section 45 alone and not Section 8 would apply. Therefore, the question before the Supreme Court was whether the moving of the Court on a wrong provision of law would deprive the parties of the right. It is in that context that the Supreme Court held in para-7 of a brief order that the application should be disposed of expeditiously by the High Court. While issuing such a direction, the Supreme Court observed that in the proceedings of the suit and obviously as contemplated by the scheme of the Act, the High Court should first concentrate on disposing of the application under section 45 at the earliest and that so long as the application is not disposed of, the High Court may not take up for consideration any other application for any other interlocutory relief.

50. I do not think that Learonal lays down as a proposition of law that the moment an application is filed under Section 8 or 45, the enquiry into all other applications should automatically be put on hold.

51. Let me assume for a minute that the enquiry into all other applications should be put on hold the minute an application under Section 8 or 45 is filed. Even then, in the case on hand, the said proposition may have to be applied in the reverse direction. The petitioner/plaintiff had an interim order of status quo in respect of a particular item in the agenda for a particular Board Meeting. Since the Board Meeting took place without that agenda being taken up, the Trial Court had no occasion to extend the very same interim order of status quo.

52. Let me assume for a minute a hypothetical situation where the Trial Court had granted an ad interim ex parte injunction and the defendant in the suit files one application for vacating the interim injunction and another under Section 45. In such a situation, would a defendant choose to continue to suffer the interim order of injunction and ask the Court to decide his application under Section 45 first? Assuming that he does and the application under Section 45 is decided in his favour, would the Trial Court be entitled to vacate the interim order of injunction thereafter? If the Trial Court chooses to vacate the interim order of injunction a few days after allowing an application under Section 45, the same would be contested as without jurisdiction, on account of the application under Section 45 having already been allowed.

53. Therefore, the argument now raised by the respondents 1 and 2 that in cases where an application under Section 45 is filed, the enquiry into all other applications should be put on hold, is an argument of convenience. Such an argument would defeat, in many cases, even the rights of the parties flowing out of Section 8 or 45 and that will be a death knell to the very arbitration agreement.

54. Therefore in fine, I am of the considered view that for the application under Section 45 of the Arbitration and Conciliation Act, 1996, the petitioner/plaintiff has a reasonably arguable defence. It is not as though the petitioner/plaintiff has raised a frivolous defence to the application under Section 45 or as though the defence raised by the petitioner is not even worth the paper on which it is written. I reiterate that I am not deciding the fate of the application under section 45 in this revision, as it is not the subject matter of the revision. I just tried to find out if the petitioner has a reasonably arguable defence to the application under section 45.

55. Relying upon the decision of the Supreme court in Sasan Power vs. North America Coal it was contended by the learned counsel for the second respondent that while deciding an application under section 45, the court can look only at the grounds mentioned therein, namely whether the arbitration agreement is null and void, inoperative or incapable of being performed and that if an agreement is not challenged on any of these grounds, the court has no alternative except to refer the parties to arbitration.

56. I have no quarrel about the above proposition. But the case on hand is a very peculiar one, where there is no challenge to the arbitration agreement at all. The petitioner is not assailing the arbitration agreement at all. On the other hand, the case of the petitioner is that the reliefs now sought by him before the civil court fall outside the arbitration agreement between the parties. The Arbitration agreement between the parties is found in Article XIX of the Shareholders Agreement, whereas the invocation of the civil courts jurisdiction is under Article XV of the Agreement. After all, the seal of approval for an arbitration agreement is on the foundation of party autonomy. Therefore, the question raised by the petitioner is whether the party autonomy would not stand infringed if the right conferred by Article XV is negated.

57. It is next contended by the Learned Counsel for the 2nd Respondent that an arbitration clause is akin to an exclusive jurisdiction clause and that therefore, a party to an arbitration agreement cannot seek relief from courts outside the seat of arbitration, when such relief is not in aid of arbitration. In support of this proposition, the Learned Counsel relies upon a decision of the Supreme Court in Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited .

58. But the decision of the Supreme Court in Indus Mobile arose out of proceedings under Section 9 of the Arbitration and Conciliation Act 1996. In that case, the seat of arbitration was prescribed as Mumbai and there was also an exclusive jurisdiction clause stating that the courts in Mumbai alone will have jurisdiction. I am not in this case dealing either with a proceeding under Section 9 or an exclusive jurisdiction clause.

59. Placing reliance upon the decision of the Supreme Court in Enercon (India) Limited v. Enercon GMBH , it is contended that the approach of a court while construing an arbitration agreement should be to be in favour of a one stop dispute resolution forum and that the intention of the parties to arbitrate should be respected.

60. But it is exactly the very same argument that is raised by the Petitioner herein. The contention of the Petitioner is that when the agreement confers a right specifically upon the parties to approach the Civil Courts for the relief of specific performance and when the 2nd Respondent themselves had approached the Civil Court in USA for specific performance, the intention of the parties should be respected and given effect to. This is exactly where the parties are caught in a catch-22 situation.

61. Placing reliance upon the decision in Ayyasamy v. Paramasivam , it is contended that the approach of a Civil Court in these matters should not be to see whether the court has jurisdiction, but to see whether its jurisdiction has been ousted or not. If there is an arbitration clause which meets the requirement of Section 44 and it has not been challenged in terms of the parameters of Section 45, the Civil Courts jurisdiction, according to the learned counsel, will stand ousted.

62. But unfortunately for the Respondents, Article XV which is incorporated as a separate and distinct stand alone Article, apart Article XIX governing dispute resolution, creates an impression that the parties specifically reserved a right to seek certain reliefs before the Civil Courts. Therefore, the decision in Ayyasamy may not fit in as a straight- jacket formula.

63. Hence, I am of the considered view that the petitioner has an arguable defence to the application under section 45. Eventually he may or may not succeed in the application under section 45. I have only tested here, the question whether the petitioner deserves to be heard at all in the application under section 45. There are cases where an enquiry into an application under section 8/45 may only be an empty formality. But this is not one of those cases where the respondents 1 and 2 have an open and shut case and where the petitioner has nothing to offer by way of defence to the application under section 45. Therefore, the application under section 45 has to be decided by the trial court at the ealiest. Whether petitioner is entitled to a protective order, pending a decision on the application under section 45

64. That takes me to the next question as to whether the petitioner and his co-plaintiffs will be entitled to some protective order till the application under Section 45 is decided.

65. To decide the question whether the petitioner/plaintiff is entitled to any protective order, I must necessarily look into the existence of a prima facie case, the balance of convenience and the question of irreparable hardship.

66. The case of the petitioner/plaintiff is that he is an eminent Gastroenterologist and a Liver Specialist and that he established the 1st respondent company, first as a private limited company and that the same was later converted into a public limited company. The company established a state of art Multi Speciality Tertiary Care Hospital and the hospital commenced its operations in 2013.

67. On 18-02-2015, three agreements viz., a Share Purchase Agreement, a Share Subscription Agreement and a Shareholders Agreement were entered into. Under these agreements, the 2nd respondent acquired 51% of the paid up capital of the 1st respondent company, as a consequence of which, the petitioner, his co-promoters and the 9th respondent company, which is held as a closely

held private limited company by the promoters, became a minority with 49% of the paid up capital in the 1st respondent Company.

68. In October 2016, the new management of the Company issued a capital call for a sum of Rs.15 Crores and the same became the subject matter of challenge before the National Company Law Tribunal at the instance of the petitioner and others. But the National Company Law Tribunal allowed the application under Section 45 and the plaintiffs in the present case have gone on appeal to the Appellate Tribunal.

69. Since the petitioner and others did not subscribe to the call, the 2nd respondent themselves subscribed in entirety to the rights issue to the extent of Rs.15 Crores. As a result, the shareholding of the 2nd respondent raised from 51% to 53% and the shareholding of the petitioner and other promoters got reduced from 49% to 47%.

70. The Company announced a second rights issue for a sum of Rs.10 Crores in April, 2017 and the petitioner and the other co-promoters attempted to stall the same by moving an application before the National Company Law Appellate Tribunal. The 1st respondent went ahead and the shareholding of the petitioner and other promoters appears to have got diluted further.

71. In other words, the shareholding of the petitioner and other promoters became 49% with the acquisition of 51% of the shareholding by the 2nd respondent in March 2015. The equation became 47:53 after the first rights issue and the same got diluted further after the second rights issue.

72. Therefore, when a third rights issue was proposed by a notice dated 22-8-2017 for a meeting of the Board to be held on 05-9-2017, it was objected to. The meeting was then adjourned to 20-9-2017. The petitioner and others, who constituted a minority, also exercised a right of Veto in terms of Article 4.2(e).

73. Despite the Veto by the minority, the majority decided to proceed with the agenda relating to the third rights issue in the meeting of the Board proposed to be held on 20-9-2017, on the ground that the right of Veto was available only in respect of reserved matters enlisted in Schedule-7 to the Shareholders Agreement, other than those covered by Article 7.3 of the agreement. Therefore, the petitioner and two other promoters approached the Civil Court, sought an injunction and obtained an interim order of status quo on 19-9-2017. This interim order of status quo was to be in force upto 6-102017. Due to this interim order, agenda Item No.16 for the Board Meeting dated 20-9-2017 relating to the third rights issue, could not proceed further.

74. But on 6-10-2017, the Trial Court refused to extend the interim order of status quo on the ground that the Board Meeting that became the subject matter of the interlocutory application was already over. Immediately, the Company Secretary proposed on 14- 10-2017, another meeting of the Board to be held on 16-10-2017. The notice convening the Board Meeting was circulated on 15-10-2017 along with the agenda. The petitioner informed the unavailability of the Nominee Directors of the minority shareholders, but the Board proceeded with the meeting on 16-10-2017 in the absence of the Nominee Directors of the minority shareholders. In the meeting, the majority shareholders

resolved to give consent to raise funds through capital infusion on a rights issue basis. It was also resolved that the offer for rights issue will be made for a period of 60 days as per the provisions of shareholders agreement, which would include a period of 30 days commencing from 23-11-2017 to 22-12-2017, as required by the Companies Act, 2013.

75. Pursuant to the resolutions passed by the Board on 16-10-2017, the Company Secretary circulated a letter of offer along with a Draft Circular Resolution on 16-11-2017 indicating that the rights issue was to remain open for a period of 30 days commencing from 10 a.m. on 24-11-2017 upto 17.00 p.m. on 23-12-2017. Immediately the petitioner and his co-plaintiffs moved the Court below for urgent orders in the 2nd interlocutory application filed by them on 20-10-2017, but since the learned Judge was on leave, it was taken up by the in charge Judge who passed the order impugned in the revision, adjourning the case for want of time.

76. The sum and substance of the grievance of the petitioner is that once the rights issue for a total sum of Rs.140 Crores goes through, the promoters of the 1st respondent Company will be reduced to a miniscule minority. Once they are reduced to a minority with less than 25% of the shareholding or less than 15% of the equity share capital on a fully diluted basis, even the right of Veto conferred under Article 4.2(e) would go.

77. In order to understand this contention, it is necessary to have a look at Article 4.2(e) of the Shareholders Agreement, which reads as follows:

Notwithstanding anything contained in this Agreement, the Company shall not become bound or committed to any of the Reserved Matters and the Shareholders shall not, directly or indirectly, take any steps of any nature to authorise of permit the Company to become bound or committed to any such Reserved Matters unless such Reserved Matter has been approved by directors constituting a majority of the entire Board, which majority shall include at least one (1) director nominated by each of the Minority Shareholder and the Majority Shareholder. Unless at least one (1) Minority Shareholder nominee director provides an affirmative vote on a Reserved Matter, the same shall be deemed to have been rejected by the Minority Shareholder nominee director. Provided that if the Minority Shareholders shareholding (in aggregate) falls below 15% of the Equity Share Capital on a Fully Diluted Basis, then such Reserved Matters may be decided and approved by directors constituting a majority of the entire Board (which majority must include the affirmative vote of at least one (1) director nominated by the Majority Shareholder) and the Minority Shareholders shall have no rights in relation to Reserved Matters as contemplated in this Section 4.2(e). Further, if a Minority Shareholders shareholding (in aggregate) falls below 25% of the Equity Share Capital on a Fully Diluted Basis, the Minority Shareholder shall have no rights in relation to the following Reserved Matters (as contemplated in this Section 4.2(e): (i) item (e) of Schedule 7, (ii) item (p) of Schedule 7,

(iii) item (u) and (v) of Schedule 7, and (iv) the limits in item (m) of Schedule 7 shall be reckoned on a 1.5 times basis of the limits appearing in the said item as duly adjusted for Inflation.

78. A close look at the Article extracted above would show that any decision of the Board with respect to matters that are indicated as Reserved Matters in Schedule 7, will be valid and binding only if the decision had been approved by a majority of the directors, who shall include at least one director nominated by the minority shareholders. If at least one minority shareholder nominee director does not provide an affirmative vote on a Reserved Matter, the matter will be deemed to have been rejected by the nominee director of the minority shareholder.

79. But the proviso to Article 4.2(e) makes it clear that if the minority shareholders holding in the aggregate, fall below 15% of the equity share capital on a fully diluted basis, then the minority shareholders will have no right of Veto. If the minority shareholders holding falls below 25% of the equity share capital on a fully diluted basis, the minority shareholder shall have no rights in relation to a few of the Reserved Matters included at serial Nos.(e), (p), (u) and

(v) of Schedule 7.

80. It is not disputed and it cannot be disputed before me that if the percentage of holding of the minority shareholders falls below 25%, one set of sequences follow and if it falls below 15%, more serious consequences would follow. Therefore, in order to ensure that their shareholding does not fall below 25% or 15%, as the case may be, there are only two options left open to the minority shareholders viz., (a) to subscribe to the capital call in proportion to their existing shareholding or (b) to establish that there was no justification for the rights issue. What the minority shareholders are trying to do is to establish that there is no justification for the third rights issue.

81. Since the entire dispute raised by the petitioner/plaintiff revolves around the justification for the rights issue, the learned counsel for the 1st respondent focussed to a great extent upon the financial position of the 1st respondent that allegedly warranted the capital infusion. In brief, the claim of the learned counsel for the 1st respondent is:

(a) that the 1st respondent Company availed financial assistance in the form of term loan for an amount aggregating to Rs.283.19 Crores from a consortium of banks comprising of Bank of Baroda, Axis Bank, Bank of India and Indian Bank;

(b) that the 1st respondent availed a working capital loan in the form of cash credit/overdraft aggregating to Rs.17.07 Crores from Bank of Baroda and Axis Bank;

(c) that when the petitioner was in the management (before entering into the Shareholders Agreement), he himself made 87 capital infusions over a period of two years from 2013 to 2015, aggregating approximately to Rs.50 Crores, for servicing the debts;

(d) that the 2nd respondent infused a total amount of Rs.188 Crores in March, 2015 and took over the management of the 1st respondent Company in June, 2015;

(e) that due to this infusion, the interest liability was serviced up to December, 2015;

(f) that the 1st respondent Company already underwent a debt restructuring with Bank of Baroda and Axis Bank, in March, 2014;

(g) that the 1st respondent was unable to service its debts by making prompt payment of interest, forcing the banks to put the status of the 1st respondent as SMA-2, with the imminent danger of the 1st respondent Company being classified at any time as a non- performing asset;

(h) that the moment the first respondent is classified as a NPA, all consequences including the threat of invocation of the provisions of the Securitisation Act, 2012 would follow;

(i) that there are several suppliers to whom the 1st respondent could not make payment forcing some of them to issue notices under the Insolvency and Bankruptcy Code;

(j) that there is a demand for the purchase and installation of new equipments, for which funds were needed and that therefore the proposal to order rights issue was justified in terms of the financial condition of the company.

82. Another argument advanced by the respondents 1 and 2 is that under Article 7.3 of the Shareholders Agreement, there were only three conditions to be satisfied, for the Board to require the shareholders to make a capital contribution and that all these 3 conditions are satisfied. They are:

(i) demonstration through documentary evidence or otherwise that despite having made best efforts, it is not possible for the Company to raise borrowings for funding expansion, upgrade plans;

(ii) demonstration that any further borrowing will breach the Leveraging Guidelines and

(iii) the provision of a notice of not less than 60 days to make capital contribution.

83. According to the respondents 1 and 2, all these three conditions are satisfied and hence the case on hand falls outside the scope of the Reserved Matters enlisted in Clause (b) of Schedule 7.

84. Leveraging Guidelines are indicated in Schedule 5, which stipulates that (a) the net debt to book equity ratio should be maintained at 1.25:1, (b) the net debt to EBITDA for the previous financial year should not have been greater than 4.5:1 and (c) the DSCR of the Company must be at least 1.20.

85. In other words, two substantial arguments are raised by the respondents 1 and 2, the first of which revolves around the financial condition of the 1st respondent Company and the second revolves around the breach of Leveraging Guidelines. I shall first take up the second point, as it is easier than the first to be dealt with.

86. According to the respondents 1 and 2, the right of the minority shareholders to exercise the Veto power conferred under Article 4.2(e) depended upon whether the matter in question was a Reserved Matter within Schedule 7 or not. Item (b) of Schedule 7 reads as follows:

Any increase, decrease, reduction or cancellation or other alteration or qualification in the authorized or issued share capital of the Company except for an issuance in accordance with Section 7.3 of this Agreement or a buyback of securities in accordance with Section 8.2A of the SSA.

87. Article 7.3 of the SHA reads as follows:

If the Board determines and demonstrates through documentary evidence or otherwise that despite having made best efforts, it is not possible for the Company to raise borrowings for funding expansion, upgrade plans approved by the Board, or if any proposed borrowing (or part thereof) will breach any of the Leveraging Guidelines, then the Board will be entitled to require the Shareholders by providing a notice of not less than sixty (60) days to make a capital contribution in their respective shareholding proportions to fund such amounts and each of the Shareholders hereby unconditionally agree to approve and contribute towards any such proposed rights issuance in accordance with the Act and cause the Company to pass such Shareholders resolutions as will be required by the Act to give effect to the same. The pricing at which such future capital contribution shall occur will be the Fair Market Value determined in accordance with Article XIII.

88. Leveraging Guidelines indicated in Schedule 5 of the SHA are as follows:

DSCR means X/Y, Where:

X = the ratio of cash flows from operations adjusted for capital expenditure during the year, and Y = sum of the scheduled principal and interest payments for debt; and EBITDA means earnings before interest, taxes, depreciation and amortization.

1. Borrowing leverages of the Company shall be subject to each of the following:

(a) The net debt to book equity ratio must be maintained at 1.25:1;

(b) The net debt to EBITDA for the previous financial year should not have been greater than 4.5:1; and

(c) The DSCR of the Company must be at least 1.20.

2. If an acquisition is under consideration, the EBITDA, cash flows, leverage and debt servicing obligations of the target company shall be considered while computing the above ratios.

89. Schedule 5 also defines EBITDA to mean Earnings Before Interest, Taxes, Depreciation and Amortization. Keeping these provisions in mind, let us now get back to the status of the 1st respondent Company with respect to the net debt to book equity ratio and to the net debt to EBITDA for the previous financial year.

90. The 8th respondent in this revision, who is also one of the Directors of the 1st respondent Company and who was the 2nd plaintiff in the suit, has filed a table showing the debt equity ratio.

Financial ended year Debt Equity Ratio Industries standards March, 2015 299.01 206.74 1.45:1 2.33:1 March, 2016 218.79 166.38 1.32:1 March, 2017 218.81 131.36 1.67:1 Now proposed (December, 2017) 133.81 131.36 1.02:1

91. The figures contained in the above table are not disputed. Therefore, it follows that even at the time when the Shareholders Agreement was entered into on 18-02-2015, the debt equity ratio was 1.45:1, which was far in excess of what was prescribed in Item No.1 of Leveraging Guidelines in Schedule 5. In fact, in March 2016, the ratio improved and in March 2017, it again fell.

92. If Leveraging Guidelines alone were to tilt the balance, the Company was already in breach of the Leveraging Guidelines even at the time when all the three agreements were entered into on 18-02-2015 between the parties. Therefore, I do not think that the respondents 1 and 2 can now take advantage of the Leveraging Guidelines to justify the proposed rights issue.

93. Coming to the financial condition of the 1st respondent Company, on the basis of which the proposed rights issue is sought to be justified, I think the main issue to be addressed is as to whether the 2nd respondent is using the projected financials to camouflage their real intention to dilute the minority shareholding or whether it is a genuine attempt to take the 1st respondent Company out of the woods.

94. In a P&L Forecast for April December, 2017 filed as Annexure-G to the counter affidavit filed by the 1st respondent, the 1st respondent himself has given the following figures: INR Lakhs Actuals Apr Jun Forecast Jul Dec Forecast Apr Dec Budget Apr Dec Revenue 4,247.3 9,649.7 13,897.0 15,986.5 Consumables 972.4 2,183.0 3,155.4 3,467.8 Doctor fee 1,159.7 2,387.4 3,547.0 3,623.4 SWB 769.1 1,635.8 2,404.9 2,511.6 Marketing 144.0 296.5 440.5 422.1 Overheads 918.3 2,111.4 3,029.6 3,002.5 Total Expenses 3,963.5 8.614.0 12,577.6 13,027.4 DBITDA 283.71 1,035.69 1,319.40 2,959.11

95. From the above, it is clear that the earnings before interest, taxes, depreciation and amortization have increased enormously over the period.

96. Today, the requirement for a capital infusion of Rs.140 Crores is sought to be justified on the ground that a sum of Rs.85 Crores is needed towards term loan repayment, a sum of Rs.17 Crores is needed towards payment of overdraft facilities, a sum of Rs.7 Crores is needed towards payment of interest, a sum of Rs.11 Crores is needed for payment to creditors and a sum of Rs.21 Crores is needed for capital expansion.

97. But it appears even on admitted facts that due to the restructuring of the debt in March 2014, the amount of Rs.85 Crores repayable towards term loan, is to be paid over a period of 30 months beginning June, 2018. The loan repayment schedule as given by the bank and furnished in the form of a tabulation by the 8th respondent is as follows:

Total Loans Rs. Crs.

218.58 2018-19 Q.E. June 2018 6.39 Q.E. Sept. 2018 6.39 Q.E. Dec. 2018 7.57 Q.E. Mar. 2019 7.59 Total 27.94 2019-20 Q.E. June 2019 10.14 Q.E. Sept. 2019 10.14 Q.E. Dec. 2019 7.63 Q.E. Mar. 2020 6.41 Total 34.32 2020-21 Q.E. June 2020 11.21 Q.E. Sept. 2020 11.21 84.68 Crores Round off Rs.85 Crores Q.E. Dec. 2020 11.2 Q.E. Mar. 2021 11.2 Total 44.82 2021-22 Q.E. June 2021 12.81 Q.E. Sept. 2021 12.81 Q.E. Dec. 2021 12.81 Q.E. Mar. 2022 12.81 Total 51.24 2022-23 Q.E. June 2022 15.06 Q.E. Sept. 2022 15.06 Q.E. Dec. 2022 15.07 Q.E. Mar. 2023 15.07 Total 60.26 Grand total Payment 218.58

98. Insofar as the repayment of overdraft facilities is concerned, it was to be paid from last years rights issue. Insofar as the payment of Rs.11 Crores to creditors is concerned, the trade receivables as on 30-6-2017, even as per the provisional balance sheet filed by the 1st respondent as part of Annexure-G is Rs.21.61 Crores, which is almost twice the amount payable to the creditors.

99. Insofar as the requirement for capital expansion is concerned, the case of the petitioner and the other promoters is that 40% of the available medical equipment and developed infrastructure are still unutilised. It appears that seven floors of the building are kept unutilised and hence the justification for capital expansion, when the existing capacity itself is not fully utilised, is questioned. Moreover, a part of this amount of Rs.21 Crores towards capital expansion, is sought to be earmarked for annual maintenance contracts of the existing equipment. The same may not be a standard accounting practice.

100. Leaving all these financial nuances aside for a moment, I asked a very fundamental question to the learned counsel appearing for the 1st respondent as to what is the exact amount required every month for payment to the banks, so that the account is not classified as a non-performing asset. The answer across the bar was that the 1st respondent may require about Rs.3 Crores every month to be paid to the banks to prevent the 1st respondent slipping into the status of a non-performing asset. If this is so, the earnings that are on the increase over the past several months, appear to be more than sufficient to take care of this payment. In fact, the revenue, as seen from the P & L Forecast, is slated to increase from Rs.42 Crores in the 2nd quarter of 2017 to Rs.96 Crores in the 3rd quarter and to Rs.138 Crores in the 4th quarter, as per projections. It must be remembered that even when the 1st respondent was unable, according to them, to service its debts, the account of the Company did not become a distressed account. Originally an impression was created in the course of arguments as though there was a Corporate Debt Restructuring (CDR). But it turned out that it was a debt restructuring not made on account of the account becoming a distressed one.

101. From the financials produced by the 1st respondent themselves, it is clear that the Company is not suffering from a solvency crisis but only a liquidity crisis. Therefore, the attempt of the 2nd respondent, to make the 1st respondent go for a rights issue does not appear to be a bona fide exercise, solely for the purpose of wriggling the 1st respondent out of a financial crisis. In fact, the Court should ask itself one question in such circumstances and it is this. Who benefits if the proposed action is stalled and who suffers.

102. Even according to the respondents 1 and 2, the petitioner as well as the individual co-promoters of the 1st respondent Company have given personal guarantees to the banks and they have also

given their own personal immoveable properties as securities for the due repayment of the loans. In contrast, the 2nd respondent has offered 50% of its shareholding as security for the due repayment of the loans.

103. Therefore, if the account of the 1st respondent Company becomes a non-performing asset, all that the 2nd respondent will lose is only 50% of its shareholding in the first respondent company, that may be brought to sale by the banks. But if the account actually becomes a non-performing account, the personal guarantees executed by the petitioner would be invoked and the personal immoveable properties of the petitioner and other co-promoters will be taken by the bank by invoking the provisions of Securitisation Act, 2002.

104. Therefore, if the fear and apprehension sought to be created by the 1st respondent that the account of the 1st respondent may become a non-performing asset leading to disastrous consequences are true, the person who would be worst affected is the petitioner. The petitioner is not only the biological mother of the 1st respondent Company but he is also the person whose personal immoveable properties are at stake, if anything happens to the first respondent. Therefore, it is easy to discern, as King Solomon did, as to who is the real mother as between the two rival claimants, who would be most affected if the first respondent company were to die.

105. Two decisions are relied upon, by the learned counsel for the respondents 1 and 2, to drive home the point that in matters of internal administration, the Courts will not normally interfere and that the principles of corporate democracy have to be respected. I have gone through those decisions in Starlight Real Estate v. Jagrati Trading and LIC v. Escorts .

106. I am not concerned in this case with the validity of the decision taken by the Board of Directors of the Company, so as to interfere with the internal administration. This is a case where, by contract between the parties, a right of veto has been conferred upon the Petitioner. The right of veto has been exercised by the Petitioner. Despite that, a notice is issued on 15.10.2017 for a meeting of the Board on 16.10.2017, for proceeding with a rights issue that may eventually lead to the dilution of the rights of the minority shareholders. It is this procedure that is followed by the majority and the motive behind such action that is more in question in this case than the wisdom of the majority.

107. The decisions of the Supreme Court in Needle Industries v. Needle , Morgan Stanley v. Karthik Das and V.S. Krishnan v. Westfort High Tech Hospital Limited are relied upon to say that a rights issue cannot be declared invalid if it is in the interest of the Company. Similarly, the decisions in JetuJacues v. JBA , Milan Sen v. Guardian Plasticote , Hanuman Prasad Bagri v. Bagrees Cereals are relied upon to contend that rights issue have been upheld even in cases where the requirement of the Company was not so high as in this case. Companies which were not in as critical a position as the 1st Respondent herein, have been permitted by Courts to go ahead with rights issue. Therefore, it is contended that the case does not call for any interference.

108. But as I have stated earlier, I am not testing at the behest of the minority, the necessity for a rights issue. If I am actually called upon to test, on the parameters of law relating to oppression and mismanagement, the necessity for the rights issue, then the matter may have to go to the National

Company Law Tribunal, in terms of the provisions of the Companies Act, 2013. In such an event, the National Company Law Tribunal will have exclusive jurisdiction. If it does, then the Civil Courts jurisdiction will stand ousted. As a corollary, there can be no arbitration agreement, since arbitration is only an alternative dispute resolution mechanism for the Civil Court and not the Company Law Tribunal. Before the Company Law Tribunal, the very same Respondents 1 and 2 contended that the arbitration agreement excluded the jurisdiction of the NCLT. In other words, the Respondents 1 and 2 took a stand that the dispute was only in the realm of a contract. Therefore, the issue has to be tested not from the point of view of the Company Law principles but first on the basis of the contractual clauses themselves.

109. Therefore, I am of the considered view that the petitioner has a prima facie case and balance of convenience in his favour for the grant of an interim order, at least till the disposal of the application under Section 45. If an interim order is not granted, the rights issue will proceed, the share capital of the Company will stand altered and necessary entries will be made in the registers of all the statutory authorities. Thereafter, it will be extremely difficult and almost near impossibility to reverse the situation, in the event of the petitioner succeeding in the application under Section 45. A whole gamut of procedure prescribed under the Companies Act, 2013 may have to be undertaken for reduction of share capital etc., if the rights issue is now allowed to proceed and the petitioner eventually succeeds. The petitioner may also lose the right of Veto, in the event of dilution of the percentage of his holding, under Article 4.2(e).

110. Therefore, I am of the considered view that the petitioner is entitled to an interim order, till the disposal of the application under Section 45. Hence, the civil revision petition is disposed of putting on hold the further process of rights issue until the Trial Court decides the application under Section 45. If the application is decided against the petitioner and the parties are directed to go for arbitration, then the Civil Court may not continue the interim order of injunction. But if the application under Section 45 is dismissed, the interim injunction would naturally continue till the disposal of the suit or till the decision of the Trial Court in the application under Section 45 is reversed. The civil revision petition is disposed of accordingly. The miscellaneous petitions, if any, pending in this revision shall stand closed. No costs.

111. It is made clear, as I have repeatedly pointed out in several portions of this order that I have not rendered a final opinion on the fate of the application under Section 45 and hence the Trial Court, while dealing with the application under Section 45, need not be influenced by observations, if any, contained herein. The Trial Court shall dispose of the application under Section 45 of the Arbitration and Conciliation Act 1996, within a period of four weeks. _____ V.RAMASUBRAMANIAN, J.

22nd December, 2017.