

(2020) 01 SHI CK 0062
In the High Court Of Himachal Pradesh
Case No : Arbitration Case No. 8 Of 2018

Actis Consumer Grooming Products Ltd	APPELLANT
Vs	
Tigaksha Metalics Private Limited And Others	RESPONDENT

Date of Decision : 10-01-2020

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 2(2), 2(3), 2(4), 2(5), 9, 21, 27, 37(3), 37(1)(a), 40(1), 41, 43

Citation : (2020) 01 SHI CK 0062

Hon'ble Judges : Vivek Singh Thakur, J

Bench : Single Bench

Advocate : Randeep Rai, T.N. Subhramanian, Anurag Arora, Ashish Kamat, Anoj Menon, Arunshka Shah, Shreevardhini Parchure, Pranay Chitale, Oendri Neogi, Trisha Sarkar, Virender Ganda, Jishnu Saha, Ajay Kumar, Sharan Thakur, Gautam Sood, Ayandeb Mitra, Vipul Ganda, Ishan Saha, Shreya Jain, Bipin C. Negi, Rubina Virmani, Pranay Pratap Singh

Judgement

Vivek Singh Thakur, J

1. Instant petition has been filed, under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Arbitration Act' for short), against the alleged threatened and apprehended illegal actions by respondents No.1 to 6, in violation of: (a) the Companies Act, 2013; (b) the Articles of Association; and (c) Subscription and Shareholders' Deed dated November 4, 2010 (in short 'SSD')(as amended), executed inter alia between the petitioner and respondents NO. 1 to 3 and others, for passing of interim directions, especially keeping in view the proposed invocation of arbitration by petitioner under SSD, seeking restraint orders against respondents No.2 to 6 pending commencement, hearing and final disposal of the proposed arbitral proceedings under the SSD, the passing of the arbitral award therein and for a period of ninety days thereafter.

2. Respondent No.1 Tigaksha Metalics Private Limited (in short 'TMPL')is a

company incorporated under the laws of India and engaged in business of manufacturing of packaging of products, on job-work basis.

3. Petitioner is a company registered in Mauritius, a part of Actis Group, a multi-asset emerging market investor, which holds 40.17% of the paid-up equity capital of respondent No.1.

4. Respondent No.3 Super-Max Mauritius (in short 'SMM') is a company incorporated and registered in Mauritius, holding 59.83% of the paid-up equity capital of respondent No.1 and respondent No.2 Rakesh Malhotra (also referred to as 'RM') owns and/or controls respondent No.3.

5. Admittedly, parties are governed by SSD dated November, 4, 2010, wherein amongst other rights, right to nominate Directors on the Board of Directors of each entity, falling within the Group, has been granted and in the SSD and the Articles of Association of respondent No.1, "A" Shareholders means the petitioner and/or its entities; "B" Shareholders means respondent No.3 Super-Max Mauritius, "A" Director means any Director appointed by the ACTIS and "B" Director means any Director appointed by respondent No.2 (RM).

6. Clause 17 of SSD deals with Directors and Shareholders Advisory Board, wherein Clause 17.2 provides for mode and manner of appointment and removal of Directors, whereby respondent No.2 Rakesh Malhotra (RM) on behalf of respondent No.3 (SMM), is entitled to appoint to, and remove from the Board of Directors of TMPL and Board of Directors of any other Group Company (each as SMM Director), and upon removal, to appoint other in their place.

7. Till February, 2018, respondent No.7 Upendra Gupta and respondent No.8 Sanjay Jagtap were Directors of respondent No.1, i.e. "B" Directors of TMPL, appointed by respondent No.3 (SMM) (through Rakesh Malhotra (RM) on behalf of respondent No.3) and respondent No.9 Alan Edward Greenough was Nominee Director of Actis Consumer Grooming Products Ltd., i.e. "A" Director of respondent No.1 TMPL.

8. In February, 2018, respondent No.2 (RM), acting on behalf of respondent No.3 (SMM), had appointed two nominee "B" Directors, namely Rakesh Malhotra (respondent No.2) and Sameer Khan (respondent No.4) and thereafter removed respondent No.7 Upendra Gupta and respondent No.8 Sanjay Jagtap, and appointed two more nominee "B" Directors, namely Subhash Chaudhuri (respondent No.5) and Chanchal Sharma (respondent No.6) in their place and thereafter vide letter dated February 8, 2018, requisition was moved on behalf of respondent No.3 (SMM) for convening Extra Ordinary General Meeting (herein after referred to as EoGM) of respondent No.1 (TMPL) for ratifying the appointment and removal of Directors of respondent No.1 (TMPL) carried on behalf of respondent No.3 (TMM) and also to appoint Executive Chairman of respondent No.1 (TMPL) and to amend Articles of Association of respondent No.1 (TMPL), whereafter a notice dated February 8, 2018 was also issued by newly appointed Director Subahsh Chaudhuri (respondent No.5) for holding an Extra

Ordinary General Meeting of Shareholders of respondent No.1 (TMPL), on 23.2.2018, for the above referred purposes.

9. Petitioner, disputing the manner of removal of respondent No.7 and respondent No.8, and appointment of respondents No.4 to 6 as Directors of respondent No.1 and also questioning right of respondent No.2 (RM) to do so without consent of petitioner, in violation of: (a) the Companies Act, 2013; (b) the Articles of Association; and (c) Subscription and Shareholders' Deed dated November, 4, 2010 (as amended), executed inter alia between the petitioner and respondents No.1 to 3; and also proposed invocation of arbitration under SSD and before making request for arbitration in London Court of International Arbitration ("LCIA" in short), petitioner has preferred present petition under Section 9 of Arbitration Act, seeking interim relief.

10. Relevant clauses in SSD, referred on behalf of petitioner, to substantiate its claim, are as under:

Clause 16 - Reserved Matters

16.1 - Each of the Malhotra Parties undertakes for the benefit of ACTIS that he or it will procure that none of the acts specified in Schedule 2 (The Reserved Matters) are carried out by any group company without the prior written consent of ACTIS.

Clause 17.2 - Appointment of Directors

17.2.1 Subject to clause 17.2.5, RM shall, on behalf of SMM, be entitled from time to time to appoint to, and remove from the Board, the board of directors of TMPL and the board of directors of any other Group Company (each a "SMM Director"), four directors, and, upon removal, to appoint other people in their place. One of the SMM Directors on the Board and on th board of directors of TMPL shall be RM. The parties agree that RM shall be the executive Chairman of the Board and the Group (the "Chairman"), provided that in the event that the RM Service Contract is terminated or expires for any reason whatsoever, RM shall only be entitled to be a non-executive chairman of the Board and the Group. The Chairman shall not have a casting or second vote.

17.2.2 Actis shall be entitled from time to time to appoint to, and remove from, the Board, the board of directors of TMPL and the board of directors of any other Group Company, two non-executive directors (each an "Actis Director") and, upon removal, to appoint other people in their place.

17.2.3 In addition to the SMM Directors and the ACTis Directors (as the case may be), Actis and RM may, by agreement between them, appoint, and remove from, the Board, the board of directors of TMPL and the board of directors of any Group Company, one independent, non executive director (each an "INED") and, upon removal, appoint another person in his place.

17.2.4 Prior to Completion:

(a) SMM shall notify

(b) Actis shall notify

The initial appointments of the Actis Directors and the SMM Directors, shall be made pursuant to this clause 17.2.4 and Schedule 7 and clause 18.9.13, and the initial appointment of the Independent Member and the INED in respect of each of SMOH and TMPL shall be made pursuant to clause 18.9.3, and subsequent appointments and removals shall be made by notice in writing to the relevant Group Company and shall take effect immediately.

17.2.5 The Malhotra Parties agree that RM shall be the only member of the Malhotra family represented on the Advisory Board, the Board or the Board of directors of any other Group Company or any committees thereof for as long as Actis holds shares in SMOH, TMPL or any other Group Company.

Schedule 2 - Reserved Matters (as contemplated under the SSD)

Clause 2 - Memorandum and Articles of Association and

Structure:

2.1 The alteration of the memorandum of articles of association of SMOH, TMPL or any other member of the group (or any equivalent document) other than as required by law or regulation.

2.2 The alteration of any member of the group's name and registered office.

Clause 5 - Directors and Senior Management

5.1 The appointment or removal of any member of the advisory board or any director of any member of the group (other than the appointment or removal of any member of the advisory board or a director in accordance with Clause 17) or any variation in the remuneration of other benefits or terms of service of any such person.

5.2 The appointment or removal of the CEO (subject to clause 18.6.1), India CEO, the CFO and the India CFO or any variation in the remuneration or other benefits or terms of service of any such person.

11. Relevant articles of Articles of Association of TMPL, after the execution of SSD, referred on behalf of petitioner, are as under:

VI Reserved Matters - Article 11

The "B" Shareholders shall procure that none of the acts specified in Schedule 1 (the "Reserved Matters") are carried out by the company or any Group Company without the prior written consent of ACTIS.

X Proceedings at General Meetings

Article 20 - Except in case where by any provisions contained in the Act and

compulsorily applicable to this company notice for a longer period is required, at least twenty one days specifying the place, day and hour of the general meeting, provided that a general meeting may be convened by shorter notice if consent thereto is given by Shareholders in accordance with the provisions of the Act.

Article 21 - Quorum

(a) No business shall be transacted at any general meeting, unless a quorum of Shareholders is present at the time when the meeting proceeds to business.

(b) One "A" Shareholder and one "B" Shareholder present in person shall be a quorum.

Article 27 - Appointment of Directors

(a) SMM shall be entitled from time to time to appoint to, and remove from the Board, four Directors (each a "B" Director", and, upon removal, to appoint other people in their place. One of the "B" Directors shall be the executive chairman of the Board (the "Chairman"). The Chairman shall not have a casting or second vote.

(b) Actis shall be entitled from time to time to appoint to, and remove from, the Board two non-executive Directors (each an "A" Director") and, upon removal, to appoint other people in their place.

(c) In addition to the "A" Directors and the "B" Directors (as the case may be), Actis and SMM by agreement between them, appoint to, and remove from, the Board one independent, non-executive Director (the "INED") and, upon removal, appoint another person in his place.

(d) The initial appointments of the "A" Directors, and the "B" Directors and the INED shall be made in such manner as may be agreed between the Shareholders and the Company, and subsequent appointments and removals shall be made by notice in writing to the Company and shall take effect immediately.

Article 41 - Proceedings and Quorum (at board meetings)

(a) No business shall be transacted at any meeting of the Board unless a quorum is present at the time when the meeting proceeds to business and remains present during the transaction of such business. The quorum for the transaction of business of the Board shall be three Directors, one of whom must be an "A" Director and one of whom must be a "B" Director, subject in each case to Articles 13, 14 and 41(c). In the event Article 41(c) applies, then the quorum shall be any two Directors who are not prohibited from voting pursuant to Article 41(c), or in the case of any matter referred to in Articles 13 or 14, the quorum shall be any two "A" Directors.

Schedule 1 - Reserved Matters under Articles of Association

Article 5. Directors and Senior Management

(a) The appointment or removal of any member of the Advisory Board or any director of the Company or any Group Company controlled by the Company (other than the appointment or removal of a member of the Advisory Board or a director in accordance with Article 27) or any variation in the remuneration or other benefits or terms of service of any such person.

(b) The appointment or removal of the India CEO, and the India CFO or any variation in the remuneration or other benefits or terms of service of any such person.

12. Clause 43 of SSD contains provisions relating to Governing Law and Jurisdiction, which reads as under:

"43. GOVERNING LAW AND JURISDICTION

43.1 This Deed and all matters arising from it (including the agreement at clause 43.2 below to refer any dispute under the Deed to arbitration) are governed by English law.

43.2 the parties agree that any dispute arising from or connected with this Deed, including a dispute regarding the existence, validity or termination of this Deed or the consequences of its nullity:

43.2.1 shall be referred to and finally resolved by arbitration under the Arbitration Rules of the LCIA (the "Rules"), which Rules are deemed to be incorporated by reference into this clause;

43.2.2 the tribunal shall consist of three arbitrators;

43.2.3 the claimant(s) (irrespective of number) and the respondent(s) (irrespective of number) shall each appoint one arbitrator and the third arbitrator shall be appointed either by the two arbitrators appointed by the claimant(s) and the respondent(s) or, if those arbitrators cannot agree on the third arbitrator, by the LCIA Court (as defined in the Rules);

43.2.4 the seat of the arbitration shall be Geneva, Switzerland, and the language of the arbitration shall be English.

43.2.5 the parties agree that the arbitral tribunal shall have power to award on a provisional basis any relief that it would have power to grant on a final award; and

43.2.6 without prejudice to the powers of the arbitrator provided by the Rules, statute or otherwise, the arbitrator shall have power at any time, on the basis of written evidence and the submissions of the parties alone, to make an award in favour of the claimant (or the respondent if a counterclaim) in respect of any claims (or counterclaims) to which there is no reasonably arguable defence, either at all or except as to the amount of any damages or other sum to be awarded."

13. From Clause 43 of SSD, three things are very clear:

(i) SSD and matters arising from it, including reference of dispute under the SSD to arbitration, are to be governed by the English Law;

(ii) any dispute arising from or connected with SSD shall be referred to and finally resolved by arbitration under the Arbitration Rules of LCIA and the said Rules have been deemed to be incorporated by reference into Clause 43; and

(iii) seat of arbitration shall be outside India, i.e. Geneva, Switzerland and language of arbitration shall be English.

14. It is contended on behalf of respondents No.1 to 6 that in view of the aforesaid provisions of SSD, relating to Governing Law and Jurisdiction, the Arbitration Agreement, in present case, is not to be governed by Part-I of the Arbitration Act, which deals with cases where place of Arbitration is in India and, therefore, it is argued that present petition, under Section 9 of Arbitration Act, is without jurisdiction. To substantiate this plea, reliance has been placed on the pronouncements of Apex Court in *Alluminium Company v. Kaiser Alluminium Technical Services Inc.*, (2016) 4 SCC 126; *Eitzen Bulk A/S v. Ashapura Minechem Limited* and another, (2016) 11 SCC 508; *Imax Corporation v. E-City Entertainment (India) Private Limited*, (2017) 5 SCC 331; and *Roger Shashoua and others v. Mukesh Sharma and others*, (2017) 14 SCC 722.

15. Undoubtedly, Part-I of the Arbitration Act deals with the cases where place of arbitration is in India. Sections 2(2) to 2(5) of the said Act defines the scope of Part-I, which reads as under:

"2(2) This Part shall apply where the place of arbitration is in India: Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognized under the provisions of Part II of this Act.

2(3) This Part shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration.

2(4) This Part except sub-section (1) of section 40, sections 41 and 43 shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as the provisions of this Part are inconsistent with that other enactment or with any rules made thereunder.

2(5) Subject to the provisions of sub-section (4), and save in so far as is otherwise provided by any law for the time being in force or in any agreement in force between India and any other country or countries, this Part shall apply to all arbitrations and to all proceedings relating thereto."

16. Proviso to Section 2(2) of Arbitration Act has been inserted by Act No.3 of

2016, w.e.f. 23.10.2015. Prior to amendment, Section 2(2) was as under:

"This Part shall apply where the place of Arbitration is in India".

17. In the light of the unamended provisions of Section 2(2) of Arbitration Act, a Division Bench of the Delhi High Court in *Marriott International Inc. and others v. Ansal Hotels Limited and another*, AIR 2000 Delhi 377, had observed that Section 2(5) of Arbitration Act has to be read with Sections 2(2) & 2(4) and the expressions 'every arbitration under any other enactment' in Section 2(4) and 'all arbitrations' in Section 2(5) do not mean that Part-I of the Arbitration Act will apply even to arbitrations taking place outside India. The applicability of Part-I of the Arbitration Act to 'all arbitrations' means that this Part will apply to all such arbitrations being held and not only under an agreement between the parties but also under the provisions of rules and bye-laws of such associations of merchants, stock exchanges, chambers or commerce etc. also to statutory arbitrations but only when the place of arbitrations is in India. The expressions "every arbitration" and "all arbitrations" in sub-sections (4) and (5) of Section 2 cannot be stretched to mean an arbitration being held outside India.

18. A three-Judge Bench of the Apex Court in *Bhatia International v. Bulk Trading S.A. and Another*, (2002) 4 SCC 105, has held that in case of international commercial arbitrations held out of India, provisions of Part I would apply, unless the parties by agreement, express or implied, exclude all or any of its provisions and in that case, laws and rules chosen by the parties would prevail and any provision in Part I, which is contrary to or excluded by that law or rules will not apply.

19. The Apex Court in *Videocon Industries Limited v. Union of India and another*, (2011) 6 SCC 161, has held that where parties had agreed that arbitration agreement shall be governed by English Law, there it necessarily implies that parties had agreed to exclude the provisions of Part-I of the Arbitration Act and, thus, the Delhi High Court did not have jurisdiction to entertain petitioner under Section 9 of the Arbitration Act arising out of the said agreement.

20. A five-Judge Bench of the Apex Court in *Bharat Aluminium Company (BALCO) v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552, considering its earlier pronouncements, including ratio of law laid down in *Bhatia International's case* {(2002) 4 SCC 105} supra; and *Venture Global Engg. V. Satyam Computer Services Ltd*, (2008) 4 SCC 190, has held that the provision contained in Section 2(2) of Arbitration Act is not in conflict with any of the provisions, either in Part I or in Part II of said Act and further that in foreign seated international commercial arbitration, no application for interim relief would be maintainable under Section 9 or any other provision under Part-I, as applicability of Part-I of Arbitration Act is limited to all arbitrations which take place in India and, similarly, no suit for interim injunction simplicitor would be maintainable in India, on the basis of an international commercial arbitration with a seat outside India, and it was concluded that Part-I of Arbitration Act is

applicable only to all arbitrations which take place within territory of India.

21. The Apex Court in *Enercon (India) Limited and others v. Enercon GMBH and another*, (2014) 5 SCC 1, has clarified difference between 'legal seat of arbitration' and 'venue of arbitration' and has held that 'venue of arbitration' is 'a geographically convenient place or places' for holding hearings, which is distinct and different from the 'legal seat of arbitration' and by having 'venue' of arbitration outside India would not exclude the Arbitration Act to such arbitration proceedings, where only, for convenience, 'venue of arbitration' has been fixed outside India. Whereas location of 'the seat of arbitration', will determine the Courts which will have exclusive jurisdiction to oversee the arbitration proceedings and further that applying the closest and intimate connection to arbitration test, provisions of law for which the parties had agreed to apply to the arbitration proceedings would be determined. In this case, after applying three tests, i.e. (i) the law governing substantive contract; (ii) the law governing the agreement to arbitrate and performance of that agreement; and (iii) the law governing the conduct of the arbitration are Indian, it was held that parties had chosen London as a 'venue', as a neutral place to hold the meetings of arbitration only and it was not accepted that the London was the 'seat of arbitration' and it was held that curial law of England would become applicable only if there was a clear designation of 'the seat' in London.

22. In *Reliance Industries Limited and another v. Union of India*, (2014) 7 SCC 603, the Apex Court has held that where the parties, by agreement, have provided that the 'juridical seat of arbitration' shall be London, it would be clearly indicating that the parties understood that arbitration law of England would be applicable to the arbitration agreement, as the Arbitration Act does not define or mention 'juridical' seat and the term "juridical seat", on the other hand, is specifically denied in Section 3 of the English Arbitration Act.

23. Not only 'expressed exclusion' but 'implied exclusion' has also been considered sufficient, making Part-I of Arbitration Act applicable, by the Apex Court. In *Harmony Innovation Shipping Limited v. Gupta Coal India Limited and another*, (2015) 9 SCC 172, after considering stipulation in the arbitration clause, therein, it has been stated that for any dispute or difference arising under the Charter, arbitration in London to apply; and that the Arbitrators are to be commercial men, members of the London Arbitration Association; and the contract is to be construed and governed by the English Law; and that for a claim of lesser sum, the arbitration should be conducted in accordance with small claims procedure of the London Maritime Arbitration Association and, therefore, there is no other provision in the agreement that any other law would govern the arbitration clause. The 'presumed intention' of the parties was taken as crystal clear that judicial seat of arbitration would be London and there is implied exclusion of jurisdiction of Courts in India.

24. A three-Judge Bench of the Apex Court in *Kaiser Aluminium Technical Services' case* {(2016) 4 SCC 126} supra, applying *Bhatia International's case*

{(2002) 4 SCC 105} supra and referring Bharat Aluminium Co.'s case {(2012) 9 SCC 552} supra, and affirming Union of India v. Reliance Industries Limited and others, (2015) 10 SCC 213, has held that once it is found that the law governing the arbitration is English Law, Part-I of Arbitration Act stands impliedly excluded. Similar view has been taken by the Apex court in Eitzen Bulk's and Imax Corporation's cases supra.

25. In Roger Shashoua's case supra, it has been held that although "venue" is not synonymous with "seat", but in an agreement, which provides for arbitration to be conducted in accordance with Rules of ICC in Paris (a supranational body of rules), a provision that "venue of arbitration shall be London, United Kingdom" does amount to designation of 'juridical seat' as the choice of any other country as the 'seat of arbitration' inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitrations shall apply to the proceedings.

26. Before two-Judge Bench of the Apex Court, in an appeal, in Union of India v. Hardy Exploration and Production (India) Inc., (2018) 7 SCC 374, a question had arisen that when the arbitration agreement specifies the venue for holding the arbitration seat by Arbitrators but does not specify the seat, then on what basis and by which principle the parties have to decide the 'place of seat' which has material bearing for determining the applicability of laws of a particular country for deciding the post-award arbitration proceedings. No doubt, in this case, exercising the power under Order 6 Rule 2 of the Supreme Court Rules, 2013, the matter has been referred for Larger Bench for its hearing, but the Bench has reiterated that the question regarding seat and the venue for holding arbitration proceedings by the Arbitrator, arising under the arbitration agreement/international commercial arbitration agreement is primarily required to be decided, keeping in view the terms of the arbitration agreement.

27. Mere reference of an issue of judicial verdict to a Large Bench does not affect enforceability, precedent value or sanctity of established ratio of law under reference, unless stayed or restricted by the judicial order. Therefore, ratio of law, being followed consistently by the Apex Court, is not affected by the reference to the Larger Bench, that too, on a limited question, which has no bearing in the present case.

28. In view of the above discussion, it is evident that consistently, it has been held by the Apex Court that three factors, i.e. (i) the law governing the substantive contract; (II) the law governing the agreement to arbitrate and the performance of agreement; and (III) the law governing the conduct of arbitration, shall determine the applicability or inapplicability of Part-I of the Arbitration Act.

29. Exposition of law, as propounded in the aforesaid judgments, is not in dispute. However, after amendment of the Arbitration Act in 2015 by inserting proviso to Section 2(2) of the Arbitration Act, w.e.f. 23.10.2015, wherein it is

provided that provisions of these Sections shall also apply to International Commercial Arbitration, even if the place of arbitration is outside India, and an arbitral award, made or to be made in such place, is enforceable and recognized under the provisions of Part-II of the Arbitration Act, an exception has been carved out with reference to applicability of Sections 9, 27, 37(1)(a) and 37(3) of Arbitration Act, contained in Part-I.

30. In present case, in Clause 43.1, it is specifically provided that SSD and all matters arising from it, including the agreement at Clause 43.2 to refer any dispute under the SSD to arbitration are governed by English Law and Clause 43.2.1 provides that dispute between the parties shall be referred to and finally resolved by arbitration under the arbitration Rules of the LCIA with further qualification that the said Rules are deemed to have been incorporated by reference into this clause and further Clause 43.2.4 provides that seat of arbitration shall be Geneva, Switzerland, i.e. out of India. All three aforesaid factors are unambiguously excluding the applicability of Part-I of Arbitration Act with regard to resolution of dispute between the parties herein, rather the parties have categorically agreed to be governed by English Law and Rules of LCIA. Therefore, 'seat of arbitration', referred in Clause 43.2.4 appears to be the 'venue', as a neutral place to hold the meetings of arbitration only. Even such a situation does not make any difference, as there is express agreement for application of English Law and Rules of LCIA.

31. Dispute between parties herein, has arisen in India, the property, with respect to which dispute has arisen, is also situated in India, which shall be subject matter of execution of arbitral award, after passing thereof. Therefore, the award is to be enforced in India. It is neither in dispute between the parties nor has any objection been raised about the enforceability and recognition of the arbitral award, to be passed made in present case, under Part-II, Chapters I & II, of the Arbitration Act, dealing with 'Enforcement of Certain Foreign Awards'.

32. Though as held by the Apex Court, referred supra, Part-I of the Arbitration Act shall have no applicability in present case, but in aforesaid facts and circumstances, for insertion of proviso to Section 2(2), w.e.f. 23.10.2015, Sections 9, 27, 31(1)(a) and 37(3) of the Arbitration Act are applicable in present case. The property, subject matter of the arbitral proceedings is situated within jurisdiction of this High Court. Therefore, this Court has jurisdiction to entertain the present petition, filed under Section 9 of the Arbitration Act.

33. It is also contended on behalf of respondents No.1 to 6 that present petition has lost its relevance and efficacy, after expiry of ninety days from the date of its filing, as before that it was mandatory for the petitioner to initiate arbitration proceedings but it has failed to do so. Petitioner has placed on record request for arbitration, made on behalf of ACTIS in the LCIA, on 19.4.2018, for resolving the dispute between the parties. Present petition has been filed on 10.2.2018 and date '19.4.2018', of making request for arbitration, is within ninety days from that date and receipt of copy of such request is not disputed. Section 9 of

Arbitration Act empowers the Court to entertain an application, before or during arbitral proceedings or at any time after the making of arbitral award but before it is enforced, to pass any order as provided in it as an interim measure of protection as may appear to it to be just and convenient and in case of passing of an order for an interim measure of protection, the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.

34. In present case, order for interim measure of protection was passed by this Court before commencement of arbitral proceedings. A request has been made for arbitral proceedings on 19.4.2018 and as per Section 21 of the Arbitration Act, commencement of arbitral proceedings, unless otherwise agreed by the parties in respect of particular dispute, will be on the date on which a request for referring the dispute for arbitration is received by the respondent and it is not in dispute that the said request was sent to respondent No.2, through E-mail, well within ninety days from the date of passing of interim order by the Court. Therefore, I find no force in this contention raised on behalf of respondents No.1 to 6.

35. In the petition, various restraint orders have been prayed, raising different issues. However, from the first date of hearing, whence on giving undertaking by learned counsel for respondents No.1 to 6 not to hold EoGM of Shareholders, scheduled for 23.2.2018, it was ordered accordingly by the Court, no other prayer was ever pressed by or on behalf of the petitioner, during pendency of the petition. Therefore, there is no necessity to discuss other issues printed in the petition, except that whether issuance of notice to convene EoGM of shareholders of TMPL on 23.2.2018, given by Subhash Chaudhuri (respondent No.5), was within his competence or not and if it was within his competence, whether the Special Business notified in the said notice was beyond competence of respondents No.1 to 6, especially respondent No.5 Subhash Chaudhuri, being covered under Reserved Matters, wherein there is prohibition to carry out the said business without prior written consent of petitioner.

36. It is undisputed that on the basis of request made on behalf of the petitioner, arbitration proceedings are undergoing and are at last stage before the Arbitral Tribunal and the same are to be governed by LCIA Rules. In the said petition, respondent No.2 Mr. Rakesh Malhotra is respondent No.1 and respondent No.1 TMPL is respondent No.4, and respondent No.3 Super Max Mauritius is respondent No.5, whereas other respondents are not party therein and Mr. Rajinder Kumar Malhotra, Mr. Rajiv Malhotra and ARVEE Family Foundation are respondents No.2, 3 and 6, respectively.

37. Before Arbitral Tribunal, petitioner has claimed various claims and one of those is that Mr. Rakesh Malhotra (respondent No.2), Mr. Rajinder Kumar Malhotra and Mr. Rajiv Kumar Malhotra are in breach of their obligations under SSD, including under Clause 16(1), 22.6.4 and 14.2; and in relation to the Take Over and the Competition against the Group, TMPL is in breach of Clause 16.2 of

the SSD. Other reliefs before Arbitral Tribunal are in respect to insolvency proceedings, prayer for direction to the respondents not to continue to act in breach of SSD, with further prayer for restraint orders on various issues, including to attempt to breach the SSD Reserved Matters and also for damages for losses suffered by the petitioner as a result of respondents' breaches of SSD and/or pursuant to the indemnity Clause 16.4 of the SSD, and the claim therein relevant to present petitioner is only with respect to breach on the part of Mr. Rakesh Malhotra (respondent No.2), regarding his obligations under the SSD, particularly matters pertaining to the Reserved Matters.

38. Article 25.1(iii) of LCIA Rules empowers the Arbitral Tribunal to order on a provisional basis, subject to a final decision in an award, any relief which the Arbitral Tribunal would have power to grant in an award. Before Arbitral Tribunal, there is no specific issue raised with regard to notice issued by respondent No.5 Subhash Chaudhuri to convene EoGM and Special Business proposed to be transacted therein, but it is the issue being pressed in present petition specifically.

39. Issue agitated in present petition is to be decided purely on the basis of provisions of SSD and Articles of Association, with reference to factual matrix placed on record and no law point, propounded by various Courts, including the Apex Court, in pronouncements referred by learned counsel for parties, is required to be considered therein. Therefore, I do not find any logic to refer plethora of case law cited by learned counsel for parties.

40. In the notice dated 8.2.2018 given to convene EoGM, following Special Business has been proposed to be transacted:

Item No.1: Ratification of appointments of Directors Mr. Rakesh Malhotra (respondent No.2) and Mr. Sameer Khan (respondent No.4).

Item No.2: Ratification of removal of Directors Mr. Upendra Gupta (respondent No.7) and Mr. Sanjay Jagtap (respondent No.8).

Item No.3: Ratification of nomination of Directors Mr. Subhash Chaudhuri (respondent No.5) and Mr. Chanchal Sharma (respondent No.6), effective from 6.2.2018.

Item No.4: To appoint Executive Chairman of TMPL.

Item No.5: To amend Articles of Association of TMPL.

41. On perusal of copy of request for arbitration, it is apparent that the issue of appointment of Mr. Rakesh Malhotra, Mr. Sameer Khan, Mr. Subhash Chaudhuri and Mr. Chanchal Sharma (respondents No.2, 4, 5 & 6 herein) and removal of Directors Mr. Upendra Gupta (respondent No.7) and Mr. Sanjay Jagtap (respondent No.8) has not been specifically raised. The issue raised before the Arbitral Tribunal is general in nature that respondents therein are acting in breach of their obligations under SSD, including the Reserved Matters contained in Clauses 16.1 and 16.2, which may also include act of appointment and

removal of Directors by respondent No.2 (RM). Ultimately, parties have to abide by the final decision in arbitral proceedings. However, for interim measure, this Court can look into the provisions of SSD and Articles of Association, referred by the parties, quoted supra, for the purpose of determining that as to whether Special Business notified to be transacted in the EoGM, notified to be convened by respondent No.5 Mr. Subhash Chaudhuri, pertains to Reserved Matters or not and whether said Mr. Subhash Chaudhuri was having authority to give notice for the said meeting or not.

42. In Item No.1 of Special Business of EoGM, appointment of Directors namely Mr. Rakesh Malhotra and Mr. Sameer Khan has been proposed to be placed for ratification from 6.2.2018, under Article 27 of Articles of Association. Similarly, in Item No.2, removal of Directors Mr. Upendra Gupta and Mr. Sanjay Jagtap has been proposed to be placed in meeting with Item No.3, wherein ratification of appointment of Directors Mr. Subhash Chaudhuri and Mr. Chanchal Sharma as Nominee-B Directors, effective from 7.2.2018, under Article 27 of Articles of Association, has been proposed to be transacted.

43. Article 27(a) provided that SMM (respondent No.3) shall be entitled from time to time to appoint to, and remove from the Board, four Directors (each a "B" Director) and, upon removal, to appoint other people in their place and one of "B" Directors shall be Executive Chairman to the Board (B-Chairman).

44. Article 27(d) also provides that such appointment, subsequent to initial appointment, shall be made by notice in writing and shall take effect immediately.

45. In Schedule-1 of Articles of Association, dealing with Reserved Matters, in Clause 5, it is provided that the appointment or removal of any member of Advisory Board or any Director of the Company or any Group Company but controlled by the Company but other than the appointment or removal of member of Advisory Board or a Director in accordance with Article 27, shall be a Reserved Matter and for dealing with Reserved Matters written consent of the petitioner is necessary. As evident from Clause 5 of Reserved Matters (Schedule 1 of Articles of Association), appointment or removal of a Director, in accordance with Article 27, is not a Reserved Matter under Articles of Association.

46. In SSD also, Clause 16 provides that prior written consent of ACTIS is necessary for carrying out business related to Reserved Matters. Clause 17.2 provides method of appointment of Directors. Clause 17.2.1 provides that subject to Clause 17.2.5, respondent No.2 (RM), on behalf of respondent No.3 (SMM), shall be entitled from time to time to appoint to, and remove from, the Board of Directors of TMPL and Board of Directors of any other Group Company (each a SMM Director), four Directors, and, upon removal, to appoint other people in their place and one of the SMM (respondent No.3) Directors on the Board and on the Board of Directors of TMPL shall be RM (respondent No.2). Clause 17.2.5 provides that RM (respondent No.2) shall be the only member of Malhotra family represented in the Advisory Board or the Board of Directors of

any other Group Company or any committees thereof for as long as petitioner holds share in SMOH, TMPL or any other Group Company.

47. Schedule-2 of SSD deals with Reserved Matters, wherein in Clause-2, it is provided that 'Memorandum and Articles of Association and Structure' shall be a Reserved Matter. Clause-5 of it deals with 'Directors and Senior Management', wherein under Clause 5.1 it is provided that appointment or removal of any member of the Advisory Board or any Director or any member of the Group Company but other than appointment or removal of a member of the Advisory Board or a Director in accordance with Clause 17, shall be Reserved Matter.

48. In the terms and conditions of SSD also, as evident from the provisions referred supra, it is clear that appointment or removal of a Director in accordance with Clause 17 of SSD is not a Reserved Matter and under Clause 17.2.1, respondent (Rakesh Malhotra), on behalf of respondent No.3 SMM, is entitled to appoint to, and remove from, the Board, Board of Directors of TMPL, four Directors and upon removal to appoint other people in their place and in this clause it has also been agreed that respondent No.2 shall be Executive Chairman of the Board and the Group.

49. As per Clause 17.2.4, like Article 27(d) of Articles of Association, appointment of Director by RM, subsequent to initial appoint, shall be made by written notice and shall take effect immediately.

50. In view of above relevant provisions of SSD and Articles of Association, referred by the parties and discussed supra, appointment and removal of Directors, proposed to be placed in EoGM for transaction in Items No.1,2&3, is not Reserved Matter and such appointment and removal has taken effect immediately on its notice and thus respondents No.2, 4 to 6 have become "B" Directors of respondent No.1 with immediate effect on issue of notice, including Subhash Chaudhuri and Chanchal Sharma, and they are entitled to act as such unless their appointment is declared invalid by competent Court of law, and as per Clause 5.2 of Schedule-2 of SSD, containing Reserved Matters, and Clause 5(b) of Schedule-1 of Articles of Association, containing Reserved Matters, business contained in Item No.4 to appoint Executive Chairman of the Company is a Reserved Matter and, therefore, is a business prohibited to be carried out without written consent of petitioner, as is required to carry on business related to Reserved Matter. Similarly, the business contained in Item No.5, i.e. to amend Articles of Association of Company, as contained in Clause 2 of Schedule-2 to the SSD and Clause 2 of Schedule-1 of Articles of Association, is also a Reserved Matter and written consent of ACTIS is necessary for dealing with Reserved Matters, and, therefore, amendment in Articles of Association cannot be carried out without written consent of the petitioner.

51. In view of the aforesaid discussion, this petition is disposed of with observation that Special Business notified in Items No.1 to 3 does not fall in the category of Reserved Matters and respondent No.3 was entitled to appoint and

remove the Directors, as proposed to be transacted in Item No.1, 2 and 3 without written consent of petitioner, and business to appoint Executive Chairman of the Company can also be placed before house in the EoGM without written consent of the petitioner and Mr. Subhash Chaudhuri being appointed validly by RM (respondent No.2), exercising its power under Clause 17.2.1 of SSD and Clause 27 of Articles of Association, is competent to act as a Director, but definitely subject to mandatory requirements to be complied with in accordance with law, as applicable to the case. However, respondents No.1 to 6 are not entitled for amending the Articles of Association of Company without written consent of the petitioner.

52. During pendency of petition, it has been brought on record that respondents No.7 and 8 have already resigned as Directors of respondent No.1-Company. In fact their resignation, after their removal, may not have any sanctity, as they have lost lien to the Directorship of the Company on the date when they were removed by respondent No.2 (RM) in February, 2018.

53. As noticed supra, under Article 25 of LCIA Rules, LCIA is also empowered to pass any order for interim measure of protection. The parties are at liberty to approach the LCIA for any further interim order.

54. Any observation made with respect to aforesaid subject matter will not have any impact on the arbitration proceedings, pending before the LCIA, and this order is being passed in the light of the material placed before the Court. Ultimately, the parties shall abide by the decision of Arbitral Tribunal.

55. No other point urged.

Petition alongwith pending application(s), if any, stand disposed of in aforesaid terms.