

(2016) 04 GAU CK 0068

In the Gauhati High Court

Case No : Co. Appeal No. 2 of 2015 & CRP No. 409 of 2015

Calcom Cement India Limited And another

APPELLANT

Vs

Binod Kumar Bawri and another

RESPONDENT

Date of Decision : 07-04-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 8
Companies Act, 1956 — Section 397, 398, 402, 403

Citation : (2016) 196 CompCas 130 : (2016) 4 GauLJ 445 : (2016) 4 GauLT 139 : (2016) 2 NEJ 411 : (2016) 136 SCL 1

Hon'ble Judges : Suman Shyam, J.

Bench : Single Bench

Advocate : G.N. Sahewalla, Sr. Advocate, R. Banerjee, Sr. Advocate, R. Dubey, Advocate, A. Roy, Advocate, R. R. Kaushik, Advocates, for the Appellant; P. Chatterjee, Sr. Advocate, R. Bachawat, Sr. Advocate, S. Dutta, Sr. Advocate, Orijit Chatterjee, Advocate, S. Mit

Final Decision : Dismissed

Judgement

Suman Shyam, J. (CAV) - Heard Mr. G.N. Sahewalla, as well as Mr. Ratnanko Banerjee, learned senior counsels appearing for the appellants/ petitioners. Also heard Mr. P. Chatterjee, Mr. S. Dutta and Mr. R. Bachhawati, learned senior counsels representing the respondent Nos. 1 to 15 in the Company Appeal as well as the Revision Petition. None appeared for the remaining respondents.

2. The Company Appeal has been filed under Section 10(F) of the Companies Act, 1956 challenging the judgment and order dated 27/07/2015 passed by the learned Company Law Board, Calcutta Bench in C.P. No. 143/2015 by means of which an ad-interim order has been passed directing the parties to maintain status quo as regards the share holding of the Company and the composition of the Board of Directors besides restraining both the rival groups from creating further third party interest over the fixed assets of the company without the leave of the Company Law Board (Herein - after referred to as CLB).

3. The appeal was admitted by this Court to be heard on the following questions of law :-

"1. Whether the learned company law board was justified in the eye of law in passing an interim order without recording any reasons thereof and without recording any findings as regards existence of prima facie case, balance of convenience or question of irreparable loss ?

2. Whether the impugned order passed by the learned Company Law Board is without jurisdiction and hence, a nullity in the eye of law?"

4. The Revision Petition has been filed by the appellants in the Company Appeal as petitioners with a grievance that without deciding the application filed by the petitioners under section 8 of the Arbitration and Conciliation Act, 1996 (in short the Act of 1996) numbered and registered as C.A. No 902 of 2015, the CLB proceeded to hear the Company Petition being C.P. No 143 of 2015 on the question of interim relief, thereby exceeding its jurisdiction in the matter. For a better understanding of the lis, it would be essential to briefly record the factual matrix of the case.

5. The appellant No.1 company, namely, M/s Calcom cement India Ltd. (here-in-after referred to as "the company") was originally incorporated in the year 2004 under the provisions of Companies Act, 1956 with its registered office situated at Anil Plaza ?II, ABC, G.S. Road, Guwahati-781005, Assam. The respondent nos. 1 to 9 (referred to as the "Bawri Group") were originally in control of the company which was engaged in the business of manufacturing and sale of cement, having two manufacturing units situated in the State of Assam. With a view to strengthen and expand the business activities of the company, the "Bawri Group" had taken a decision in the month of January, 2012 to induct the appellant No. 2 as a strategic investor. Accordingly, on 16/01/2012, several agreements including a share holders agreement was executed by and between the "Bawri Group" and the appellant No.2, (referred to as the "Dalmia Group") so as to pave the way for the Appellant No. 2 to infuse the desired funds into the company notwithstanding the fact that the management of the company would still remain under the control of the "Bawri Group". However, despite the same, the appellant No. 2 company had failed to release the funds as per the terms and conditions of the agreement, as a result of which, the "Bawri Group" was compelled to handover the control and management of the company to the appellant No. 2. In order to facilitate such change of management, several agreements were executed by and between the "Bawri Group" and the appellant No. 2 on 30/11/2012 laying down the terms and conditions mutually agreed by the parties and the Articles of Association of the company was also suitably amended so as to incorporate such terms and conditions of the share holders agreement dated 16/01/2012 as well as the amendments brought about in the agreement dated 30/11/2012. By virtue of the aforesaid transactions, the control and management of the company stood transferred to the appellant No. 2.

6. According to the "Bawri Group", despite having the necessary expertise in the cement industry and notwithstanding the share holders agreement dated 16/01/2012, the appellant No.2 had refused to release the required funds as per the terms of the shareholders agreement and on the contrary, had started indulging in various malafide activities which were injurious to the interest of the company and its share holders. Since the appellant No. 2 did not honour its commitment under the shareholders agreements, and instead demanded that the respondent Nos 1 to 9 were liable to sell their share holding in the Company to the appellant No. 2 for Rs. 1/- under the default clause due to alleged non-fulfillment of the project conditions, the "Bawri Group" had to approach the Delhi High Court by filing an application under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act of 1996), numbered and registered as OMP(I) No. 279/2015 seeking certain interim measures of protection against the appellant No. 2 whereby, the Delhi High Court had passed an order dated 29/08/2015 recording an undertaking given on behalf of the appellant No.2 to the effect that until the next date fixed, there would be no transfer of share holding in the company which are being held in the in the Escrow account.

7. It further appears from the record that the respondent nos. 1 to 15 herein had filed Company Petition No. 143/2015 under Section 397, 398, 402, 403 and 406 of the Companies Act, 1956 alleging oppression and mismanagement against the appellant No.2. The case projected in the aforesaid company petition, in a nutshell, is that the respondent Nos. 1 to 15 i.e. the company petitioners have a share holding of 17.8% in the paid up share capital whereas the appellant No. 2 is currently holding 76% shares in the paid up capital of the company. The "Bawri Group", who are in the minority share holding, have made substantial investment in the company. However, after the change of management of the company, the appellant No. 2 has been conducting the affairs of the company in violation of the Articles of Association, thereby indulging in activities causing loss and injury to the interest of the company and its share holders. The gist of the allegation made in the company petition is that the appellant No.2 has failed to furnish any cash flow plan as per the requirement of Article 62 read with the relevant clause of the share holders agreement, neither any business plan in the year 2013-14 has been furnished. It has also been alleged that loans were being obtained at a much higher rate of interest so as to benefit the associates of the appellant No. 2 in contravention of the provisions of Article 15(II) of the Articles of association of the company causing loss to the company and that there has been no rights offers made to the existing share holders of the company in terms of Article 15(iii)(a) and (b). The respondent Nos. 1 to 15 have also alleged that at the instance of the appellant No.2, 52% of the clinker were being purchased from the groups connected with appellant No. 2 at gross over value causing loss to the company. Not only that, loans were being taken from the respondent No. 33 (Adhunik cement Ltd), a wholly owned subsidiary of the appellant No. 2, at an objectionable rate without obtaining prior consent of the "Bawri Group" as per

the mandate of Article 82(g). Similarly, the transactions made with the respondent No. 37 without obtaining the consent of the "Bawri Group" by giving a go bye to the requirement of Article 92(j). Having indulged in such illegal activities, Article 62(a) had been inserted only to legitimise such collusive transactions made at the instance of the appellant No. 2 with its associate companies for their mutual benefits at the cost of the company. The respondent Nos. 1 to 15 have, therefore, alleged that the acts of the appellants are harsh, burdensome and oppressive to the respondent Nos. 1 to 15 and is highly prejudicial to the interest of the company and its share holders. The aforesaid respondents have also stated in the company petition that on account of such illegalities indulged in by the appellant No. 2, the said petitioners have lost faith and confidence on the appellants and have several reasons to believe that the appellants would further alter or manipulate the records of the company and by following such approaches would siphon off the assets of the company so as to diminish the value of the company by bringing it to a state of insolvency.

8. Upon receipt of notice in connection with the CP No. 143/2015, the appellant Nos 1 and 2, had appeared and filed an application bearing No. CA 907/2015 under Section 8 of the Act of 1996 invoking the arbitration clauses contained in clause 17 and in the agreements dated 16-01-2012 and 30-11-2012 respectively, thereby requesting the learned CLB to refer the matter for arbitration. The appellant Nos. 1 and 2 had contended in the said application that the controversy projected in the company petition are essentially founded on the alleged breach of the terms and conditions of the share holders agreement dated 16/01/2012 and hence, the same would squarely fall within the purview of the arbitration clause contained therein. That apart, since the respondent Nos. 1 to 9 has already invoked the arbitration agreement by approaching the Delhi High Court by filing the application under Section 9 of the Act of 1996, the dispute raised in the company petition also deserved to be referred to settlement by means of Arbitration.

9. After hearing the learned counsel for the parties, the learned CLB had passed the interim order dated 27/07/2015 directing the parties to maintain status quo as regards the share holding and composition of the Board of Directors of the company with a further restraint order upon both the rival groups from creating any third party interest over the fixed assets of the company without the leave of the Board. By the order dated 27/07/2015, the appellant Nos. 1 and 2 were allowed three weeks time to file reply affidavit. The respondent Nos. 1 to 15 (i.e. the company petitioners) were also allowed two weeks time to file their reply to the CA No. 907/2015. The matter was posted for hearing on 04/09/2015.

10. It appears from the records that instead of filing their reply affidavit in terms of the direction passed by the learned Company Law Board, the appellant Nos. 1 and 2 had approached the Calcutta High Court assailing the order dated 27/07/2015 passed by the learned CLB. However, by order dated 08/09/2015, the Calcutta High Court had refused to entertain the appeal on the ground of lack

of territorial jurisdiction, as a result of which the Company Appeal No. 2/2015 has been filed by the appellants before this Court challenging the legality and validity of the aforesaid order dated 27/07/2015.

11. Civil Revision Petition bearing No. CRP 409/2015 has been filed by the appellants as petitioners invoking the jurisdiction of this Court under Article 227 of the Constitution of India assailing the said order dated 27/07/2015 passed by the learned Company Law Board, primarily on the ground that by issuing the impugned order dated 27/07/2015 without first deciding CA No. 907/2015, the learned Company Law Board had committed manifest illegality and erred in exercise of its jurisdiction vested by law.

12. By referring to the impugned order dated 27/07/2015, Mr. Banerjee, learned senior counsel appearing for the appellants submits that a bare reading of the said order would go to show that no reason, whatsoever has been recorded by the learned CLB before passing an order of injunction putting undue fetters in the authority of the appellants to run and manage the affairs of the Company. Mr. Banerjee submits that his clients i.e. the Dalmia Group has already invested more than 500 crores in the appellant No. 1 company and as such, being the majority shareholders in the Company, is entitled to manage the affairs of the said company in the manner it chooses. However, in view of the impugned order dated 27/07/2015 passed by the CLB, the right and freedom of his client to manage the company had been severely curtailed.

13. By referring to a decision of the Hon^{ble} Supreme Court rendered in the case of (2010) 3 SCC 732 (Secretary and Curator, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity and others), Mr. Banerjee submits that reasons are the heart beat of every conclusion. In the absence of any mention in the order as to the reasons for issuing the restraint order by the learned Company Law Board, the impugned order dated 27/07/2015 is a nullity in the eye of law and has become indefensible. In support of his aforesaid argument, Mr. Banerjee has also placed reliance on the decisions of the Calcutta High Court reported in (2007) 4 CHN 712 (Uniworth Resorts Ltd. v. Ashok Mittal and Ors) ; Birla Corporation and others v. Rameshwara Jute Mills and Ors (CP No 57 of 2004) ; Sadbhav Engineering Ltd. v. Montecarlo Ltd. reported in (2013) SCC Online Guj 4375, an unreported decision of the Calcutta High Court being order dated 14/09/2015 passed in APO No. 374/2015.

14. Arguing in support of the second question of law, Mr. Banerjee submits that law is well settled that once an application under Section 8 is filed before a court or a judicial authority it will be obligatory for the said authority to refer the dispute to Arbitrator if there is a valid arbitration agreement covering such dispute. In the present case, the learned CLB has committed manifest illegality in exercising jurisdiction vested by law by issuing the impugned order dated 27/07/2015 during the pendency of the CA No. 907/2015 without addressing the objection raised under Section 8 of the Act of 1996, by the appellant companies.

15. Referring to the decision of the Apex Court in the case of Hindustan Petroleum Corporation Ltd. v. Pinkcity Midway Petroleums reported in (2003) 6 SCC 503, Mr. Banerjee has forcefully argued that since the existence of the arbitration agreement is not in dispute, it was mandatory for the learned CLB to take up the said application for disposal first in point of time and thereafter, refer the matter to arbitration leaving all the contentious issues to be decided by the arbitral tribunal . He submits that once the application under Section 8 is filed, the Court or judicial authority would not have the jurisdiction to pass any order affecting the rights and interests of the parties by ignoring the objection raised under Section 8 of the Act of 1996. In support of his aforesaid argument, Mr. Banerjee has placed reliance upon the decision of the Supreme Court in the case of M/s. Sundaram Finance Ltd. and another v. T. Thankam reported in (2015) SCC Online 147. The learned senior counsel, therefore, submits that the impugned order dated 27/07/2015 having been passed by the learned CLB by ignoring the Section 8 application filed by the appellants, the same is an order without jurisdiction and hence, unsustainable in the eye of law.

16. Resisting the arguments made by and on behalf of the appellants, Mr. P.C. Chatterjee, learned senior counsel appearing for respondent Nos. 1 to 15 has argued that from the text of the order dated 27/07/2015 it would be clear that the same is an ad-interim order passed by the learned CLB in exercise of its discretionary powers conferred under Section 402 of the Companies act, 1956. The very fact that three weeks time had been granted to the appellants to file their counter affidavit and two weeks? time to the present respondents to file their reply affidavit in CA No. 907/2015, clearly goes to show that learned Company Law Board had not disposed of the prayer of interim order made in the CP No. 143/2015 or the objection raised under Section 8 of the Act of 1996 in CA No. 907/2015. Therefore, submits Mr. Chatterjee, the observations recorded in the impugned order are for the limited purpose for passing an adinterim order only and as such the learned CLB cannot be faulted for not recording elaborate reasons in the said order at the stage of passing an ad-interim order.

17. Mr. Chatterjee further submits that short of recording detailed reasons, the CLB has recorded sufficient reasons in the order 27/07/2015 disclosing its mind as to the factors that had led to the passing of the impugned order. The learned senior counsel submits that the interim order passed by the learned Company Law Board is aimed at granting minimum interim protection to the petitioners so as to ensure that the company petition is not rendered infructuous. He submits that the restraint order is equally applicable to both the parties and is merely aimed at maintaining status quo as regards the share holding pattern and the assets of the company pending fuller consideration of the contentious issues. In any events submits Mr. Chatterjee, in view of the discretionary power vested upon the learned Company Law Board under Section 402 of the Companies Act, the impugned order dated 27/07/2015 cannot be treated as null and void merely because the same does not record elaborate reasons, if this Court is otherwise satisfied that the order was called for in the facts and circumstances of the case.

In support of his aforesaid argument, Mr. Chatterjee has relied upon a decision of the Calcutta High Court in NEPC Mycom Ltd. v. Magma Leasing Ltd. and Anr. reported in (1999) 2 CALLT 347(HC), Cosmosteel Pvt. Ltd. and others v. Jairam Das Gupta and others reported in (1978) 1 SCC 215, Wander Ltd. and another v. Antox India P. Ltd. reported in 1990 (supp) SCC 727; Debi Jhora Tea Co. Ltd. v. Barendra Krishna Bhowmick and others reported in (1980) 50 Comp Cas 771 (Cal) as well as the decision in the case of Uma Devi and others v. Amal Kr. and others in Company Petition No. 1163/2010.

18. Referring to the averments made in the Company petition, Mr. Chatterjee further contends that the allegations of oppression and mismanagement made in the company petition are on account of violation of the Articles of Association of the Company and the other misdeeds on the part of the appellant No 2 which do not strictly fall within the domain of the share holders agreement. The power and jurisdiction to entertain a petition alleging oppression and mismanagement under Section 397 and 398 has been statutorily vested upon the Company Law Board and the said jurisdiction cannot be assumed by the arbitrator nor can the Company Law Board abdicate its jurisdiction to decide the disputes raised within the ambit of Section 397 and 398 of the Companies Act once a bonafide complaint is brought before it. In support of the aforesaid argument, Mr. Chatterjee has relied upon a decision of the Hon'ble Supreme Court in the case of Booz Allen and Hamilton Inc v. SBI Home Finance Ltd. and Ors reported in AIR 2001 SC 2007 ; Claude-Lila Parulekar (Smt) v. Sakal Papers (P) Ltd. and others reported in (2005) 11 SCC 73 as well as another decision of the Bombay High Court in the case of Rakesh Malhotra v. Rajinder Kumar Malhotra reported in (2014) SCC Online Bom 1146

19. Defending the observations made by the CLB in the impugned order dated 27/07/2015 to the effect that respondent Nos. 10 to 15 not being parties to the Arbitration agreement, there was no scope for referring the dispute to arbitration, Mr. Chatterjee submits that in the instant case there is no commonality of parties and hence, the learned Company Law Board had rightly assumed the jurisdiction in the matter by noticing the aforesaid fact . He submits that in the case of Sukanya Holdings (P) Ltd. v. Jayesh Pandya and another reported in (2003) 5 SCC 531 law has been settled by the Apex Court that a dispute can be referred to the arbitration only if all the parties are signatory to the arbitration agreement and the entire dispute is covered under the arbitration agreement. Contending that the respondent No 10 to 15 are not party to the agreement and have a common grievance of misuse of the companies resources by the appellant no 2, It would not be permissible to refer the disputes to arbitration if all the parties are not signatory to the arbitration agreement nor is it permissible to bifurcate the cause of action. In support of his aforesaid contention, Mr. Chatterjee has also referred to a decision of the Punjab and Haryana High Court rendered in the case of Sudarshan Chopra and others v. Company Law Board and others reported in (2004) SCC Online P and H 128, to contend that the statutory jurisdiction of the Company Law Board under Section

397 and 398 read with Section 402 and 403 cannot be ousted by seeking refuge under an arbitration clause. The learned counsel has also relied upon a decision of the Apex Court in the case of Needle Industries (India) Ltd and others v. Needle Industries Newey (India) Holding Ltd. and others reported in (1981) 3 SCC 333 as well as the decision of the Madras High Court in the case of Sporting Passtime India Ltd. v. Kasthuri and Sons Limited reported in 2006 (4) CTC 377 to contend that since the jurisdiction to adjudicate a petition of oppression and mismanagement is conferred upon the CLB under the provisions of Sections 397, 398, 402 and 403 of the Act, the Arbitrator would not be competent to adjudicate upon the issues raised in the company petition and therefore, the question of referring such a dispute to Arbitrator does not arise.

20. In his reply argument, Mr. Banerjee has made an attempt to distinguish the authorities cited on behalf of the respondents to contend that the decisions cited by Mr. Chatterjee are not applicable in the facts and circumstances of the present case. He submits that the decisions cited by Mr. Chatterjee lay down that the Company Law Board has wide powers to grant relief under section 397/ 398 of the Companies Act. However, none of the authorities relied upon by the learned counsel for the respondent throw any light on the core question involved in these proceedings as to whether the jurisdiction of the Company Law Board would be ousted upon filing of the application under section 8 of the Arbitration and Conciliation Act, 1996. Mr. Banerjee has, however, argued that the submissions advanced by the Bawri Group are premature since the application filed under section 8 has not been finally decided by the CLB.

21. Referring to the decision of the Punjab and Haryana High Court in the case of Sudarshan Chopra (supra) cited by the respondents, Mr. Banerjee submits that in the said decision, on facts it was held that there was no arbitration agreement covering the entire dispute and there were 2.4% independent shareholders who would be prejudiced if the matter was referred to Arbitration. He submits that the aforesaid decision is distinguishable on facts and the same does not lay down any proposition of law of universal application.

22. The learned senior counsel has further made an attempt to distinguish the decisions relied upon by the respondents in the case Booz Allen and Hamilton Inc (Supra) and Sukanya Holdings Pvt Ltd (supra) by contending that disputes under section 397/398 are not included in the list of non-arbitrable disputes laid down by the Apex Court. Since the issue herein is as to whether the subject matter of a judicial proceeding is the subject matter of an arbitration proceeding or not hence, the law laid down in the case of Sukanya Holdings is not relevant in the facts of this case. Referring to the decision of Rakesh Malhotra (supra) Mr. Banerjee submits the said decision does not lay down that there would be an absolute bar in referring the disputes involved in a 397/398 petition for arbitration.

23. I have heard the elaborate arguments advanced by and on behalf of both the parties and have perused the materials available on record.

24. Coming to the first question of law framed by this Court, it would be apposite to refer to the observations made by the learned Company Law Board in paragraph 5.1 of the order disclosing the reasons for passing the impugned order dated 27/07/2015, which is quoted below :-

"5.1. In the Company Petition, the allegations have been levelled as to the violation of certain Articles contained in the Articles of Association and mismanagement including diversion of fund. Thus, there is prima facie case of oppression and mismanagement on the part of the Respondents. However, the Respondents Advocate has controverted by filing the Company Application being CA No. 907 of 2015 seeking stay of all proceedings in the present Company Petition on the ground that the allegations made in the Company Petition are in relation to the breach of the terms of the Shareholders' Agreement dated 30.11.2007 and several other agreements. In this context, it is pertinent to observe that the Petitioner Nos. 10 to 15 in the present Company Petition are not the signatories to the aforesaid agreements and also, in the arbitration proceeding. Moreover, the issue/allegations relating to non-adherence to certain Articles of the Articles of Associations and acts of mismanagement cannot be adjudicated by the Arbitrator and hence, several prayers made in the present Company Petition cannot be considered/allowed in the arbitration proceedings. On the other hand, Section 397/398 read with Section 402 of the Companies Act, 1956 deals with the oppression and mismanagement and the same is a code in itself and this covers the powers which cannot be exercised by the Arbitrator. Thus, without going into the merits as to the arbitration proceedings and also, the allegations levelled in the present Company Petition, I am of the considered view that there is no jurisdictional bar of this Hon'ble Board to deal with the alleged acts of oppression and mismanagement despite the pending proceedings under Section 9 of the Arbitration and Conciliation Act, 1996. Therefore, in the interest of justice, I hereby direct the Respondents to maintain status quo as to the shareholding and composition of the Board of Directors of the Respondent No.1 company. In addition, both the rival groups are also directed not to create further third party interest over the fixed assets of the Respondent No. 1 Company without the leave of this Bench. The petitioners as well as the Respondents are also directed to explore the possibilities of amicable settlement in the matter and report the outcome thereof on the next date of hearing."

25. From a perusal of the above observations made by the learned CLB, it is apparent that the impugned order dated 27/07/2015 has been passed after discussing the brief factual background of the case, whereby the Board had gone on to observe that the issues raised in the company petition relates to non-adherence to the provisions of the Articles of Association and would constitute acts of oppression and mismanagement, which cannot be adjudicated by the arbitrator. It has also been observed that the power to deal with oppression and mismanagement under Section 397, 398 and 402 of the Companies Act cannot be exercised by the Arbitrator and that the respondent No. 10 to 15 herein not being signatories to the arbitration agreement, the disputes could not be referred

to arbitration. By referring to the allegations leveled in the company petition the learned Board had also observed that such allegations make out a prima facie case of oppression and mismanagement. Such observation has been recorded after discussing the claims and counter claims made on behalf of the parties to the proceeding. The CLB had also taken due note of the objections taken under section 8 of the Act of 1996, whereby and whereunder reasons for not accepting such objections had also be recorded in the order. It cannot, therefore, be said that the impugned order does not disclose any reason.

26. Sections 397 and 398 of the Companies Act, 1956 provides a complete code conferring jurisdiction upon the CLB to grant reliefs in cases of oppression and mismanagement. Section 402 of the Act of 1956, lays down the powers that can be exercised by the CLB inter-alia regulating the affairs of the company in future and such powers are without prejudice to the generality of the powers of the Board under sections 397 or 398.

27. Further, section 403 of the Act of 1956 provides that pending the making of a final order under sections 397 or 398 the CLB may, on an application of any party to the proceeding, make any interim order which it thinks fit for regulating the conduct of the Company?s affairs, upon such terms and conditions as it appears to it to be just and equitable. Therefore, from the plain language employed in section 403 it is evident that pending final orders that may be passed in an application filed under section 397 or 398, the CLB would have wide discretionary powers to pass interim orders so as to regulate the affairs of the company. The only condition imposed by section 403 is that the interim order to be passed in exercise of such power must be just and equitable. Whether an order passed under section 403 is just and equitable would depend on the facts and circumstances of each case.

28. As has been alluded here-in-before, while issuing the order dated 27/07/201, the learned CLB has not only recorded its satisfaction regarding the existence of a prima facie case but has also dealt with the objection raised under Section 8 of the Act of 1996 by recording a prima facie satisfaction on the point of its jurisdiction to pass an ad-interim order in the matter. The basic allegation of the complainants in C.P. 143/ 2015, reduced to its essence, is that the appellant No 2 is diverting the resources of the company to its sister concerns in violation of the Articles of Association with a view to diminish the value of the company. Any act on the part of the majority shareholders which is harsh, burdensome or wrongful can be said to be oppressive to the interest of the minority share holders.

29. There can be no quarrel with the proposition advanced by Mr. Banerjee that a judicial order bereft of any reason would be per se illegal. However, as has been indicated hereinbefore, this is not a case where the learned CLB has passed the order dated 27/07/2015 without recording any reason nor can it be said that the order dated 27/07/2015 is an unjust order causing serious prejudice to the interest of either party. Rather, from a reading of the order dated 27/07/2015

what can be seen is that the CLB has issued certain ad-interim order of protection pending fuller consideration of the contentious issues involved in the C.P. 143/2015. In a case of oppression and mismanagement under section 397 or 398 the quintessential proof of oppression would not be necessary for the CLB to pass an interim order under 403 of the Act. On an appreciation of the pleaded case of the complainant supported by materials on record once the CLB had arrived at a prima facie satisfaction as regards existence of a bonafide case it would be well within its jurisdiction and competence to pass such interim orders regulating the affairs of the company as may be deemed to be just and equitable. Having regard to the scheme of the Act visible from sections 397, 398, 402 and 403 of the Act of 1956, as long as the conditions contained in section 403 are met, an interim order cannot be set aside merely on the ground of inadequacy of reasons recorded therein, if the intension of the CLB can otherwise be gathered clearly from the order itself.

30. In the above context it would be pertinent to mention here-in that during the pendency of the appeal before this court, the respondent Nos 1 to 9 had filed C.A No 1863 / 2015 praying for further interim orders in the matter and the said application was disposed of by the order dated 09/12/2015 passed by the learned CLB after hearing both the parties, inter-alia directing the parties to hold the Board meetings by complying with provisions of the Articles of Association bearing in mind the interim directions/ reliefs allowed by the order dated 27/07/2015. It appears from the record that during hearing of the C.A. No 1863/ 2015, the appellants have neither mentioned about any difficulty faced by them before the learned CLB arising out of order dated 27/07/2015 nor have they challenged the subsequent order dated 09/12/2015 which in a way confirms the interim directions issued by the order dated 27/07/2015. The above fact clearly goes to show that the appellants have not suffered any prejudice on account of the order dated 27/07/2015 .During the course of the hearing of the appeal, the learned counsel for the appellants had also failed to draw the attention of this court to any prejudice being suffered by them on account of the interim directions contained in the order dated 27/07/2015.

31. From the materials on record it further appears that the appellants themselves delayed the hearing of the C.A. 907 /2015 pending before the CLB. In view of the above, the arguments advanced by Mr. Banerjee contending that the order dated 27/07/2015 passed by the CLB being devoid of any reason is liable to be declared as a nullity does not merit acceptance by this court.

32. Before attempting an answer to the next question of law, it would be pertinent to mention herein that there is no dispute at the bar that the CA No. 907/2015 filed by the appellants raising an objection under section 8 of the Arbitration and Conciliation Act, 1996 has not yet been finally disposed off and the same is still pending adjudication before the learned CLB. Learned counsels appearing for both the parties have fairly submitted that the adjudication of the said application (CA 907/2015) would warrant detailed factual enquiry by the

CLB for the purpose of recording its satisfaction as to whether the disputes involved in the C.P.143/2015 requires to be referred to arbitration or not. Hence, this Court would not be called upon at this stage to pass an order on the merit of the said application. In view of such candid submission made by the learned counsels for both the parties it would ordinarily not have been necessary for this Court to go into the second question of law at all. However, since the learned counsel for both the parties have advanced elaborate arguments addressing the Court on the principles of law that would govern a decision of the said application in the facts and circumstances of the case, it has become necessary for this court to deal with the arguments advanced by both the parties covering second question of law.

33. The existence of an arbitration agreement in the share holders agreement dated 16/01/2012 as well as 30/11/2012 is not in dispute. What has been disputed by the respondent Nos. 1 to 15 is that the matters complained of in CP No. 143/2015 alleging oppression and mismanagement, are matters exclusively falling within the domain of the CLB for an appropriate enquiry under Section 397, 398 read with Section 402 and 403 of the Companies Act, 1956 and the arbitrator would not be competent to entertain such dispute nor would he have the power to grant any of the reliefs envisaged under section 397/398 of the Companies Act, 1956. It is also the case of the respondents that the respondent Nos. 10 to 15 not being the signatory to the share holders agreements which contain the arbitration clause, in any event, the disputes raised in the company petition cannot be referred to arbitration. The basic contention of Mr. Banerjee, on the other hand is that since the existence of the Arbitration Clause in the shareholders agreement is not in dispute, the CLB did not have the jurisdiction under the law to pass the order dated 27/07/2015 the C.P. No 143 of 2015 before disposing of the C.A. No 907/ 2015 filed by the appellants.

34. Section 8 of the Act of 1996 deals with the power to refer parties to arbitration where there is an arbitration agreement. Section 8 inter-alia provides that a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, shall, if a party so applies not later than submitting his first statement on the substance of the dispute, refer the parties to arbitration. Subsection (2) of section 8 of the Act of 1996 further provides that the application referred to in subsection(1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof. Law is well settled that once an application is filed by a party satisfying the conditions contained in section 8(2) of the Act of 1996, the judicial authority would be under a statutory obligation to refer the parties to arbitration. The question, however, arising for consideration of this court in the present case is that once an application under section 8 is filed by any party, would it ipse jure amount to ouster of jurisdiction of the concerned court or the judicial authority debarring it from passing any order in the main proceeding ?

35. In the case of case of Agri Gold Exims Ltd. v Sri Lakshmi Knits and Wovens,

(2007)3 SCC 686 the Hon^{ble} Supreme Court has held that section 8 of the Act of 1996 is preemptory in nature. In a case where there is an arbitration agreement, the court is under an obligation to refer the parties to arbitration in terms of the arbitration agreement. Again in the case of *Yogi Agarwal v Inspiration clothes and U* in (2009) 1 SCC 372, the Apex court has held that the twin conditions precedent for invoking an arbitration agreement under section 8 are (i) it should be between the parties to the dispute and (ii) it should relate to or be applicable to the dispute. What, therefore, follows is that when an application under section 8 is filed a court or a judicial authority before which an action is pending has no option but to refer the matter to arbitration subject to fulfillment of the preconditions. Whether the pre-conditions are satisfied or not would depend on the facts of each case and the judicial authority will be required to arrive at a satisfaction in respect thereof on the basis of a proper enquiry in the matter. While making such enquiry the authority before whom the application is pending will have to determine as to whether, the disputes are covered under the arbitration agreement between the parties who are signatories of the agreement.

36. In the case of *Sukanya Holdings* (supra), the Hon^{ble} Apex Court on being confronted with a similar question, had held that in a suit where the subject matter falls within the arbitration agreement which involves parties other than some of whom are not the signatories to the arbitration agreement, the provisions of section 8 of the Act of 1996 is not attracted. In the said decision, the Apex Court had also held that the bifurcation of a subject matter of the proceeding in such cases is also not allowed. In the aforesaid decision, the Hon^{ble} Apex Court has observed as follows :-

"15. The relevant language used in Section 8 is "in a matter which is the subject matter of an arbitration agreement", Court is required to refer the parties to arbitration. Therefore, the suit should be in respect of "a matter" which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced - "as to a matter" which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Section 8. The words "a matter" indicates entire subject matter of the suit should be subject to arbitration agreement.

16. The next question which requires consideration is even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible under Section 8 of the Act? In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action that is to say the subject matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course.

Since there is no such indication in the language, it follows that bifurcation of the subject matter of an action brought before a judicial authority is not allowed.

17. Secondly, such bifurcation of suit in two parts, one to be decided by the arbitral tribunal and other to be decided by the civil court would inevitably delay the proceedings. The whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated by such procedure. It would also increase the cost of litigation and harassment to the parties and on occasions there is possibility of conflicting judgments and orders by two different forums."

37. In the case of Chloro Controls India Private Ltd. v. Seven Trent Water Purification Inc and others reported in (2013) 1 SCC 641, the Apex Court had the occasion to deal with a similar issue but in the domain of Section 45 of the Act of 1996 whereby a submission was made at the bar that the law laid down in the case of Sukanya Holdings (Supra) did not set a correct exposition of law and hence, the same needs to be clarified by the Hon?ble Supreme Court in the present case. The Hon?ble Apex Court had rejected the said argument. However, while discussing the law in the context of Section 45 of the Act of 1996, the Apex Court had observed that while examining the said issue the Court is not to permit a party to avoid their bargain of arbitration by bringing civil action involving multifarious causes of action, parties and prayers. While dealing with the rights and obligations of nonsignatory parties the apex court had further observed in the above case as follow:-

"72 This evolves the principle that a non-signatory party could be subjected to arbitration provided these transactions were with the group of companies and there was a clear intention of the parties to bind both, the signatory as well as the nonsignatory parties. In other words, "intention of the parties" is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties".

38. In the case of Rakesh Kr. Malhotra (Supra), the Bombay High Court had held that when an objection as to non-arbitrability of the dispute under Section 397 and 398 read with Section 402 of the Companies Act is raised, it is not enough for the applicant seeking a reference to arbitration merely to show that there exists an arbitration agreement but he must in addition establish before the learned CLB that the petition is malafide, vexatious and "dressed up" and cannot be permitted to succeed. I am in respectful agreement with the views expressed by the learned Single Judge of the Bombay High Court in the aforesaid decision.

39. As has been indicated hereinabove the law laid down in the case of Sukanya Holdings Pvt. Ltd. (Supra) still holds the field. Therefore, in order to succeed in getting a reference of the disputes raised under Section 397, 398 read with Section 402 and 403 of the Companies Act to arbitration, the applicant/appellants would not only be liable to show that the entire gamut of the dispute falls within the purview of the arbitration agreement but also the fact that company petition is a sham and mischievous one which has been decked up

deliberately so as to gainfully sustain the plea of non-arbitrability of such dispute. There would also be a heavy burden cast upon the appellants to show that the arbitration agreement would bind the non-signatory respondent No 10-15. In a case involving such complex questions of law and facts determination of the aforesaid aspect may call for deeper examination of the matter by the CLB. As such, the CLB cannot be found fault with for non-disposal of the C.A.907/2015 on the date of issuing the order dated 27/07/2015.

40. Coming to the argument made by Mr. Banerjee that due to the pendency of the C.A. No 907 /2015, the CLB did not have any jurisdiction to pass the order dated 27/07/2015 it may be mentioned here-in that there is nothing in the Act of 1996 that supports such a conclusion. In the absence of any express provision contained in the statute, ouster of jurisdiction of the CLB cannot be readily inferred by this court.

41. There can be no doubt about the fact that in the instant case an obligation was cast upon the CLB to decide the objection as to the question of jurisdiction raised under section 8 of the Act of 1996 at the earliest point of time. But a perusal of the impugned order also indicates the reasons that have been recorded by the CLB for issuing the said order despite the pendency of the section 8 application. As such, the submission of Mr. Banerjee to the effect that the CLB did not have any jurisdiction to pass the order dated 27/07/2015 pending disposal of the section 8 application is found to be wholly untenable and hence, does not commend acceptance by this court.

42. The decision in the case of Hindustan Petroleum v Pinkcity Midway (supra) relied upon by the appellants does not lay down any binding proposition of law that the court or the judicial authority would cease to have jurisdiction to pass any order in the main proceeding once an application under section 8 of the Act of 1996 is filed. The decision of the Gujarat High Court in the case Sadbhav Engineering Limited (supra) is also of no assistance to the learned senior counsel since that was a case where the CLB had not recorded any reason for granting the interim order. That apart the CLB also had not examine the section 8 application pending before it whereas in the present case the CLB had not only taken cognizance of the same but had also recorded reasons, tentative though, for not inferring an ouster of jurisdiction in the matter.

43. For the reasons and discussions recorded herein above, the company appeal find under section 10(F) of the Act of 1996 is held to be devoid of any merit and the same is hereby dismissed. The questions of law would stand answered accordingly.

44. As regard the CA No. 907/2015 pending adjudication before the learned CLB, there is no dispute at the bar that the same calls for expeditious disposal. In view of the urgency expressed by Mr. Banerjee, learned counsel for the appellants, the Learned CLB is requested to hear and dispose of the CA No. 907/2015, as expeditiously as possible, preferably within a period of 30 (thirty)

days from the date of receipt of a copy of this order keeping in mind the principles of law applicable in the matter. The C.R.P No 409/2015 stand disposed of accordingly.

45. It is however, made clear that notwithstanding the order passed by this court, the appellants would also be at liberty to move the learned CLB seeking alteration/modification of the order dated 27/07/2015 if so advised. In the event such an application is filed, the same shall be heard and disposed of on its own merit. Having regard to the facts and circumstances of the case, there would be no order as to costs.