

(2013) 06 CAL CK 0042

In the Calcutta High Court

Case No : A.P.O. No. 13 of 2013 and C.S. No. 152 of 2012

Chatterjee Petrochem (Mauritius) Co. and Another

APPELLANT

Vs

Haldia Petrochemical Ltd. and Others

RESPONDENT

Date of Decision : 04-06-2013

Acts Referred:

Arbitration Act, 1940 — Section 11, 11(6)
Arbitration and Conciliation Act, 1996 — Section 16, 2(e), 34, 44, 45
Civil Procedure Code, 1908 (CPC) — Section 9
Companies Act, 1956 — Section 108, 397, 398, 402, 420
Contract Act, 1872 — Section 39
Limitation Act, 1963 — Section 14
Securitisation and Reconstruction of Financial Assets and Enforcement of Security
Interest Act, 2002 (SARFAESI) — Section 13
Specific Relief Act, 1963 — Section 34, 41

Citation : (2013) 3 CALLT 1 : (2013) 5 CHN 218

Hon'ble Judges : Arun Mishra, C.J.;Joymalya Bagchi, J

Bench : Division Bench

Advocate : Siddartha Mitra, Ms. Mousumi Bhattacharya and Mr. S. Dutta, for the Appellant;Pratap Chatterjee Mr. Jishnu Saha, Aditya Garodia, Sayan Roychowdhury for Respondent No. 1, Mr. S.K. Kapoor Mr. Ravi Kapoor, Sanjoy Ginodia, Preetam Chowdhury, Ms. Pubali Sinha Chowdhury for Respondent Nos. 5 and 6 and Mr. Bimal Chatterjee, Ld. A.G. for the State, for the Respondent

Final Decision : Dismissed

Judgement

Joymalya Bagchi, J.—This appeal is directed against the judgment and order dated 20.12.2012 passed by the learned Single Judge in G.A. No. 1191 of 2012 whereby the learned Single Judge restrained the appellant from proceeding with arbitration proceeding bearing case No. 18582/ARP before the ICC International Court of Arbitration at Paris. Cross-objection has been filed by Haldia Petrochemicals Ltd. (hereinafter referred to as "HPL"), respondent No. 1 plaintiff, which was also heard along with the instant appeal.

2. On 21st March, 2012 the appellant Chatterjee Petrochem (Mauritius) Company

(hereinafter referred to as "CPMC") filed a request for arbitration in ICC, Paris for the following reliefs:

(a) An award:

(i) (1) That WBIDC take all necessary steps and GoWB ensure that WBIDC takes all necessary steps forthwith to:

(A) dematerialize The Shares (being the shares in Haldia bearing certificate number HPL 24 and distinctive numbers 29 to 155100026 inclusive);

(B) issue instructions to its depository participant to transfer the same to CPIL;

(C) ensure that the depository records CPIL as the beneficial owner of the same in the Register of beneficial owners of the depository, and

(2) that Haldia take all necessary steps to facilitate the dematerialization and transfer of The Shares and registration of CPIL as their owner and GoWB and WBIDC procure that the Haldia directors appointed by WBIDC vote in favour of any resolution necessary to achieve the same.

(ii) (1) That WBIDC accept from CPIL as nominee of CPMC Rupees 1,173,449,980 being the sum of unencashed loan payments (being the loan for Rupees 1,473,449,980 deemed made by WBIDC in favour of CPIL on 8 March, 2002) upon the same by CPIL which CPMC undertakes CPMC to do within such time as may be specified in the Award; and

(2) declaring that upon such re-tender the pledge of shares under the Loan shall stand discharged.

(iii) That WBIDC deliver to CPIL on behalf of CPMC the documents of title (including the original share certificates) for the Additional Pledged Shares (being the 38,775,000 shares in Haldia deposited in escrow (sic escrow) by CPMC on 8 March, 2002).

(iv) That WBIDC and GoWB and Haldia procure that the directors nominated by WBIDC vote with CPMC directors on all issues.

(v) That upon the first General Meeting called subsequent to the transfer of The Shares in accordance with paragraph (X) of the award and at every subsequent General Meeting WBIDC and/or GoWB vote for any shareholder resolution proposed by CPMC reconstituting the board of Haldia or amending Haldia's Articles of Association, in each case such that CPMC is empowered to appoint a number of directors proportionate with shareholding.

(vi) That WBIDC do and GoWB cause WBIDC to transfer to CPMC or its nominee CPIL such of WBIDC's or GoWB's shareholding (up to a maximum of Rupees 360 crores per transfer) as is from time to time required to ensure that CPMC/its nominees/affiliates have 51% of the total paid up equity of Haldia.

(vii) Such other or further Awards as may be deemed appropriate in the

circumstances.

3. On receipt of such notice of request for arbitration, on 31st April, 2012, HPL, respondent No. 1 herein, filed the instant suit, inter alia, praying for the following reliefs:

(a) a decree for declaration that the impugned Arbitration Agreement contained in Clause 15 of the Agreement dated January 12, 2002 is void and/or unenforceable and/or has become inoperative and/or incapable of being performed;

(b) a decree of permanent injunction restraining the defendant No. 1, their officers, employees and successors-in-interest from initiating and/or continuing with the Impugned Arbitration proceedings bearing case No. 18582/ARP pursuant to the impugned arbitration agreement contained in clause 15 of the Agreement dated January 12, 2002 and the Request for Arbitration dated March 21, 2012 and the communication dated April 2, 2012 issued by the defendant No. 8 and any other proceeding connected therewith or incidental thereto.

(c) a decree of permanent injunction prohibiting the defendant No. 8, its agents, officers and employees from acting upon and further proceeding with any proceeding pursuant to the Impugned Arbitration Agreement contained in clause 15 of the Agreement dated January 12, 2002 and the Request for Arbitration dated March 21, 2012 and the communication dated April 2, 2012 bearing case No. 18582/ARP issued by the defendant no. 8 and any proceeding pursuant thereto.

(d) Injunction;

(e) Costs;

(f) Such further or other reliefs.

4. The learned Single Judge declined to grant ad interim relief in the interlocutory application.

5. In appeal filed by HPL, a Division Bench of this Court passed an order of injunction restraining CPMC from proceeding with the arbitration. The order was challenged before the Hon''ble Supreme Court whereupon the Apex Court directed the learned Single Judge to dispose of the matter within 20th of December, 2012.

6. Upon hearing the parties, the learned Single Judge has passed the impugned order dated 20th December, 2012 restraining the appellant from proceeding with the arbitration before ICC till disposal of the suit. Hence, the present appeal by the appellant.

7. In this appeal, initially the appellant was denied stay of operation of the impugned order. An appeal was preferred before the Hon''ble Supreme Court against such refusal. By order dated 29.01.2012, the Hon''ble Supreme Court

disposed of the appeal by directing the Division Bench of the High Court to decide the appeal as early as possible, but latest by the end of February, 2013.

8. In spite of our best efforts, the arguments in the matter were concluded by the respective parties as late as on 13.05.2013. Since the parties were unable to conclude arguments within the aforesaid time frame, we were informed by the learned senior counsel appearing for the appellant that an application had been preferred before the Apex Court for extension of time for disposal of this appeal but we have not been informed till date as to the fate of such application.

Genesis of the case:

9. HPL was incorporated in 1985 as an ambitious flagship project of the State of West Bengal to set up a petrochemical complex in Haldia. Initially, West Bengal Industrial Development Corporation (WBIDC) and Mr. R.P. Goenka, an industrialist were the promoters of the said project.

10. In 1990 Mr. Goenka quit the project and thereafter the Tata Group was inducted. As much headway was not made towards the implementation of the project, in June, 1994, Dr. Purnendu Chatterjee, head of the Chatterjee Group of Companies, a non-resident Indian businessman, expressed interest in the project. A Memorandum of Understanding (MoU) was entered between the WBIDC, Chatterjee Group and the Tata Group on 3rd May, 1994 with regard to the affairs of HPL.

11. According to the said MoU, equity capital was to be held by WBIDC, CPMC and Tata Group in the ratio of 3:3:1 and the Board of the Company would consist of four nominees each by WBIDC, CPMC and two from Tata Group. This was followed by a joint venture agreement, on 20th August, 1994 wherein it was, inter alia, agreed that in case of disinvestment of shares by WBIDC, the disinvested shares will be first offered for sale to CPMC.

12. Subsequent to the said agreement, letters were exchanged between the parties whereby it was agreed that at least 60% of the shareholding of WBIDC would be offered to CPMC at Rs. 14 per share within 24 months of commencement of commercial production or within 60 months from the date of joint venture agreement whichever was later. It was also agreed that the role of the Government in HPL would only be limited to its promotion and guidance through the initial phase of the project. The commercial production commenced in August, 2001. Thereafter, on 12th January, 2002, CPMC, Government of West Bengal, WBIDC and HPL, inter alia, entered into an agreement for financial and managerial reconstruction of HPL which was heavily indebted by them. The 12th January, 2002 agreement, inter alia, provided for the following condition:

1. Under clause 1 - 3 of the 12 January, 2002 CPMC agreed that it would:

(a) Induct Rs. 107 crore in HPL within 5 working days of signing of the agreement.

(b) Induct a minimum of Rs. 500 crores (inclusive of the aforesaid Rs. 107 crores), as equity/equity like instruments and/or advances from outside sources;

(c) Arrange a letter of comfort (the "Letter of Comfort") in respect of the possession of Rupees 500 crores in long term funding for Haldia, to be issued within 30 days of the signing of the agreement.

(d) Out of the Rupees 500 crore, invest or "induct":

(i) Rupees 53.5 crore within 5 working days of the signing of the agreement.

(ii) Rupees 53.5 crore within 5 days of GoWB's acceptance of the Letter of Comfort.

2. GoWB agreed (under Clause 5) that:

(a) Subject only to CPMC's provision of an acceptable Letter of Comfort it would "cause WBIDC to transfer to (CPMC) such of its existing shareholding in (Haldia) up to a maximum of (Rupees 360 crore) from time to time so as to ensure that (CPMC) has 51% of the total paid-up equity of "HPL". Each such transfer.

(b) The first such transfer of shares was to be effected within 10 days of the acceptance of the Letter of Comfort by GoWB.

3. Clause 5 provided that CPMC would discharge payment for the first transfer by:

(a) Paying in cash 3% of the consideration on acceptance of the Letter of Comfort.

(b) Paying in cash 2% of the consideration simultaneously with the transfer of shares.

(c) An interest free loan from WBIDC to CPMC in respect of the remainder consideration, deemed to be made simultaneously with the transfer of the shares and for which a loan agreement would be issued (the "Loan").

4. It further provided for the terms of the Loan as follows:

(a) The loan would be repaid by CPMC at the rate of 10 crore Rupees annually for the first five years, and 20 crore Rupees annually for the following 5 years with any balance paid at the end of the tenth year.

(b) The Loan would be secured by the pledge to WBIDC of the shares being acquired and additional shares of face value of 25% of the value of shares being transferred.

(c) WBIDC would release a pro rata number of shares from the pledge upon receipt of each repayment installment. This ensured that WBIDC was not over secured as the Loan was repaid. At all material times WBIDC was to be limited to a maximum of 125% by face value of the remaining shares as security for the outstanding loan.

5. Clause 5 also retained the MoU/JVA requirement that GoWB/WBIDC offer any further Haldia shares which they wished to divest first to CPMC.

6. Clause 6 of the 12 January Agreement provided for the transfer of management control to CPMC:

(a) CPMC would have total control over Haldia's day to day operations and would be free to nominate key executive.

(b) The composition of the Board of Directors of Haldia would be changed to reflect its revised share structure.

(c) The directors appointed by WBIDC and/or GoWB would vote on all issues in accordance with those appointed by CPMC.

(d) WBIDC and GoWB would vote in accordance with CPMC at shareholders' meetings in terms of a new Joint Venture Agreement to be entered into.

7. Clause 15 of the 12 January, Agreement, to which GoWB; WBIDC, CPMC and Haldia were parties, provides:

In respect of all disputes, differences, claims and questions between the parties hereto arising out of this JVA or in any way relating to this document or any term, condition or provision herein mentioned or construction or interpretation thereof or as to the working of (Haldia) or in any way relating to the business or the affairs of (Haldia), the parties shall first endeavor to settle such disputes, differences, claims or questions by friendly consultation and failing such settlement, disputes or differences will be settled in accordance with the Rule of Arbitration of the International Chamber of Commerce (ICC) Court of Arbitration. The venue of the arbitration will be in Paris and the law applicable to the Contract will be Indian Law.

Any award with financial implication of more than 50 lakhs shall be made with reasons. Any decision or award rendered pursuant to such arbitration may be confirmed and enforced in any court of competent jurisdiction, if required.

As at 12 January, 2002 the parties' shareholding in Haldia was as follows:

13. Accordingly, under the terms of the 12th January Agreement the parties agreed that WBIDC would transfer 155,099,998 (or "155 million Shares") to CPMC, with a par value of Rupees 1,550,999,980 as consideration to bring its shareholding in Haldia to 51%.

14. In order to expedite the process of reconstructing of HFL and to avoid delay due to pending approvals, it was agreed that the aforesaid 155,099,998 shares of HPL be transferred to Chatterjee Petrochem (India) Pvt. Ltd. (hereinafter referred to as "CPIL") instead of CPMC. It was also agreed that CPIL makes part payment of the sale consideration and the remainder of the consideration be paid by giving deemed loan to CPIL by WBIDC against pledge of the shares sold to CPIL and upon repayment of such loan in installments, the said pledged shares

be released in a phased manner.

15. CPMC agreed to secure such loan transaction as a guarantor and pledged its additional shares to the tune of 387750000 shares which would also be released in a phased manner as the loan was progressively repaid.

16. Such agreement was recorded in a letter dated 8th March, 2002 written by CPMC to WBIDC. On the self-same date, an agreement was executed among CPIL, WBIDC and CPMC wherein it was recited that the transfer of the shares had been made to CPIL vide letter dated 8th March, 2002. It was also recited that the payment for the aforesaid 155,099,998 shares of HPL transferred to CPIL has been made by CPIL, partly by way of earnest money and down payment in cash and the balance amount is to be paid partly by way of repayment of deemed loan accepted by CPIL from WBIDC. CPMC stood as guarantor in respect of such transaction. The agreement provided for the manner of repayment of the said deemed loan in the following manner:

(1) Rupees 10 crore on 7th March of each of 2003, 2004, 2005, 2006 and 2007.

(2) Rupees 20 crores on 7th March of each of 2008, 2009, 2010, 2011.

(3) The balance of Rupees 173,449,980 on 7th March, 2012,

17. The Agreement also provided that the aforesaid shares sold to CPIL shall remain pledged to WBIDC as security for such loan. Additional shares of CPMC, the guarantor, to the tune of 387750000 shares shall also be pledged to WBIDC against such loan.

18. Such shares so pledged to WBIDC as security for the loan shall be released in a phased manner to CPIL and CPMC respectively with progressive repayment of the loan in a manner as provided in Clause 2.5 of the agreement. Clause 7.5 of the agreement provided that Courts of Calcutta alone shall have jurisdiction in all matters relating to this agreement. Thereafter a supplemental agreement dated 30th July, 2004 was executed by and among Government of West Bengal, WBIDC, CPMC and HPL whereby Clause 5 and Clause 9 of the 12th January, 2002 agreement were altered. Clause 1 of the said agreement dated 30th July, 2004 recorded that transfer of 155 crore shares to CPIL by WBIDC was accepted by CPMC in fulfillment of shares transfer obligation of Government of West Bengal (except the right to first refusal as described in Clause 2 thereof under the principal agreement of 12th January).

19. Clause 2 of the supplemental agreement provided that CPMC gave up its right to acquire any further shares of HPL as mentioned in Clause 5 of the principal agreement except the right to first refusal in respect of any share held by Government of West Bengal/WBIDC in HPL which they intend to sell at a price decided by Government of West Bengal/WBIDC.

20. Subsequently, on 14th January, 2005 another agreement was entered into between Government of West Bengal and Mr. Purnendu Chatterjee that

Government of West Bengal will sell its entire shareholding to CPMC at a price determined by an individual valuer selected by Government of West Bengal from amongst a panel of firms prepared by CPMC.

21. Instead of taking steps to provide majority status and/or management control to CPMC, in the months of January and February, 2005, HPL approved the issuance and allotment of equity shares worth 150 crores at par to Indian Oil Corporation (IOC).

22. Objecting to such proposed allotment of shares to IOC on the ground that such action on the part of WBIDC, Government of West Bengal would change the private equity bias of the Company and would put Chatterjee Group into minority, CPIL filed Company Petition being No. 58 of 2012 before the Company Law Board (CLB) for oppression and mismanagement, inter alia, prayed for the following reliefs:

(a) An order be passed directing the company to take immediate steps for modifying and/or altering and/or amending the Articles of Association of the Company to incorporate therein the complete agreement by and between the joint venture partners and special rights of the petitioner in relation to the Company, as provided in the agreements dated 20th August, 1994, 12th January, 2002, 8th March, 2002 and 30th July, 2004;

(b) Appropriate orders be passed directing the entire shareholding of the respondent No. 2 in the Company to be transferred in favour of the petitioner at the agreed price of Rs. 14/- per share in respect of such number of shares of HPL registered in the name of respondent No. 2 constituting 60% of the holding of the respondent No. 2 in the Company and on such valuation in respect of the balance shares held by respondent No. 2 as this Hon'ble Board may think fit and proper;

(c) Declaration that the resolution passed at the EGM of the Company held on January 14, 2005, is illegal, inoperative, null and void and not binding on the company or any person connected therewith;

(d) Permanent injunction restraining the respondents whether by themselves or by their servants or agents or assigns or otherwise howsoever from giving any effect or further effect to the resolution passed on the EGM held by the Company on January 14, 2005 in any manner whatsoever;

(e) Permanent injunction restraining the respondents from receiving any money or encashing any cheque that may have been issued by the respondent No. 6 to the Company in pursuance of the Memorandum of Association and the resolution passed by the EGM of the Company held on January 14, 2005;

(f) Permanent injunction restraining the Company and its Board of Directors from taking any major decision or policy decision relating to the management and affairs of the Company before the majority shareholding and management control in the Company is effectively established as per the Agreements dated

12th January, 2002 and 30th July, 2004 including the due recognition of the nominee of petitioner No. 2 as Director of the Company pursuant to the letter of Petitioner No. 2 dated 1st August, 2005;

(g) Permanent injunction restraining the Company and its present board from dealing with or disposing of or alienating or encumbering any asset or property of the Company except strictly in the course of the business of the Company;

(h) Permanent injunction restraining the Company and its Board of Directors from taking any decision in relation to the management and administration of the Company except with the previous approval of the petitioner;

(i) Permanent injunction restraining the respondents and each of them from in any manner acting in derogation of the petitioner's rights as majority shareholders in the company and the petitioner's rights to control the management of the company, including without limitation by way of sale of shares of the company held by any of them to any third party except the petitioners;

(j)

(k)

(l) Direct the reconstitution of the Board of the Company to reflect the majority control and the special rights accorded under the agreements between the shareholders to the petitioners;

23. In the course of the said proceeding, prayer was also made for a direction upon WBIDC/Government of West Bengal to complete the transfer of 155 million shares in favour of CPIL. The Company Petition was disposed of by CLB by upholding the decision of the Company to allot 150 million shares by IOC. Similarly, transfer of 155 million shares by WBIDC to CPIL at par was confirmed. Further direction was given to the Government of West Bengal and WBIDC to transfer 520 million shares held by them in HPL to Chatterjee Group.

24. In an appeal preferred by the Government of West Bengal against the said order, the High Court set aside the order of the CLB on the ground that CPIL was not a member of HPL and the CLB could not have enforced its rights under private contract entered between CPIL and WBIDC for transfer of shares as the same could not be subject matter of a petition u/s 397 of the Companies Act.

25. In appeal, the Hon'ble Supreme Court by judgment and order dated 30.09.2011 upheld the order of the learned Single Judge of Calcutta High Court. The Hon'ble Supreme Court, inter alia, held that the claim of the Chatterjee Group that they were induced to invest in HPL on the promise that the Company would retain a private equity character and Chatterjee Group would control over its management and that such promise not being adhered to and allotment of 150 million shares made to IOC had changed the private character of the company was not an act of oppression on the part of the Company but was due

to failure on the part of the Chatterjee Group to infuse adequate funds into the Company by way of equity, as promised and to participate in its rights issue.

26. It was at a stage when the Chatterjee Group failed to invest sufficient funds, HPL was constrained to induct IOC as a member by transferring 150 million shares to it. Dr. Chatterjee himself decided to induct IOC as member of the Company at the board meeting and there was no clandestine sale of shares to IOC. The Supreme Court held that had Chatterjee Group stood by its commitment to bring in equity and subscribe to the rights issue it would neither have been in minority nor it would have been necessary to induct IOC as a strategic partner.

27. With regard to failure of WBIDC, Government of West Bengal to register 150 million shares to CPIL the Apex Court held that such failure was a failure between the parties to a private agreement to abide by their commitments and the remedy for such failure was not u/s 397 of the Companies Act.

28. With regard to powers u/s 402 of the Companies Act, the Apex Court held that it was not on account of any act on the part of the Company that the shares transferred to CPIL were not registered in the name of Chatterjee Group and therefore there was no occasion for CLB to make any order u/s 397 or 402 of the aforesaid Act.

29. After the aforesaid set back, the appellant sought to invoke the arbitration clause contained in the agreement dated 12th January, 2002 and made a request for arbitration. On receipt of notice of such request for arbitration, respondent No. 1 filed the instant suit, inter alia, praying for a declaration that the impugned arbitration agreement is null and void, inoperative or incapable of being performed and an injunction restraining the appellant to proceed with the said arbitration.

30. It is the case of HPL in the plaint that the arbitration agreement dated 12th January, 2002 had been rendered void in respect of the claim for transfer of 155 million shares in favour of CPIL inasmuch as the parties had contracted out of the earlier agreement and the legal liability in respect thereof was redefined in the subsequent 8th March, 2002 agreement which provided for an exclusive jurisdiction to Courts in Calcutta to decide dispute arising out of said agreement. It was also contended that the self-same relief was canvassed before the CLB and the matter went up to the Apex Court wherein the Apex Court recorded certain findings of facts with regard to failure on the part of the Chatterjee Group of Companies to live upto its commitment to invest equity and/or funds as promised.

31. It was pleaded that once a party to an arbitration agreement seeks to adjudicate dispute before another forum and such forum arrives at a conclusive finding of facts in relation to the dispute, the subsequent effort on the part of the self-same party to refer dispute for arbitration would be vexatious and abuse of law and it shall be construed that the arbitration agreement has been rendered

inoperative by the conduct of the party himself.

32. It was also contended that any reference of the dispute after finding arrived at by the Apex Court would be contrary to law and barred by principle of estoppel and *res judicata*. It was also contended in the suit that the agreement was terminated in September, 2005 and the request for arbitration after 6 years thereof was patently barred by law of limitation.

Findings by the learned Single Judge:

33. The learned Single Judge allowed the injunction application on the ground that the parties have entered into a new agreement dated 8th March, 2002 where it is provided that the Courts in Calcutta alone would have jurisdiction in respect of any dispute arising therefrom. Earlier agreement dated 12th January, 2002 including the arbitration clause stood abrogated by the 8th March, 2002 agreement. As the earlier agreement had been substituted by the subsequent one, the arbitration clause perished with it and the arbitral tribunal did not have any jurisdiction over the subject matter of the dispute. Accordingly, the learned Single Judge granted injunction against the continuation of the impugned arbitration. Learned Single Judge, however, held that the findings of the Supreme Court did not operate as *res judicata* on the issue of specific performance of the agreement to transfer 155 million shares or that such a prayer was barred by limitation.

Arguments on behalf of the appellants:

34. Mr. Siddhartha Mitra, Learned Senior Counsel submitted that the agreement dated 12th January, 2002 was not novated. According to him, this was the principal agreement which was implemented by the supplemental agreements dated 8th March, 2002 and 30th July, 2004. He submitted that the letter dated 8th March, 2002 did not create any independent legal right but was a mere direction from CPMC to transfer 155 million shares to its nominee CPIL to avoid delay. The letter itself provided that after such transfer steps would be taken to transfer the shares and the loan to CPMC. It also provided that the terms and conditions of 12th January, 2002 agreement would remain valid and subsisting between the parties.

35. He also referred to the supplemental agreement dated 30th July, 2004 which reaffirmed the principal agreement of 12th January, 2002 (with alterations in Clause 5 and 9 thereof). He therefore submitted that the principal agreement dated 12th January, 2002 including the arbitration clause was subsisting and had not been substituted. He referred to share subscription agreement dated 30th July, 2004 which defined the word "an affiliate". He also referred to a letter dated 17th December, 2004 by Government of West Bengal to HPL stating GoWB stands committed to the transfer of shares to CPMC as agreed with in agreements dated 12th January, 2002, 8th March 2002 and 30th July, 2004. He referred to prayers IV, V, and VI in request for arbitration (RFA), to stress that the disputes related to the 12th January, 2002 agreement which was valid &

binding by and between the parties. He further submitted that even if the agreement is terminated, the arbitration clause survived.

36. According to Mr. Mitra the validity existence of the arbitration agreement ought to be decided by the arbitral tribunal in terms of Article 6 of the ICC Rules, 1998 which is *pari-materia* to section 16 of the Arbitration and Conciliation Act (hereinafter referred to as "the Act"). Civil Court has no jurisdiction to decide such issue. He referred to section 5 of the Act in that regard.

37. He submitted that under the scheme of the Act, particularly section 45 thereof, a suit of the present nature is not maintainable. He submitted that a suit instituted to restrain a foreign arbitration was in violation of section 5 of the Act and the impugned order of injunction was contrary to law.

38. He contended that non-party CPIL being a nominee/affiliate of CPMC, who was a party to the arbitration agreement, would also be bound by the arbitration clause in the principal agreement. He further submitted that resorting to the Company proceeding did not amount to abandonment of the arbitration agreement. He further submitted that the finding of the Supreme Court did not operate as *res judicata* or issue estoppel. He further submitted that the plea of *res judicata* is to be left to be decided by the arbitrator.

39. On the issue of limitation he submitted that the letter dated 20th September, 2005 does not unequivocally terminate the contract as it was issued during the pendency of the Company Petition and was marked "without prejudice" and as such was never placed in the course of such Company proceeding.

40. He submitted that the period taking in pursuing the company proceeding ought to be excluded from computing the period of limitation in terms of section 14 of the Limitation Act. He submitted that in any case when question of limitation is disputed and not patent the same has to be left to be decided by the arbitrator.

Arguments on behalf of HPL:

41. Mr. Pratap Chatterjee, Senior Advocate appearing for HPL submitted that the jurisdiction of the civil court to entertain a suit seeking declaration that the arbitration agreement is null and void, inoperative and/or incapable of being performed is not barred. He submitted that section 5 of the Act can come into play only when existence of a valid arbitration agreement is established. He further submitted that institution of such a suit would constitute an "action pending before a judicial authority" necessitating the invocation of section 45 of the Act, if one of the parties makes a request to refer the matter for arbitration. In such cases, the court must see whether the arbitration agreement is valid, operative and capable of being performed before referring the parties to arbitration. Such power of the court is not taken away by section 5/16 of the Act or Article 6 of the ICC Rules.

42. On factual score, he submitted that the arbitration agreement had become

inoperative and/or being incapable of being performed in the instant case as the parties had contracted out of the 12th January, 2002 agreement by entering into a subsequent agreement dated 8th March 2002 in respect of transfer of 155 million shares of HPL. Such agreement not only created new rights and liabilities by and between non parties to the arbitration agreement but also provided for a different dispute resolution mechanism, namely Courts in Calcutta for resolving disputes arising out of such agreement. He therefore submitted that any dispute arising over transfer of 155 million shares in favour of CPIL would be a dispute relating to the 8th March, 2002 agreement and amenable to the jurisdiction of the courts in Calcutta. He further submitted that although the consent and approval for transfer of 155 million shares had been granted by lenders on or about May 27, 2005, CPMC did not invoke the arbitration agreement till 2012. Such arbitration agreement was abandoned by the conduct of the parties as the prayer for transfer of such shares was made before the CLB in the Company petition and even allowed by the said tribunal. Subsequently when such relief was disallowed by the Supreme Court, CPMC has resorted to the arbitration proceeding. He submitted that such an action on the part of the CPMC amounts to the abandonment of the arbitration agreement rendering it inoperative.

43. He further submitted that it was the appellant's group who invoked the jurisdiction of CLB to seek relief of the enforcement of various agreements/The Supreme Court while dealing with such issue arrived at certain factual conclusions with regard to the conduct of the parties in the transaction. Such findings have become final and binding between the parties and cannot be reopened by making a request for arbitration wherein the self same issues would be germane for consideration of relief. He further submitted that the prayer for the transfer of such shares upto a maximum of 360 crores is vexatious and is abuse of process of law as such right under Clause 5 of the 12th January, 2002 agreement was given up by CPMC under Clause 1 and 2 of the Supplemental Agreement of 2004.

44. Arguing in support of his cross objection, Mr. Chatterjee submitted that the request of arbitration was patently barred by the law of limitation as the contract was terminated by a letter dated 28th September, 2005 and no action was instituted seeking specific performance thereof in terms of Article 54 of the Limitation Act, 1963. He further submitted that section 14 of the Limitation Act did not have a manner of application as the relief was not denied on the ground of defect of jurisdiction but on other considerations. He therefore sought to justify the order of injunction not only on the grounds stated therein but also on the ground that there was no live issue for arbitration as the same was barred by res judicata and limitation.

Arguments on behalf of the GoWB and WBIDC:

45. Mr. Kapoor, Senior Advocate appearing on behalf of the GoWB/WBIDC submitted that the January 2002 agreement was novated by the March 2002 agreement and the same no longer survived. He submitted that the appellant

had abandoned arbitration and had sought the same relief before the Company Law Board which was initially granted by the said tribunal but turned down by the Supreme Court. The findings of the Apex Court as to the conduct of the party would therefore operate as *res judicata* in seeking the self-same relief.

46. Furthermore, the relief claimed was barred by limitation. Hence, there was no live issue which could be referred to arbitration.

He, therefore, prayed that the order of injunction be not interfered with.

Our Findings:

47. The question before us therefore is whether the learned Single Judge was justified in passing an order of injunction restraining an arbitration proceeding pending before ICC between the parties.

48. It has been argued on behalf of the appellants that no injunction restraining arbitration could be passed by a Court in view of section 5 of the Act which limits judicial intervention in arbitration. It has also been argued the Act is a complete Code and no judicial intervention beyond its provisions is permissible. It has also been argued that in view of Article 6 of ICC Rules which is *pari-materia* to section 16 of the Act, the existence and validity of an arbitration agreement is to be decided by an arbitral tribunal.

49. It has also been contended that section 45 of the Act is a provision in favour of arbitration and an action as in the present suit is not contemplated under the section.

50. The suit in the instant case was instituted after the respondent No. 1 received the request for arbitration. In the said suit HPL prayed for a declaration that the arbitration agreement was null and void, inoperative or incapable of being performed and a permanent injunction was sought upon the defendants not to proceed with such arbitration.

Section 5 of the Act reads as follows:

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

51. Section 45 of the Act provides that notwithstanding anything contained in Part I or in the Civil Procedure Code, a judicial authority seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall at the request of one of the parties or anyone claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. Agreement referred to in section 44 of the Act means an agreement in writing for arbitration to which Convention set out in the First Schedule of the Act applies. Arbitration agreement in the instant case which refers to arbitration under ICC Rules is admittedly such an agreement u/s 44 of the Act.

52. A bare reading of section 45 of the Act would therefore show that in the event a judicial authority is in seisin of an action relating to a matter covered by an arbitration agreement referred to in section 44 of the Act the judicial authority shall refer the dispute in question to arbitration provided - (a) a party or anyone claiming through or under him makes such request and (b) a judicial authority is satisfied that the agreement is not null and void or inoperative or incapable of being performed.

53. Section 45 therefore empowers the judicial authority when seized of a matter relating to an arbitration agreement to decide as to whether such agreement is null and void or inoperative or incapable of being performed prior to referring the parties to arbitration. Such power prevails over the provisions contained in Part I of the Act (which includes section 5 of the Act) or the CPC due to the operation of the non-obstante clause contained in such provision.

54. It is therefore amply clear that the power of the judicial authority to decide the issue as to existence/validity of the arbitration agreement is provided under the statute itself and is not whittled down by operation of section 5 of the Act.

55. Next issue is whether an action as in the present suit can be said to be covered u/s 45 of the Act. Power to entertain an action or cause by a Civil Court is inherent in itself. It does not derive its source from the statute. Hence the nature of action which may be entertained by the Court is not regulated by section 45 of the Act. The said provision merely lays down the procedure to be followed if the action so entertained by a Court relates to a matter covered by an arbitration agreement providing for foreign seated arbitration. Similar is the scope of section 8 of the Act in respect of domestic arbitration. Hence, neither section 8 nor section 45 of the Act restricts the inherent power of a Court to entertain any action in a matter relating to arbitration agreements including an action challenging the validity, existence or scope thereof.

56. In this regard one may profitably refer to Smt. Ganga Bai Vs. Vijay Kumar and Others, as follows:

There is an inherent right in every person to bring a suit of a civil nature and unless the suit is barred by statute one may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous the claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit. But the position in regard to appeals is quite the opposite. The right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law. That explains why the right of appeal is described as a creature of statute.

57. Dealing with provisions of the Arbitration Act, 1940, the Apex Court in The State of Uttar Pradesh and Another Vs. Janki Saran Kailash Chandra and Another, it held as follows:

.....It is, however, to be clearly understood that the mere existence of an

arbitration clause in an agreement does not by itself operate as a bar to a suit in the court. It does not by itself impose any obligation on the court to stay the suit or to give any opportunity to the defendant to consider the question of enforcing the arbitration agreement. The right to institute a suit in some court is conferred, on a person having a grievance of a civil nature, under the general law. It is a fundamental principle of law that where there is a right there is a remedy. Section 9 of the CPC confers this general right of suit on aggrieved person except where the cognizance of the suit is barred either expressly or impliedly...

58. Section 5 of the Act restrains judicial intervention in respect of matters covered by Part I of the Act except in the manner so provided. As the power of the Court to entertain a suit or action is not derived from any provision of the Act but is inherent in it, it cannot be said entertaining a suit or cause in a matter relating to an arbitration agreement is barred by operation of section 5 of the Act. A conjoint reading of sections 5 and 8 of the Act shows that the said provisions regulate the procedure in which a judicial authority must deal with a suit or action relating to an arbitration agreement but does not bar jurisdiction of the Civil Court to entertain such a cause.

59. Section 45 of the Act is similar to section 8 of the Act and it falls within Part II of the Act dealing with foreign seated arbitration and regulates the procedure to be followed once a suit or action is entertained by a Civil Court relating to such arbitration. Section 5 of the Act shall therefore not be treated as an express bar on the inherent power of the Civil Court to entertain a cause or action relating to a foreign seated arbitration agreement including one challenging the validity thereof.

60. In *Fuerst Day Lawson Ltd. and Others Vs. Jindal Exports Ltd. and Others etc.*, the Supreme Court held that the act is a complete Code and provision 37 of the Act (relating to appeals) shall override the right to appeal contained in clause 15 of the Letters Patent. We are of the opinion that the said judgment is of no help to the appellant as right to appeal is a statutory right and therefore is eclipsed by the special act. Right to entertain a cause/action is inherent in the court and therefore such inherent power subsists in the Court in it unless it is expressly taken away.

61. It has also been contended that since the International Court of Arbitration (the Court) of ICC is empowered under Article 6 of the ICC Rules to decide on the validity or scope of the arbitration agreement the same should necessarily exclude the jurisdiction of the Civil Court to examine such matter.

Article 6 of the ICC Rules of Arbitration reads as follows:

1. Where the parties have agreed to submit to arbitration under the Rules, they shall be deemed to have submitted ipso facto to the Rules in effect on the date of commencement of the arbitration proceedings, unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement.

2. If the Respondent does not file an Answer, as provided by Article 5, or if any party raises one or more pleas concerning the existence, validity or scope of the arbitration agreement, the Court may decide, without prejudice to the admissibility or merits of the plea or pleas, that the arbitration shall proceed if it is prima facie satisfied that an arbitration agreement under the Rules may exist. In such a case, any decision as to the jurisdiction of the Arbitral Tribunal shall be taken by the Arbitral Tribunal itself. If the Court is not so satisfied, the parties shall be notified that the arbitration cannot proceed. In such a case, any party retains the right to ask any court having jurisdiction whether or not there is a binding arbitration agreement.

3. If any of the parties refuses or fails to take part in the arbitration or any stage thereof, the arbitration shall proceed notwithstanding such refusal or failure.

4. Unless otherwise agreed, the Arbitral Tribunal shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is non-existent, provided that the Arbitral Tribunal upholds the validity of the arbitration agreement. The Arbitral Tribunal shall continue to have jurisdiction to determine the respective rights of the parties and to adjudicate their claims and pleas even though the contract itself may be non-existent or null and void.

62. It has also been contended that the said article is similar to section 16 of the Act. In *Kvaerner Cementation India Ltd. v. Bajranglal Agarwal & Anr.* (2012) 5 SCC 214, the Apex Court held as the Arbitral Court has power to decide on the existence and validity of the agreement, the Civil Court cannot decide such issue in view of sections 5 and 6 of the Act.

63. However, in *S.B.P. and Co. Vs. Patel Engineering Ltd. and Another*, a Constitution Bench of the Supreme Court dealt with such power of the arbitral tribunal u/s 16 of the Act vis-a-vis the power of the judicial authority/Court u/s 8 and section 11 of the said Act. While dealing with such issue, the Constitution Bench held as follows:

19. It is also not possible to accept the argument that there is an exclusive conferment of jurisdiction on the Arbitral Tribunal, to decide on the existence or validity of the arbitration agreement. Section 8 of the Act contemplates a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement, on the terms specified therein, to refer the dispute to arbitration. A judicial authority as such is not defined in the Act. It would certainly include the Court as defined in section 2(e) of the Act and would also, in our opinion, include other courts and may even include a special tribunal like the Consumer Forum (see *Fair Air Engineers (P) Ltd. v. N.K. Modi*). When the defendant to an action before a judicial authority raises the plea that there is an arbitration agreement and the subject-matter of the claim is covered by the agreement and the plaintiff or the person who has approached the judicial authority for relief, disputes the same, the judicial authority, in the absence of any restriction in the Act, has necessarily to decide whether, in fact, there is in

existence a valid arbitration agreement and whether the dispute that is sought to be raised before it, is covered by the arbitration clause. It is difficult to contemplate that the judicial authority has also to act mechanically or has merely to see the original arbitration agreement produced before it, and mechanically refer the parties to an arbitration.

64. It is evident from the decision of the Constitution Bench that the power of the Court to decide as to the validity or existence of the arbitration agreement (when called upon to do so by one of the parties) is not eclipsed by the existence of such power in the arbitral tribunal. In fact, the decision of the Court would prevail over the arbitrator's jurisdiction.

65. In the instant case, respondent No. 1 has not submitted to the jurisdiction of the arbitrator and has sought to bring an action in Court challenging the validity and existence of the arbitration agreement. The Court is not denuded to entertain such a cause or action relating to the arbitration agreement but may choose to refrain from exercising the same leaving the dispute to be decided by the arbitrator on cogent reason, namely, the issues are debatable and not *ex facie* or patent in nature.

66. However, in appropriate cases where the issue as to invalidity or non-existence of the arbitration agreement brooks no controversy or where the claim is patently stale making the agreement inoperative or incapable of being performed, the Court has jurisdiction not to refer the parties to a vexatious and futile arbitration which would be an abuse of process of law.

67. In *Korp Gems (India) Pvt. Limited and Others Vs. Precious Diamond Limited and Others*, this Court held that in the event there is a valid arbitration agreement no injunction can be passed restraining the arbitration. On facts the plaintiff was not a party to the arbitration agreement and the suit was permitted to continue.

68. In *Shakti Bhog Foods Limited Vs. Kola Shipping Limited*, the Supreme Court recorded the existence of a valid agreement by and between the parties and declined to comment on the issue. It merely noted that the arbitrator had power to decide the issue also. It is not an authority for the proposition that the existence of the power of the arbitrator denudes the jurisdiction of the Civil Court to decide as to whether the arbitration agreement is valid and binding as per section 45 of the said Act.

69. In *Bharti Televentures Ltd. Vs. DSS Enterprises Private Ltd. and Others*, the Delhi High Court held as follows:

14. So far as Civil Courts are concerned it is not necessary for them to trace their powers to issue injunctions to a statute; in common law systems the reverse is oftentimes observed. To mention only a few examples, the principles laid down in *Ryland v. Fletcher*, *Donoghue v. Stevenson*, *Central London Property Trust Ltd. v. High Trees House Ltd.*, 1947 K.B. 130 : [1956] 1 All ER 256 (now known simply

as High Trees in which the principle of promissory estoppel was established) and *Mareva v. International Bulk Carriers*, (1980) 1 All ER 213 (thenceforward "Mareva injunction" has become a term of art) have in fact acted as catalysts for statutory activity. Civil Courts in common-law countries have a duty, which cannot be deferred, postponed or procrastinated, to decide every dispute brought before it. If no legislation is in existence the lies must be decided on first principles. The Channel Tunnel case (*supra*) is significant for several reasons including the reiteration by the House of Lords that the Court had power pursuant to its inherent jurisdiction to grant a stay of an action brought before it in breach of an agreed method of resolving disputes.

19. In summation, in every Arbitration governed by the New York Convention, Part II Chapter I shall have to be applied, notwithstanding the provisions of Part I. In these cases it is the venue of the arbitration that is conclusive whilst an application must be filed in Part I arbitrations to halt civil proceedings, this is not necessary where Part II comes into operation. However, in the latter case the Court must adjudicate whether the arbitration clause is not null and void but is operational and capable of being performed, and only after it arrives at this conclusion, can it refer the parties to arbitration. The deliberate decision not to incorporate section 9(b) of FARE assumes great significances, and leads inexorably to the conclusion that the factum of Indian laws in the 1996 Arbitration regime, especially Part II thereof, venue/territoriality is all important.

70. In *Devinder Kumar Gupta Vs. Realogy Corporation and Another*, a Division Bench of the self-same High Court held as follows:

14. We would also like to clarify that the provisions of section 34 and section 41 of the Specific Relief Act, 1963 may not apply so far as the prayers of Declaration or Injunction are concerned. We say this for the reason that both these reliefs are actively and specifically contemplated in the A & C Act itself in terms of section 8 and section 45 thereof. The proposition that section 5 of the A & C Act bars the jurisdiction of Civil Courts may be too *FAO(OS)* 268/2011 Page 34 of 54 widely stated, especially on a consideration of section 8 of the A & C Act for the reason that an arbitration agreement may perforce be nullified or given a go-by and abandoned consequent on the failure of the Defendant to bring its existence to the notice of the Court. This important feature is often lost sight of.

16. In *Abdul Gafur and Another Vs. State of Uttarakhand and Others*, , their Lordships have recently clarified that there is always a presumption in favour of the jurisdiction of the civil court. Unfortunately, the A & C Act does not provide a remedy to a person claiming the non-existence of an arbitration agreement except by submitting to the jurisdiction of the Arbitral Tribunal u/s 16. In the event that the Arbitral Tribunal does not return a determination negating its own jurisdiction the statutory remedy is only by way of Objections u/s 34 of the A & C Act. Yet, paradoxically, the Act mandates this adjudication u/s 8 and section 45 of the A & C Act as well as u/s 11(6) thereof. It appears to us wholly incongruous that when such a curial investigation is invited by the filing of a civil suit, it

should be rendered nugatory by simply holding that a civil court has no jurisdiction. The matter has FAO(OS) 268/2011 Page 36 of 54 been discussed at great length and all its complexities have been laid bare before us. We, therefore, think it vexatious and idle to remand the matter back to the Single Bench for returning a specific finding as to the existence of an efficacious arbitration agreement as well as the parties bound by it. A situation, similar to the one at hand, had arisen in Pampa Hotels as well as Monnet Finance.

71. Shree Krishna Vanaspati Industries (P) Ltd. Vs. Virgoz Oils and Fats Pte Ltd. and Another cannot be said to be any relevance in view of the aforesaid decision of the Division Bench of Delhi High Court in Devendra Kumar (Supra).

72. In MSM Satellite (Singapore) Pte Ltd. Vs. World Sport Group (Mauritius) Limited, the Bombay High Court held as follows:

Therefore, we have no hesitation in proceeding on the basis that the Arbitration and Conciliation Act, 1996 does not rule out intervention by the Court although section 45 confers powers on judicial authority to refer parties to arbitration that is a power which will have to be exercised only after the Court finds that the agreement is not null and void, inoperative and incapable of being performed. To this extent, the power to examine the arbitration agreement between the parties is available.

73. Such issue did not fall for decision in the case of Bharat Aluminium Company and Others Vs. Kaiser Aluminium Technical Service, Inc. and Others etc. etc.,

74. In Bharat Aluminium Company question which fell for decision was as to whether a civil suit for interim relief in the nature of section 9 of the Act was permissible in respect of foreign seated arbitration. The Supreme Court held that Part I of the Act was inapplicable to foreign seated arbitration. It however held that the law shall not apply to foreign seated arbitration agreements already entered into as the present one.

75. Reference to paragraph 175 of the said judgment is of no assistance to the appellant. The said paragraph deals with a suit for interim relief in a foreign seated arbitration and not one seeking declaration that the arbitration agreement is null and void or inoperative or incapable of being performed in terms of section 45 of the Act.

76. Similarly, in Venture Global Engineering Vs. Satyam Computer Services Ltd. and Another, the Court was dealing with a post award situation and did not have the occasion of dealing with the power of the judicial authority when an arbitration agreement is alleged to be null and void, inoperative or non-existence. In the said judgment the Apex Court held that Part I of the Act shall apply to foreign seated arbitration covered by Part II of the Act.

77. We are therefore of the view that the Court has jurisdiction to entertain a cause/action as to whether an arbitration agreement for a foreign seated arbitration is null and void, inoperable or incapable of being performed and, in

exceptional cases, where non-existence, incapacity or inoperability of such agreement is patent may injunct the parties from proceeding with such vexatious arbitration.

78. Now let us examine whether the respondent No. 1 has made out a case to restrain the foreign seated arbitration in the instant case.

Clause 5 of the 12th January, 2002 agreement reads as follows:

GoWB shall cause WBIDC to transfer to CP(M)C such of it existing shareholding in HPL upto a maximum of Rs. 360 crores from time to time so as to ensure that CP(M)C has 51% of the total paid-up equity of HPL subject to and upon CP(M)C providing the latter of comfort mentioned in the proceeding clause 2 within the time mentioned therein and the same being accepted by GoWB and such transfer shall be effected within 10 days of the acceptance of the said Letters of Comfort by GoWB and upon payment of Rs. 53.5 crores as per clause 3 above. The consideration for all such transfer shall be at par. On GoWB accepting the letter of comfort, CP(M)C will pay a sum of 3% of the consideration amount by way of earnest money as part payment for sale of such shares and a further sum of 2% of the consideration amount simultaneously with the transfer of such shares. The balance of the consideration shall be treated as paid to WBIDC and WBIDC will be deemed to have give a simultaneous interest free loan to CP(M)C for which an interest free Loan Note shall be issued by CP(M)C to WBIDC. Such loan will be repaid at the rate of Rs. 10 crores per year for the first five years and at the rate of Rs. 20 crores per year for next five years and the balance, if any, at the end of the 10th year. The entire shares being acquired under this clause and additional shares of face value of 25% of the value of shares being transferred shall remain as security for the said loan pledged with WBIDC. Such security level would be reduced as payments are made, so that 125 percent of face value shares remain as security for the outstanding loan. WBIDC shall within 10 days of the letter of comfort being accepted, shall cause the said transfers to be effected.

In the event, WBIDC/GoWB at any point of time intend to transfer all or any part of its remaining shares, WBIDC/GoWB shall first offer it to CP(M)C who shall have the right of first refusal. If CP(M)C also wants to acquire at any time all or any of these shares of WBIDC/GoWB, these shares shall be sold by WBIDC/GoWB to CP(M)C at a price that may be agreed between the parties, and failing that at a price to be determined by independent valuation done by a valuation expert of repute, who shall be jointly determined by WBIDC/GoWB and CP(M)C.

79. In analysis, CPMC was to receive such shares upto a maximum of Rs. 360 crores from time to time so as to ensure that it had 50% of the total paid up equity of HPL. The clause also provided that CPMC shall pay 3% of the consideration amount by way of earnest money as part payment and 2% of the consideration money would be paid with the transfer of the shares. The balance amount of the consideration shall be treated to be paid to WBIDC and WBIDC shall be deemed to have given a simultaneous interest free loan to CPMC and

such loan was to be repaid at the rate of Rs. 10 crores per year from the first five years and at the rate of Rs. 20 crores per years for the next five year and the balance, if any, at the end of the 10th year. As a security of such loan, the entire shares acquired under the clause and additional shares of face value of 25% of the value of the shares so transferred would remain as security pledge with WBIDC alone and the security value would be reduced as the loan is repaid so that 25% of the face value of the shares shall remain security for the said outstanding loan.

80. The said agreement was executed by CPMC, HPL, WBIDC, and GoWB. This agreement contained an arbitration clause for referring disputes to the Court of Arbitration under the International Chamber of Commerce (ICC) Rules at Paris.

81. In terms of the said agreement and in the light of the shareholding of the parties as on 12th January, 2002, WBIDC agreed to transfer 155 million shares to CPMC as par value to bring the latter's shareholding to 51% of the paid up equity of HPL.

82. Subsequent to such decision and in order to expedite the restructuring process, a letter was written, by CPMC on 8th March, 2002 to WBIDC stating that the transfer of the said shares be made to CPIL in order to comply with the January agreement. In the said letter it was stated that CPIL will enter into a loan agreement with WBIDC after making payment of Rs. 75500000 out of which Rs. 465300000 has already been paid by said CPIL. The shares so sold to CPIL would remain pledged with WBIDC till the loan is repaid by CPIL. CPMC on its turn agreed to stand as a guarantor by pledging 387750000 of its own shares in addition to the aforesaid shares pledged by CPIL by way of additional security to WBIDC and that the said pledged shares was agreed to be returned to CPIL and CPMC proportionately on the progressive repayment of the loan.

83. The said letter provided that the agreement was without prejudice to the rights of CPMC under the agreement of January 12, 2002 and the terms and conditions thereof shall continue to remain valid and binding by and between the parties. Such terms were agreed to by WBIDC and the agreement was endorsed on the face of the letter itself.

84. On the self-same date, another agreement was executed between the WBIDC, CPIL and CPMC for providing a deemed loan to CPIL against pledge of the shares by CPIL and CPMC as indicated in the aforesaid letter. CPMC stood as a guarantor in the said agreement.

85. Clause 2.3 of the said agreement provided for repayment of the said loan amount by way of installments.

86. Clause 2.5 of the said agreement provided for phased release of pledged shares to CPIL as well as to CPMC, the guarantor, on repayment of the loan by way of installments.

87. Clause 7.5 of the said agreement provided that Court of Calcutta alone shall

have jurisdiction in all matters relating to the said agreement.

Salient features of the 8th March, 2002 agreement are set out as follows:

.....

AND WHEREAS the CORPORATION has entered into an agreement with the GUARANTOR on 12th January, 2002 to transfer a part of said shares to the GUARANTOR on certain terms and conditions and due to certain pending necessary approvals such shares instead of being transferred to the GUARANTOR have been transferred and delivered to the BORROWER vide the letter dated 8th March, 2002 of the GUARANTOR in order to comply with the said agreement.

AND WHEREAS the payment for 15,50,99,998 (fifteen crores fifty lakhs ninety-nine thousand and nine hundred and ninety eight) shares in Haldia Petrochemicals Ltd. transferred to the BORROWER has been made by the BORROWER partly by way of earnest money and down payment in cash and the balance payment is to be made partly by deemed payment and deemed acceptance by the borrower of long term debt from the CORPORATION.

.....

ARTICLE-I INTERPRETATION

.....

(b) "Corporation" means West Bengal Industrial Development Corporation Limited.

(c) "Borrower" means Chatterjee Petrochem (India) Pvt. Ltd.

(d) "Guarantor" means Chatterjee Petrochem (Mauritius) Co.

(e) "Loan" means the loan of the Borrower.

.....

ARTICLE-II AGREEMENT AND TERMS OF THE LOAN.

2.1 The Corporation is hereby deemed to have granted to the Borrower a secured loan of Rupees 147,34,49,980 (Rupees one hundred and forty seven crores thirty four lakhs forty nine thousands nine hundred and eighty only) and the Borrower hereby acknowledges having taken such loan.

2.2 This loan is deemed to be given by the Corporation to the Borrower upon full and final discharge of the balance consideration money against sale of 15,50,99,998 (fifteen crores fifty lakhs ninety-nine thousand and nine hundred and ninety eight) shares in Haldia Petrochemicals Limited transferred by the Corporation to the Borrower for a sum of Rupees 155,09,99,980 (Rupees One hundred and fifty five crores nine lakhs ninety-nine thousand nine hundred and eighty only) and the balance consideration of Rupees 7,75,50,000 (Rupees Seven crores seventy five lakhs fifty thousand only) having already been paid by the

Borrower to the Corporation.

2.3 This loan will be repaid as follows:

Rs. 10,00,00,000 (Rupees Ten crores) on or before 7th March, 2003 Rs.
10,00,00,000 (Rupees Ten crores) on or before 7th March, 2004 Rs.
10,00,00,000 (Rupees Ten crores) on or before 7th March, 2005 Rs.
10,00,00,000 (Rupees Ten crores) on or before 7th March, 2006 Rs.
10,00,00,000 (Rupees Ten crores) on or before 7th March, 2007 Rs.
20,00,00,000 (Rupees Twenty crores) on or before 7th March, 2008 Rs.
20,00,00,000 (Rupees Twenty crores) on or before 7th March, 2009 Rs.
20,00,00,000 (Rupees Twenty crores) on or before 7th March, 2010 Rs.
20,00,00,000 (Rupees Twenty crores) on or before 7th March, 2011

And the balance of Rs. 17,34,49,980 (Rupees Seventeen crores thirty four lakhs forty nine thousand nine hundred and eighty only) on or before 7th March, 2012.

Time is of the essence for repayment in the manner aforesaid and any default in repayment of any installment will be treated as a default.

2.4 The loan shall remain secured by pledge of 19,38,74,998 (Nineteen crores thirty eight lakhs seventy four thousand nine hundred and ninety eight only) shares of Haldia Petrochemicals Ltd. which will Comprise of 15,50,99,998 (fifteen crores fifty lakhs ninety-nine thousand and nine hundred and ninety eight) shares now transferred by the Corporation to the borrower on this date and 3,87,75,000 (Three crores eighty seven lakhs seventy five thousand only) other fully paid-up shares of the GUARANTOR.

2.5 On the Borrower paying the Corporation installments as stated in Clause 2.3 above the Corporation shall unconditionally release to the Borrower and Guarantor, shares as follows:

2.6 It is hereby recorded that the Borrower and the Guarantor have lodged with the Corporation transfer deeds along with the certificates for the above mentioned shares hereby pledged and till such shares are released progressively by the Corporation to the Borrower and the Guarantor as per Clause 2.5 above, the Borrower and the Guarantor hereby grant to the Corporation irrevocable power to renew the said transferred deeds or to execute fresh transfer deeds on the Borrower's and/or Guarantor's behalf as and when required after the original transfer deeds reach the expiry date as per Section 108 of the Companies Act, 1956. As and when any of these shares are required to be lodged for transfer with Haldia Petrochemicals Ltd. for transfer including the transfer on sale of 15,50,99,998 shares by the Corporation to the Borrower in the name of the Borrower, the parties shall cause the shares require to be transferred to be dematerialised and give necessary instructions to the depository so as to effect the transfer.

.....

7.5 Jurisdiction: Courts at Calcutta alone shall have jurisdiction in all matters relating to this agreement.

88. The argument of HPL is that the letter dated 8th March, 2002 and the agreement on the self-same date created independent legal rights in favour of CPIL, an Indian Company, in respect of the aforesaid shares and that the execution of the subsequent agreement resulted in abrogation and/or novation of the 12th January, 2002 agreement including the extinguishment of the arbitration clause therein.

89. On the other hand, it has been submitted by the appellant that such subsequent agreement is merely a supplemental arrangement in aid of the principal contract dated 12th January, 2002 and did not create any independent legal right in favour of CPIL in any manner whatsoever.

90. It has also been submitted that CPIL is a mere nominee of CPMC and it is settled law that a purchaser to a sale agreement may direct delivery in favour of his nominee. It has been argued that there is no novation of the agreement as the parties are different and that the supplemental agreement dated 30th July, 2004 unequivocally reiterates the principal agreement except the alterations made in clause 5 and clause 9 thereof. Reference has also been made to the letter dated 17th December, 2004 wherein Government of West Bengal wrote to HPL stating its commitment to transfer shares to CPMC as agreed vide agreement dated 12th January, 2002, 8th March, 2002 and 30th July, 2004.

91. Perusal of the letter dated 8th March, 2002 and the terms of the agreement of the self-same date shows that the parties had, in fact, altered their legal relationships inter se by substituting the terms of the earlier agreement dated 12th January, 2002. Under 12th January, 2002 agreement, the transferee of the shares in question was CPMC, whereas under the new agreement it was CPIL (as non-signatory to the arbitration agreement). It is true that CPIL has been described as a affiliate of CPMC in subsequent agreements but what is important is not the description of the entity but the status in which it had entered into the transaction. In terms of the letter dated 8th March, 2002 and the loan agreement of the self-same date, shares were transferred to CPIL in its independent capacity and it made part payment in respect of the value of shares and agreed to repay the deemed loan advanced against the balance consideration thereof. Such terms make it evident that shares were not transferred to CPIL merely as a nominee of CPMC but as an independent legal entity. The desire contained in the letter dated 8th March, 2002 that after necessary approvals the shares will be transferred to CPMC does not alter the nature of the transaction that CPIL had purchased the shares after making part payment and agreeing to repay the loan advanced against balance consideration thereof. The status of CPMC had substantially altered in the new arrangement from that of a buyer to a guarantor to the transaction. It had pledged some of its shares in addition to those pledged by CPIL as security in respect of such loan.

92. Such subsequent agreement therefore cannot be said to be a mere nomination in favour of CPIL on behalf of the CPMC but created independent legal rights by and between the parties. The creation of such rights completely extinguished the rights existing under the January, 2002 agreement. Not only did it extinguish such rights under the principal agreement but also destroyed the arbitration clause in respect of the transaction by creating a new dispute resolution forum, namely, Courts of Calcutta with regard to any dispute with regard thereto. It was not a case where the principal agreement had been terminated but the arbitration clause had survived. It was a situation where not only the principal agreement was substituted by the new agreement but the arbitration clause was also extinguished by creation of a new forum, namely, the Courts of Calcutta for dispute resolution.

93. In Union of India (UOI) Vs. Kishorilal Gupta and Bros., his Court held that accord and satisfaction recorded in the substituted agreement extinguished the original contract resulting in the extinguishment of the arbitration clause contained in the said original contract. The said judgment was upheld by the Supreme Court in The Union of India Vs. Kishorilal Gupta and Bros., Similar view has been expressed in Century Spinning and Manufacturing Co. Ltd. Vs. Motilal Dhariwal, and Dadri Cement Company and Another Vs. Bird and Co. (P) Ltd.,

94. The ratio of the aforesaid decisions applies with full force to the instant case wherein the subsequent contract has created new rights and discharged the rights under the old contract in respect of transfer of 155 million shares of HPL.

95. Such substituted contract has not only discharged the liabilities under the original contract but also created a new forum for adjudication in relation to disputes arising from the subsequent contract.

96. In Lata Construction and Others Vs. Dr. Rameshchandra Ramniklal Shah and Another, title Apex Court held that there was no substitution of an earlier contract as the terms of the subsequent contract provided that the earlier contract would stand extinguished on payment of certain sum of money and as the said money was not paid earlier contract was sought to be revived.

97. In the instant case, the terms contained in clause 5 of January, 2002 agreement was unequivocally substituted by the new agreement of 8th March, 2002. It was not conditional on the happening of any event. Failure on the part of WBIDC to receive the subsequent installments and/or release the pledged shares to CPIL and take steps for registration of the same with HPL are breaches of the agreement dated 8th March, 2002 which are remediable in the Courts of Calcutta under the new agreement and not by resorting to the arbitration clause under the earlier agreement.

98. The ratio of the aforesaid decision is not therefore applicable to the facts of the case.

99. Similarly the decisions in LMJ International Limited Vs. Sleepwell Industries

Co. Ltd. and Another, , Gujarat NRE Coke Ltd. v. Gregarious Estates Incorporated and Ors. (Unreported decision of High Court at Calcutta in A.P.O. No. 381 of 2012), JSW Steel Ltd. Vs. JFE Shoji Trade Corporation and Hampton Roads Testing Laboratories Inc., are of no assistance to the appellant since in all these decisions the Court refrained from judicial intervention after coming to a finding that a valid arbitration agreement subsisted in the case of a live dispute. In none of the aforesaid decisions the issue of substitution of the arbitration agreement by creation of a new agreement and discharge of the earlier one had fallen for decision. The said judgments are clearly distinguishable from the facts of the case.

100. In Dresser Rand S.A. v. Bindal Agro Chemical Ltd. & Anr. (unreported decision of Supreme Court of India in Civil Appeal Nos. 1455 and 1456 of 1994) and Centrotrade Minerals and Metals INC v. Hindustan Copper Ltd. (unreported decision of Supreme Court of India in Civil Appeal No. 1124 of 2001), the orders are interim in nature and no law of binding effect has been declared by the Apex Court.

101. Chloro Controls (I) P. Ltd. Vs. Severn Trent Water Purification Inc. and Others, was relied upon by the appellant in support of his contention that if the principal agreement contained in arbitration clause and the ancillary agreement did not provide for such clause, non signatories to the arbitration agreement may also be referred to the arbitration.

102. He contended that though CPIL was a non-signatory to the arbitration agreement but as a nominee and affiliate of CPMC (who was a signatory thereof) may be referred to the arbitration and the principal i.e. CPMC was entitled to seek a relief on its behalf in the arbitral tribunal.

103. In the said judgment, the principal agreement, that is the shareholder's agreement, contained an arbitration clause. Other parties, who were group companies, had entered into ancillary agreements mostly on the same date in aid of the principal agreement.

104. None of the ancillary agreements are running counter to the terms or modified or altered the principal shareholder agreement.

105. In this backdrop the Apex Court held that the real interaction of the parties was to subject the non-signatory group companies to the arbitration clause.

106. The Court held that, in exceptional cases, where it can be inferred that the real intention of the parties was to subject non signatory affiliates to arbitration, such non signatory affiliates could be referred to arbitration. It further held that real intention of the parties was to be decided in the facts of the case. Let us examine whether such intention is evident from the facts of this case.

107. In the instant case, the subsequent agreement dated 8th March, 2002 was not in terms of the 12th January, 2002 agreement but materially altered the terms of the said agreement and expressly stated the intention of the parties to

adjudicate the dispute arising out of the subsequent agreement before a different forum, namely Courts of Calcutta. The transferee of the shares in the subsequent agreement though an affiliate to the CPMC, was not a mere nominee but had paid part consideration money and also had undertaken the principal liability of repaying the deemed loan advanced against balance consideration. The subsequent agreement was therefore not in terms of the earlier agreement but in abrogation of the liabilities arising therein and created new rights and liabilities by and between the parties.

108. The real intention of the parties as evident from the facts of this case is therefore not to subject the non-signatory affiliate to the arbitration clause under the earlier agreement which stood substituted by the new one and created a forum for the adjudication of disputes under the later was also altered to Courts of Calcutta instead of arbitration as under the earlier agreement. This judgment is thereof of no assistance to the appellant.

109. We are therefore of the opinion that the subsequent arrangement arrived at by and between the parties on 8th March, 2002 substituted the terms of the earlier agreement dated 12th January, 2002 with regard to the reliefs pertaining to the transfer of 155 million shares to CPIL.

110. The subsequent arrangement also provided for a different forum for adjudication and thereby rendered the arbitration clause null and void, inoperative and incapable of being performed in relation to such dispute in the aforesaid case. We therefore do not find any reason to differ from the finding of the learned Single Judge in this regard.

111. It appears from the impugned order as well as earlier orders passed at the ad interim stage the appellant has not advanced any argument with regard to other reliefs claimed by it in the request for arbitration (RFA for short). However, before us argument was advanced that prayers (IV), (V) and (VI) in the RFA are pertaining to the terms of 12th January, 2002 agreement and therefore are arbitrable under the said agreement.

112. Prayers (IV), (V) and (VI) relate to directions for providing managerial control of HPL and/or majority holding by transfer of shares upto maximum of Rs. 360 crores to ensure 50% of total paid up equity of HPL.

113. Clause 5 of the January 12, 2002 agreement provided that WBIDC shall transfer shares from time to time to the tune of Rs. 360 crores to CPMC so as to get 51% control of the shareholding of the company. It also provided that in the event of WBIDC/GoWB deciding to transfer the remaining of its shares, CPMC shall have the right of first refusal.

114. Clauses 1 and 2 of the supplemental agreement dated 30th July, 2004, read as follows:

Clause 1:

Pursuant to the said Principal Agreement GoWB has caused WBIDC to transfer to Chatterjee Petrochem (India) Private Limited (CPIL), an affiliate of CPMC Rs. 155 crores of shares from the shareholding of WBIDC existing on the date of the said Principal Agreement, which in effect has been transferred and CPIL has become the beneficial owner thereof, however, the registration of the said shares in the book of HPL are pending the approval of the Lenders, being the Banks and Financial Institutions of HPL (hereinafter referred to as the Lenders) CP(M)c has accepted such transfer in fulfillment of shares transfer obligations (except Right of First Refusal discussed in Clause 2 below) of GoWB under the Principal Agreement of any other agreement, arrangement or understanding.

Clause 2:

CPMC hereby agreements to relinquish its rights to acquire any further shares of HPL as mentioned in Clause 5 of the said Principal Agreement except that in the event WBIDC/GoWB at any point of time intend to transfer all or any part of shares in HPL held by GoWB/WBIDC, they shall first offer the same to CP(M)C, at a price to be decided by GoWB/WBIDC ("Offered Price") and CPMC shall have the right of first refusal on such shares offered at such price, if the offer is not accepted, GoWB/WBIDC shall be free to transfer such shares offered to a third party at such offered price or higher.

115. It appears from the aforesaid terms in the supplementary agreement that CPMC had relinquished its rights under clause 5 of January, 2002 agreement to acquire any further share apart from 155 million shares already transferred in favour of CPIL. It accepted such transfer in fulfillment of all shares obligations under January, 2002 agreement, except the right of first refusal, as aforesaid.

116. This was controverted by the appellant by referring to the letter dated 17th October, 2004 written by GoWB to WBIDC wherein it was stated that GoWB stood committed to the transfer of shares to CPMC as already agreed vide agreement dated 12th January, 2002, 8th March, 2002 and 30th July, 2004.

117. We are unable to accept such proposition. If one reads clause 1 and clause 2 of 30th July, 2004 agreement it is amply clear that CPMC had agreed not to acquire any further share under clause 5 of the January, 2002 agreement except the transfer of 155 million shares already made to CPIL. It only reserved its right of first refusal in respect WBIDC/GoWB chose to dispose of any further share of HPL and nothing more.

118. The letter of 17th October, 2004 merely records the commitment of the government to act in terms of the aforesaid agreement. It does not create any independent right of transfer of shares save and except what appears from the aforesaid agreements read in conjunction with one another.

119. The claim of transfer of shares beyond 155 million shares to CPIL stood extinguished by clause 1 and 2 of the supplementary agreement dated 30th July, 2004. Such claim, therefore, is not a live claim and referring to the parties to

arbitration would be wholly vexatious and unwarranted.

120. Furthermore, similar issues as to unlawful denial of managerial control and/or majority holding of Chatterjee Group in HPL were raised before the Apex Court in the company petition which has been delineated as follows:

99. The case of the Chatterjee Group is woven around two particular issues, namely, that it had been induced to invest in HPL so as to make it a successful commercial enterprise on the promise that the Company would always retain a private character and the Chatterjee Group would have control over its management, but such a promise had not been adhered to and, on the other hand, negotiations were undertaken by WBIDC to induct IOC, Central Government Company, with the intention of ultimately handing over the management of the Company to IOC. The aforesaid case of the Chatterjee Group is also based on the grievance that while keeping the Chatterjee Group under the impression that it intended to ensure that the Chatterjee Group had the requisite number of share to allow it to have a majority shareholding and thereby control of the Company's management, the Company carried on clandestine negotiations with WBIDC to transfer all the shares held by it in the Company to IOC to give it management and control over the Company's affairs.

100. The second ground, as made out by the Chatterjee Group, was that despite having transferred 155 million shares in favour of CP(I)PL on 8th March, 2002, it did not register the same in the name of CP(I)PL, which remained the beneficial owner, the right to vote on the basis thereof remained with WBIDC. This was done despite the fact that the price for the said shares had been received by way of a private arrangement and the Lenders and financial institutions had given their consent to the same. According to the Chatterjee Group, this one act of omission on the part of the Company was sufficient to attract the provisions of section 397 of the Companies Act and for the CLB to pass appropriate orders on account thereof. It is on account of the second ground on which the Company Petition was filled that a prayer had been made therein for a direction upon WBIDC and IOC to immediately register the transferred 155 million shares in the name of CP(I)PL.

121. The said issue as to whether the Chatterjee Group had been unlawfully denied managerial control and/or majority holding in HPL, as promised, was adjudicated by the Apex Court on merits and it was held as follows:

101. From the facts as revealed, it is clear that when Dr. Purnendu Chatterjee expressed his interest in setting up of the Haldia Petrochemicals Ltd., various incentives had been offered to him by the GoWB and WBIDC to invest in the Company and to make it a successful commercial enterprises. Such investments were, however, contingent upon Dr. Chatterjee's bringing in sufficient equity to set up and run the Company. As would be seen, at the very initial stage all the understanding between Dr. Chatterjee and GoWB and WBIDC, both WBIDC and the Chatterjee Group were to hold 433 million shares each, while Tata was to

hold 144 million shares. The promise extended by WBIDC and GoWB to the Chatterjee Group to provide at least 60% of the shares held by WBIDC at Rs. 14/- per share to the Chatterjee Group so as to give the Chatterjee Group the majority shareholding in the Company, as was indicated in the Agreement dated 12th January, 2002, 8th March, 2002 and 14th January, 2005, did not ultimately materialize and, on the other hand, the Chatterjee Group was reduced to a minority on account of its decision not to participate in the Rights Issue, and, therefore, by transfer of 15 million shares by WBIDC in favour of IOC.

102. Although, the Chatterjee Group has complained of the manner in which it had been reduced to a minority in the Company, it is also obvious that when the Company was in dire need of funds and the Chatterjee Group also promised to provide a part of the same, it did not do so and instead of bringing in equity, it obtained a loan from HSBC through the Merlin Group, which only increased the debt equity ratio of the Company. Furthermore, while promising to infuse sufficient equity in addition to the amounts that would have been brought in by way of subscription to the Rights Issue, the Chatterjee Group imposed various preconditions in order to do so, which ultimately led GoWB and WBIDC to terminate the agreement to transfer sufficient number of shares to the Chatterjee Group to enable it to have complete control over the management of the Company and also to retain its private character. It is at a stage when there was a threat to the supply of Naphtha, which was the main ingredient used by HPL for its manufacturing process, that it finally agreed to induct IOC into the Company as a member by transferring 150 million shares to it. It may not be out of place to mention that it was on Dr. Chatterjee's initiative that it had been decided to induct the IOC as a member of the Company at meetings of the Directors which were chaired by Dr. Chatterjee himself. Of course, as explained on behalf of the Chatterjee Group, even the induction of the IOC as a member of the Company is concerned, was part of a conspiracy to deprive the Chatterjee Group of control of the Company since GoWB and WBIDC never intended to keep its promise regarding transfer of at least 60% of its shareholdings in favour of the Chatterjee Group. Such a submission has to be considered in the context of the financial condition of the Company and the response of the Chatterjee Group in meeting such financial crunch. In our view, if in the first place, the Chatterjee Group had stood by its commitment to bring in equity and had subscribed to the Rights Issue, which was a decision taken by the Company to infuse equity in the running of the Company, it would neither have been reduced to a minority nor would it perhaps have been necessary to induct IOC as a portfolio investor with the possibility of the same being converted into a strategic investment.

122. The Apex Court had come to a finding on merits that the denial of managerial control and/or majority status to Chatterjee Group was due to its own fault in failing to bring equity into the company and/or subscribing to the rights issue of HPL. Such finding of the Court was arrived at the behest of Chatterjee Group who had invoked the jurisdiction of the CLB u/s 397, 398, 420 of the Companies Act to adjudicate the same.

123. Prayers (IV), (V) and (VI) of RFA substantially involve the same issue as to the managerial control and majority shareholding in HPL. The Chatterjee Group had sought the same relief in the Company Petition, inter alia, on the ground that it had legitimate expectation of attaining the managerial control and majority status in HPL in terms of the various agreements including the 12th January, 2002 agreement. The issue as to whether such denial of majority status and managerial control in HPL amounted to an act of oppression was decided on merits against the Chatterjee Group. Now the appellant seeks the same relief of managerial control and majority status in prayer (IV), (V) & (VI) of RFA by invoking the arbitration clause.

124. It had been contended that there is no inconsistency or repugnancy between the two proceeding or the reliefs claimed therein and therefore the arbitration proceedings cannot be said to be barred by resorting to the Company proceeding. So far as prayer (IV), (V) & (VI) of RFA are concerned, we are of the opinion that the same relief as to the managerial control and majority holding was also claimed before the CLB. The same was dealt with on merits in the Apex Court and was denied on the ground that the Chatterjee Group failed to live up to its commitments.

125. The appellant therefore could not revive such a claim in arbitration which it had abandoned by conduct. It was not a denial of relief on the premise that the relief claimed was beyond the scope of the Company Petition so far as it related to prayers (IV), (V) & (VI) of RFA.

126. When a party to an arbitration agreement pursues the self-same relief before a court and invites the Court to adjudicate the same on merits and such court adjudicates the same on merits and arrives at a decision, the said party shall be deemed to have abandoned his right to seek arbitration in respect of such claim. In the instant case, the right of the Chatterjee Group to seek managerial control and majority status under the aforesaid agreement or otherwise had been finally decided by the Apex Court. It would be patently vexatious and the abuse of process of law to permit the appellant to reagitate the self-same issue before the arbitral tribunal. The appellant by his own conduct has rendered the arbitration clause inoperative and incapable of being performed as has been held in the cases of *Mr. Ramasamy Attappan and Anr. v. The Secretariat of the Court of International Chamber of Commerce and Ors.* (2009) 3 LW 580, *Magma Leasing Limited Vs. N.E.P.C. India Ltd.*, , *Pran Nath Panjan Vs. State of Jammu and Kashmir*,

127. In *Mussummut Gulab Koer v. Badshah Bahadur*, Vol - X CLJ 420 it was held that a challenge to a consent decree by way of a suit on the ground of fraud is maintainable notwithstanding rejection of application for review. In the instant case, the Supreme Court in Company Petition had denied the plea of the Chatterjee Group that they were wrongfully denied to majority status in managerial control in HPL, as promised not on the ground that such prayer was beyond the scope of the petitioner but on merits that the Chatterjee Group had

failed to live up to its commitment.

128. Similarly, in *Transcore Vs. Union of India (UOI) and Another*, the Supreme Court held that the statutory remedy u/s 13 of the SARFESI Act, 2002 cannot be said to be an alternative remedy for realization of debt under DRT Act. The Apex Court held that the remedies under the said Statutes constituted one remedy as a whole complementing one another and therefore the doctrine of election did not apply.

129. On the other hand, remedy of arbitration and that before the CLB cannot be said to be complementary remedies constituting one remedy as a whole and one invoking arbitration on the issue of majority status and managerial control in HPL, after the Apex Court had returned a verdict on merits against the appellant on the self-same issue in the Company proceeding at the latter's behest undoubtedly amounts to abandonment of its right to arbitration by choosing to agitate such issue before the other tribunal.

130. With regard to the prayer for the transfer of 155 million shares to CPIL we are, however, in agreement with the finding of the learned Single Judge that the decision of the Apex Court on that score was not on merits but on the ground that failure to transfer such shares did not relate to the affairs of the company, but was a private arrangement between two shareholders. On this issue the Apex Court held as follows:

The failure of WBIDC and GoWB to register the 155 million shares transferred to CP(I)PL could not, strictly speaking, be taken to be failure on the part of the Company, but it was the failure of one of the parties to a private arrangement to abide by its commitments. The remedy in such a case was not u/s 397 of the Companies Act. It has been submitted by both Mr. Nariman and Mr. Sarkar that even if no acts of oppression had been made out against the Company, it would still be open to the learned Company Judge to grant suitable relief u/s 402 of the Act to iron out the differences that might appear from time to time in the running of the affairs of the Company. No doubt, in *Needle Industries* case, this Court had observed that the behavior and conduct complained of must be held to be harsh and wrongful and in arriving at such a finding, the Court ought not to confine itself to a narrow legalistic view and allow technical pleas to defeat the beneficial provisions of the section, and that in certain situations the Court is not powerless to do substantial justice between the parties, the facts of this case do not merit such a course of action to be taken. Such an argument is not available to the Chatterjee Group, since the alleged breach of the agreements referred to hereinabove, was really in the nature of a breach between two members of the Company and not the Company itself. It is not on account of any act on the part of the Company that the shares transferred to CP(I)PL were not registered in the name of the Chatterjee Group. There was, therefore, no occasion for the CLB to make any order either u/s 397 or 402 of the aforesaid Act. If, as was observed in *M.S.D.C. Radharamanan's* case (supra), the CLB had given a finding that the acts of oppression had not been established, it would still be in a position to pass

appropriate orders u/s 402 of the Act. That, however, is not the case in the instant appeals.

131. The decision of the Apex Court cannot operate as a legal bar upon CPIL to seek appropriate relief in accordance with law for completion of the transfer of the said shares.

With regard to the issue of limitation it has been argued in support of cross-objection that the claim is patently barred as the agreement was terminated on 20th September, 2005 and the Request for Arbitration has been made on 21st March, 2012. It has been argued that the period of limitation under Article 54 of the Limitation Act is three years from the date when the plaintiff had notice that the performance of the agreement has been refused. It has also been argued that Section 14 of the Limitation Act has no manner of application in the instant case as the relief was denied not due to the defect of the jurisdiction, but as the party failed to make a case on merit. Reference was made to *Nakul Chandra Ghose and Others Vs. Shyamapada Ghose*,

132. In rebuttal the learned senior Counsel for the appellant argued that the letter dated 28th September, 2005 was never placed on record in the company proceeding. It was not an unequivocal refusal as the matter was sub-judice and the same was marked as "without prejudice".

133. It was also argued that when a claim is not patently time barred and matters are in controversy the same ought to be left to the arbitrator for decision, *Anil Kumar Vs. B.S. Neelkanta and Others*, , *Indian Oil Corporation Ltd. Vs. SPS Engineering Ltd.*,

134. He further submitted that section 14 of the Limitation Act ought to be liberally construed and relied on *Union of India (UOI) and Others Vs. West Coast Paper Mills Ltd. and Another*, and *Shakti Tubes Ltd. tr. Director Vs. State of Bihar and Others*,

135. In paragraph 40 of the RFA it has been pleaded as follows:

None of the parties to either the 12 January Agreement or the 8 March Agreement has served any notice of termination and it is CPMC's position that there have been no grounds for termination. Further, section 39 of Indian Contract Act, 1872, which provides for termination of a contract by a party alleging non-performance, denies that right if "he has signified, by words or by conduct, his acquiescence in its continuance," GoWB, WBIDC and Haldia have no numerous occasions expressly acknowledged the continuance of the two agreements.

136. It, therefore, appears that both on the factual and legal matrix the letter of termination has been disputed as the starting point of limitation. Hence, it cannot be said that the claim of the appellant is patently barred by limitation in the facts of this case so as to justify an order of injunction on such premise. We, therefore, feel the learned Single Judge was justified in rejecting the plea of

limitation as a valid ground for injunction, as prayed for, so far as it relates to the transfer of 155 million shares to CPIL. This issue is to be decided on merits by the Court before whom such prayer for specific performance is made in accordance with law.

The appeal is accordingly dismissed. The cross objection is disposed of in the light of the aforesaid findings.

Later:

Prayer for stay of operation of this judgment and order has been prayed for by the learned counsel for the appellants. It has been considered and rejected.

Arun Mishra, J.

I agree.