

(2012) 02 DEL CK 0049

In the Delhi High Court

Case No : O.M.P. 951 of 2011 and IA No's. 1572 and 1573 of 2012

Clearwater Capital Partners (Cyprus) Limited

APPELLANT

Vs

Satyajit Singh Majithia and Others
 Gurmehar Singh
Majithia and Ors Vs Clearwater Capital Partners (Cyprus)
Limited

RESPONDENT

Date of Decision : 23-02-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(6), 11(7), 16, 16(1)
Specific Relief Act, 1963 — Section 34

Citation : (2012) 3 AD 210 : (2012) 189 DLT 362 : (2012) 128 DRJ 478

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Rajiv Nayyar and Mr. N.K. Kaul, s with Mr. Amit Sethi and Mr. Aman Raj Gandhi, in O.M.P. 951/2011 and Mr. A.S. Chandhiok and Mr. Sandeep Sethi, s with Ms. Maneesha Dhir, Mr. Kshitij Khera and Mr. R.S. Paliwal, in 1572 and 1573/2012, for the Appellant; A.S. Chandhiok and Mr. Sandeep Sethi s with Ms. Maneesha Dhir, Kshitij Khera and Mr. R.S. Paliwal, Advocates in 1572 and 1573/2012 and Mr. Rajiv Nayyar and Mr. N.K. Kaul s with Mr. Amit Sethi and Mr. Aman Raj Gandhi, Advocates. in O.M.P. 951/2011, for the Respondent

Final Decision : Dismissed

Judgement

Justice S. Muralidhar

1. OMP No. 951 of 2011 u/s 9 of the Arbitration and Conciliation Act, 1996 ("Act") and CS (OS) No. 277 of 2012 arise out of the same set of facts and are being disposed of by this common judgment.

Background facts

2. The Petitioner in OMP No. 951 of 2011, Clearwater Capital Partners (Cyprus) Limited ("CCPCL"), is a company incorporated in Cyprus. It entered into a Share Subscription Agreement ("SSA") and a Shareholder's Agreement ("SHA"), both dated 11th December 2005, with Respondent Nos. 1 to 6, all residents of New

Delhi and promoters and shareholders of Saraya Industries Limited ("SIL"), a company incorporated in India under the Companies Act, 1956 ("CA"). Respondent Nos. 1 to 6 own 72.5% of total issued equity share capital of SIL and are in control of its management and day-to-day affairs. By virtue of the SSA and SHA CCPCL was issued 11,13,800 shares of SIL resulting in the CCPCL holding 26% of the total issued equity share capital of SIL. However, the management and day-to-day affairs of SIL continued to be with Respondents 1 to 6.

3. Clause 17.8 of the SHA states that the SHA will be interpreted and governed in all respects by the laws of India. Under Clause 17.9 the disputes arising out of the SHA between the parties are to be resolved by arbitration. Under Clause 17.9.2 the parties are to mutually appoint a sole Arbitrator to resolve their differences or disputes. The venue of the arbitration proceedings would be Singapore. Clause 9.6 of the SHA gave CCPCL a Put Option in terms of which if the initial public offer or the listing of shares of SIL did not happen by 30th June 2009, CCPCL could require Respondents 1 to 6 to purchase 10% of the shares of SIL held by CCPCL at any time within a 30 day period commencing 31st December 2009 at a price computed on the basis of 25% per annum Internal Rate of Return on investment ("IRR").

4. The SHA was amended on 22nd January 2010. Clause 9.6 of the SHA was replaced by Clause 1 of the amended SHA. SIL and the promoters, i.e., Respondent Nos. 1 to 6 granted CCPCL a Put Option in relation to 4,28,384 shares held by CCPCL. CCPCL could exercise the Put Option at any time within 24 months from 1st January 2010 at once or in multiple tranches. CCPCL could require Respondent Nos. 1 to 6 or SIL to purchase such shares at a price equal or the pro rata subscription price paid by CCPCL for a number of shares in relation to which the Put Option had been exercised, plus an IRR of 25% calculated from the date of subscription of the shares in relation to which the Put Option has been exercised. If CCPCL decided to exercise its rights under Clause 1.1 of the amended SHA, it was to serve upon Respondent Nos. 1 to 6 or SIL a written notice (Put Notice) requiring them to purchase the shares in relation to which the Put Option was exercised. Within a period of 60 days from the date of the Put notice, Respondent Nos. 1 to 6/SIL was to make payment of the Put Option exercise price into a bank account of CCPCL specified in the Put Notice. On receipt of the entire Put Option exercise price, CCPCL was to transfer/return the relevant shares to Respondent Nos. 1 to 6 or SIL.

5. It is stated by CCPCL that Respondent Nos. 1 to 6 had not provided CCPCL with an exit in relation to its investment and since the exercise period specified in the amended SHA was expiring, CCPCL issued a Put Notice to Respondent Nos. 1 to 6 on 7th December 2011 calling them to confirm in writing to CCPCL within a period of seven days from the date of receipt of Put Notice that the Put Option exercise price (as specified in the amended SHA) would be deposited in a bank account held by CCPCL within 60 days. The Put Notice further provided that on deposit of the said amount, CCPCL would deliver 4,28,384 shares held by CCPCL

in SIL. It is stated that the Put Notice was received by Respondent Nos. 1 to 6 on 8th December 2011 and also through speed post on 9th December 2011.

6. Stating that Respondent Nos. 1 to 6 had failed to respond to the Put Notice, CCPCL on 19th December 2011 filed the present petition u/s 9 of the Act seeking the following reliefs:

(a) an injunction to restrain the Respondents 1 to 6 from selling, transferring, alienating, encumbering, parting with or disposing of their properties located within India or outside;

(b) an order directing Respondent Nos. 1 to 6 to disclose by way of an affidavit details of all their immovable and moveable assets;

(c) an order appointing a private Receiver in respect of the properties belonging to Respondents 1 to 6;

(d) a mandatory order directing Respondent Nos. 1 to 6 to deposit in this Court a sum of Rs. 48,57,28,582/-plus additional amounts calculated @ 25% IRR on the subscription amount of Rs. 13,46,15,388/-starting from 8th December 2011 up to the date of deposit;

(e) an injunction restraining Respondent Nos. 1 to 6 from selling,

transferring, alienating, encumbering or parting with in any manner or disposing of their respective share holdings in SIL.

7. The petition was listed in this Court on 22nd December 2011 when the Respondents appeared on caveat. The Court required CCPCL to satisfy it as regards the jurisdiction to entertain the present petition. This was because under the arbitration clause, the venue of arbitration was to be Singapore and Clause 17.9.1 stated that the Rules of the Singapore International Arbitration Council ("SIAC") would govern the arbitration. It was stated by Mr. Rajiv Nayyar, learned Senior counsel for the Petitioner that in terms of Clause 17.10 of the SHA, the parties had agreed to the "exclusive jurisdiction of the courts of Delhi, India". He pointed out that the decision of the Supreme Court in *Yograj Infrastructure Ltd. Vs. Ssang Yong Engineering and Construction Co. Ltd.*, as further explained in *Yograj Infrastructure Ltd. Vs. SSANGYONG Engineering and Construction Company Ltd.*, holding that in such event the Indian courts would not have the jurisdiction to entertain a petition, was rendered in the context of the SICA Rules as they stood prior to 2010. He pointed out that after 2010 the SICA Rules were amended as a result of which merely because the venue of the arbitration was Singapore the parties would not be precluded from approaching courts outside Singapore for relief.

8. On 3rd January 2012 Mr. A.S. Chandhiok, learned counsel for the Respondents stated that the parties were scheduled to meet on 5th January 2012 to sort out their differences. However, on the next date, i.e., 9th January 2012 it was stated by Mr. Nayyar that the talks had not progressed. While directing notice to issue

to Respondents on that date the Court directed that "the Respondents will within two weeks file their respective affidavits disclosing their assets as of today, including bank accounts and enclose therewith the statements of the bank accounts indicating the balances therein." Further, it was directed that "till the next date, the Respondents will maintain status quo as regards the shareholding in Respondent No. 2 and also as regards the assets of the Respondents."

9. On 23rd January 2012, Respondent Nos. 1 to 6 thereafter filed IA No. 1572 of 2012 for dismissal of the present petition as well as IA No. 1573 of 2012 for vacating an order dated 9th January 2012. Notice was directed to issue in the said applications on 25th January 2012.

10. On 3rd February 2012 Respondent Nos. 1 to 6 filed CS (OS) No. 277 of 2012 seeking the following reliefs:

(a) declaration that SSA and SHA, both dated 11th December 2005 and the amended SHA dated 22nd January 2010 are "illegal and therefore, void ab initio being in complete contravention of the External Commercial Borrowing Guidelines ("ECB Guidelines") issued by the Reserve Bank of India ("RBI") as well as the Securities Contracts (Regulation) Act, 1956 ("SCR Act");

(b) declaration that Put Option contained in Clause 9.6 of SHA as amended by Clause 1.1 of the amended SHA was "illegal and unlawful and not enforceable in law;

(c) permanent injunction restraining the CCPCL, (Defendant No. 1 in the suit) from initiating any legal action for the enforcement of any terms of the SSA and SHA "including but not limited to invocation of the arbitration clauses" in the SSA and SHA as well as the amended SHA as well as enforcement of Put Option contained in Clause 9.6.

11. On 3rd February 2012, the suit was directed to be listed along with OMP No. 951 of 2011. In the suit Respondent Nos. 1 to 6 filed IA No. 2139 of 2012 for an ex parte ad interim injunction restraining the CCPCL from initiating any legal proceedings for the enforcement of any terms of the SSA, SHA as well as the amended SHA.

12. Respondent Nos. 1 to 6 did not comply with the order dated 9th January 2012 passed by this Court in OMP No. 951 of 2011. In the meanwhile, CCPCL invoked the arbitration clause and approached the SIAC. Pursuant thereto SIAC issued an arbitration notice to Respondents 1 to 6 on 7th February 2012. Thereafter, Respondent Nos. 1 to 6 filed IA No. 2985 of 2012 in CS (OS) 277 of 2012 on 15th February 2012 seeking stay of the impugned notice of CCPCL seeking to invoke arbitration clause and for a direction to CCPCL to maintain status quo.

13. This Court has heard the submissions of Mr. Rajiv Nayyar and Mr. N.K. Kaul, learned Senior counsel appearing for CCPCL and Mr. A.S. Chandhok and Mr. Sandeep Sethi, learned Senior counsel appearing for Respondent Nos. 1 to 6.

Maintainability of the suit

14. The first question that arises for consideration is whether the suit seeking the reliefs aforementioned is maintainable in light of CCPCL having invoked the arbitration clause in the SHA.

15. The relevant Articles of the SHA read as under:

9.6.1 Put Option - In consideration of CCPCL entering into this Agreement, the Promoters grant CCPCL a Put Option in the event that the Initial Public Offer/ listing of shares does not happen by end of June 30, 2009, being the right of CCPCL to require the Promoters to purchase up to 10% of the shares of the company held by CCPCL (the "Put Option Shares") at any time within a 30 days period commencing from December 31, 2009 ("Put Option period") at a price computed on the basis of 25% per annum IRR (i.e., Internal Rate of Return on Investment) to CCPCL ("Put Option Strike Price"). The said Put Option shall not be applicable in the event the Promoters have already acquired 100% or more shareholding from CCPCL, and procured the acquisition of the remaining shares of CCPCL, pursuant to exercise of the Right of First Offer under Article 9.3 above.

17.8 Governing Law

This Agreement shall be interpreted and governed in all respects by the laws of India.

17.9 Arbitration

17.9.1 Any dispute arising out of or in connection with this Agreement (including a dispute regarding the existence, validity or termination of this Agreement or the consequences of its nullity) shall be referred to and finally resolved by arbitration to be conducted in accordance with the rules of the Singapore International Arbitration Council.

17.9.2 The arbitration shall be conducted as follows:

- (a) The parties shall mutually appoint a sole Arbitrator to resolve the aforesaid disputes or differences.
- (b) All proceedings in any such arbitration shall be conducted in English.
- (c) The venue of the arbitration proceedings shall be Singapore.
- (d) The Arbitrator shall be free to award costs as he thinks appropriate.
- (e) The arbitration award shall be final and binding on the parties, and the parties agree to be bound thereby and to act accordingly.

17.10. Jurisdiction

Subject to Article 17.9 each party submits to the exclusive jurisdiction to the Courts of Delhi, India.

17.13 Violation of the terms

Without prejudice to the provisions of this Agreement, the parties agree that each party shall be entitled to an injunction, restraining order, right for recovery, suit for specific performance or such other equitable relief as a court of competent jurisdiction may deem necessary or appropriate to restrain the other party from committing any violation or enforce the performance of the covenants, obligation and representations contained in this Agreement. These injunctive remedies are cumulative and are in addition to any other rights and remedies the parties may have at law or in equity, including without limitation a right for recovery of the amounts due under this Agreement and related costs and a right for damages.

16. In terms of the Amended SHA dated 22nd January 2010 Clauses 1.1, 1.2 were inserted in the SHA. They read as under:

1. Put Option

1.1 In consideration of a sum of Rs.100/-each received from CCPCL, the receipt of which the Promoters and the Company hereby acknowledge, the Promoters (jointly and severally) and the Company hereby grant CCPCL a Put Option in relation to the 428,384 shares held by CCPCL, CCPCL may exercise the Put Option at any time within 24 months from January 1, 2010, at once or in multiple tranches. CCPCL may require the Promoters and/or the Company to purchase such shares at a price equal to the pro rata subscription price paid by CCPCL for the number of shares in relation to which the Put Option has been exercised plus an IRR of 25% calculated from the date of subscription of the shares in relation to which the Put Option has been exercised ("Put Option Exercise Price"). Provided that in the event that the Promoters and/or the Company have exercised the call Option under Clause 2 below the relevant shares in relation to which the call Option is exercised have been transferred and the consideration paid to CCPCL, CCPCL shall exercise the Put Option in relation to such number of shares as would remain after such transfer, i.e.: [428384 shares - the shares in relation to which the call Option has been exercised and shares transferred]

1.2 If CCPCL decides to exercise its rights pursuant to Clause 1.1 above, CCPCL shall serve upon the Promoters and/or the Company a written notice ("Put Notice") requiring the Promoters and/or the Company to purchase the shares in relation to which the Put Option is exercised within a period of 60 days from the date the Put notice. Within 60 days from the date of the Put Notice, the Promoters and/or the Company shall make payment of the Put Option Exercise Price into a bank account of CCPCL specified in the Put Notice. ON the date on which the entire Put Option Exercise Price is received by CCPCL, CCPCL shall transfer/return the relevant shares to the Promoters and/or the Company. The Promoters and the Company shall do all such things as may be required to give effect to the provisions of this Clause. The Promoters shall not exercise and shall

waive any rights that may be available to any of them in relation to the repurchase of CCPCL's shares by the Company pursuant to this Clause. The Promoters and the Company shall make all requisite applications in a prompt and timely manner to obtain such approvals as may be required to give effect to the provisions of this Clause 1.

17. A collective reading of the aforementioned clauses shows that Article 17.10 which provides for the exclusive jurisdiction of the courts in Delhi is subject to Article 17.9 which provides for arbitration. The scope of the disputes that can be referred, in terms of Article 17.9.1, to arbitration, is indeed wide. It includes not only disputes arising out of SHA but also a dispute "regarding the existence, validity or termination of this Agreement or the consequences of its nullity." Consequently, any dispute between the parties arising out of a challenge by Respondent Nos. 1 to 6 to the existence or validity of the SHA or of any of its articles, including Article 9.6 as further amended, on any ground whatsoever, can also be referred to arbitration.

18. The contention of Mr. Chandhiok is that by virtue of Article 17.13 the parties have agreed that each of them would be entitled to the remedies of "an injunction, restraining order, right for recovery, suit for specific performance or such other equitable relief as a Court of competent jurisdiction may deem necessary or appropriate to restrain the other party" and therefore if CCPCL seeks specific performance of the SHA, the "only" remedy available is by way of a suit. Considerable reliance is placed upon the decision of the learned Single Judge of the Bombay High Court in *IND Synergy Limited v. Clearwater Capital Partners* 2011 (1) Bom CR 168 where while interpreting similar clauses of the SHA and SSA in that case the Bombay High Court held that "the parties had not arrived at a definite conclusion that the dispute must be referred to arbitration only and they should not be resolved by any other method." Consequently, in that case the court declined to refer the disputes to arbitration. Mr. Chandhiok also placed reliance on the decision in *Wellington Associates Ltd. Vs. Mr. Kirit Mehta*, . Mr. Chandhiok sought to distinguish the decision of this Court in *Oval Investment Private Limited v. Indiabulls Financial Services Limited* 2009 VII AD (Del) 336 which was upheld by the Division Bench of this Court by its order dated 3rd November 2009 in RFA (OS) No. 68 of 2009.

19. The facts in *IND Synergy Limited* were that Plaintiff No. 1 *IND Synergy Limited* ("ISL") was engaged in extraction of iron ore and Plaintiff Nos. 2 to 9 were its promoters. Defendant Nos. 1 and 2 were the companies with whom the Plaintiffs entered into a Subscription Agreement for the sale of fully convertible debentures of ISL on 11th March 2008. A separate agreement was also entered into on the same date titled as "Shareholders" Agreement" under which Defendant No.1 had a Put Option. Under the Shareholders" Agreement it was agreed that 50% of the fully convertible debentures held by Defendant No. 1 company could be transferred to Defendant No. 2. Defendant No. 2 also asserted that it was entitled to Put Option like Defendant No. 1. Both Defendants

exercised the Put Option and issued notices on 18th June 2008 to the Plaintiff enforcing their rights conferring upon them in terms of the Shareholders' Agreement. In terms of the Agreement, ISL was to extract one million tonnes of iron ore between 1st April 2009 to 31st March 2010. However, that did not happen. ISL and other Plaintiffs filed a suit in the Bombay High Court for a declaration that the provisions of Shareholders' Agreement relating to transferability of the promoters' shares in ISL were illegal, null and void. The other prayer in the suit was for a declaration that the Put Notices dated 18th June 2010 issued by Defendants were misconceived, illegal and null and void. The Plaintiffs also sought an order of injunction restraining the Defendants from taking any coercive action on the basis of notices dated 18th June 2010. The Defendants, on receipt of the notices, filed an application u/s 8 of the Act stating that the disputes should be referred to arbitration.

20. At this stage it may be noted that Clause 16.7.1 of the Shareholders' Agreement dated 11th March 2008 in IND Synergy Ltd. is more or less similar to Clause 17.9.1 of the SHA in the present case. Likewise, Clause 16.8 of the Shareholders' Agreement in IND Synergy Ltd. is identical to Clause 17.10 of the SHA in the present case. Clause 16.11 of the Shareholders' Agreement in IND Synergy Ltd. is identical to Clause 17.13 of the SHA in the present case.

21. In IND Synergy Ltd. the application filed by the Defendants u/s 8 of the Act was rejected. The learned Single Judge of the Bombay High Court interpreted Clauses 16.7.1 and 16.11 of the agreement in that case thus:

30. Looking to the two clauses as they stand, I am inclined to observe that the parties had not arrived at a definite conclusion that the dispute must be referred to arbitration only and they should not be resolved by any other method. If that would have been the intention of the parties, there was no room for the litigation clause. The judgment in the case of Wellington Associates Ltd. would clearly indicate that in order to have the dispute referred to arbitration, the parties must have a firm intention that the dispute should be referred to an arbitration. The parties must whole heartedly agree that the dispute should be referred to arbitration only. In my view, slightest deviation by the parties from their intention to refer the dispute to the arbitration would lead to non-compliance of requirements of Section 8 of the said Act.

31. In my view, in the present case, the way in which the litigation clause has been worded it is clear that parties were not firm on the point of reference of the dispute to arbitration. In such a situation, it will not be possible for this Court to arrive at a conclusion that the only intention of the parties was to refer the dispute between them to arbitration.

22. While it is true that clauses interpreted in the above decision of the Bombay High Court are identical to the clauses in the present case, this Court is, for the reasons explained hereafter, not inclined to follow the said decision. The words "without prejudice" occurring in Clause 17.13 of the SHA cannot be read as

"notwithstanding" as in a non-obstante clause of a statute. In fact it is doubtful that the rules of interpretation of statutes could ipso facto be adopted while interpreting clauses of a contract where the intention of the parties is determinative of the meaning that should be given to the clauses. Secondly, Clause 17.13 itself makes it clear that "these injunctive remedies are cumulative and are in addition to any other rights and remedies the parties may have at law or in equity." Therefore, there is no "ouster" of the arbitration clause by Clause 17.13 when the relief sought is of specific performance of the agreement. Thirdly, if one of the parties has elected to invoke the arbitration clause to resolve the disputes, and which includes every type of dispute, then that party is entitled to contend that the said remedy must be exhausted. Fourthly, it is possible to read Clause 17.13 and Clause 17.9.1 harmoniously and not as if one excludes the other. The injunctive reliefs that a court may be approached for by any of the parties in terms of Clause 17.13 could well mean the kind of interlocutory reliefs that may be sought, for instance, u/s 9 of the Act., Fifthly, our Court has taken a view different from the Bombay High Court in the matter of entertaining a suit concerning the validity of an agreement which includes an arbitration clause.

23. In *Oval Investment Private Limited v. Indiabulls Financial Services Limited* a Single Judge of this Court was dealing with the question of maintainability of a suit by the Plaintiff in that case in which it sought a declaration against the Defendant No. 1 company in that case that the invocation of the arbitration/reference to arbitration in terms of a letter dated 17th July 2009 issued by Defendant No. 1 company was vitiated and liable to be struck down. The second relief sought was a decree of perpetual injunction restraining Defendant No. 1 from invoking the arbitration clause. The issue that arose was whether the suit was maintainable in view of Clause 57 of the agreement between the parties in that case which provided for reference of a dispute or difference arising between them to arbitration. The suit was held to be not maintainable. After analyzing the scheme of the Act and its provisions, it was observed as under (AD, pp 344-345):

24. It appears that the Court comes into picture thereafter only at two stages. u/s 37(2)(a) of the 1996 Act, an appeal can be filed to a court against an order passed by an Arbitrator either accepting the plea of lack of jurisdiction or of exceeding the scope of authority. u/s 37(2)(b) an appeal can also be filed against an interim order passed by the Arbitrator u/s 17 of the 1996 Act either granting or refusing interim measure. If the Arbitrator u/s 16(1) overrules the plea of an objector and rules that he has jurisdiction or that there does exist a valid arbitration agreement then the aggrieved party has to wait for the final Award and thereafter challenge it u/s 34 of the Act. Section 34(2) sets out the grounds on which the Award can be challenged. Among these grounds is that the arbitration agreement is not a valid one or that the award deals with the disputes not contemplated or not falling within the terms submitted to the arbitrator or it contains the decision on matters beyond the scope of the submission to arbitrator. One other ground is that the composition of the tribunal or the arbitral

tribunal was not in accordance with the agreement between the parties .The scheme of the Act appears to be restrict interdiction by the court of arbitral proceedings except to the limited extent indicated hereinbefore.

25. u/s 33 of the 1940 Act, the Arbitrator could examine the question of the existence or validity of the arbitration agreement. Section 16 of the Act not only preserves this power of the arbitrator but in fact expands it. The wording of Section 16(1) indicates that the arbitrator could rule on his own jurisdiction "including ruling on any objections with respect to the existence or validity of the arbitration agreement". The word "including "shows that the scope of the examination of the questions concerning the jurisdiction of the arbitral tribunal is not limited to the existence of the arbitration agreement itself. Therefore ,it is inconceivable that where there is a violation of mandatory requirement like Section 21 of the Act, the arbitrator cannot examine that question as well. If the existence of the arbitration agreement is a sine qua non for commencement of arbitration proceedings and if such a question is to be examined only by the arbitrator, it is difficult to accept the proposition that the question whether a valid notice u/s 21 has been received by the respondent in a claim petition, cannot be gone into by the arbitrator. The question really is not so much whether the requirement u/s 21 of the Act is mandatory or not. This Court is of the view that such a requirement is indeed mandatory for without the notice of invocation being received bythe respondent no arbitral proceedings can commence. The question really, therefore, is whether the arbitrator has the power to decide where this procedure u/s 21 of the Act has been complied with. In the considered view of the Court, given the scheme of the Act and the minimal scope of the interference by the civil courts, it must be held that this question can and should be examined by the arbitrator himself.

(emphasis supplied)

24. After discussing the decisions of the Supreme Court including the one in Milkfood Ltd. Vs. GMC Ice Cream (P) Ltd., it was concluded in Oval Investment Private Limited as under (AD, pp 349-350):

34. It appears to this Court in the light of the scheme of the Act as discussed hereinbefore, the question whether the mandatory requirement of receipt of the notice by the Respondent in terms of the Section 21 of the 1996 Act has been complied with is also to be examined by the Arbitrator u/s 16 of the 1996 Act. The reliance by the learned Senior Counsel for the Plaintiffs upon the decision in India Household & Healthcare Ltd. v. LG Household & Healthcare Ltd. (supra) appears to be misplaced. The question that arose there was whether in terms of Section 16 of the 1996 Act, notwithstanding that the agreement itself was challenged as being vitiated by fraud, it would be for the Arbitrator to determine he had jurisdiction. Para 3 of the said decision in India Household & Healthcare Ltd. (supra) reveals that the respondent there had questioned the Memorandum of Understanding (MOU) dated 1st November 2003 and the Licence Agreement dated 8th May 2004 containing the arbitration clause as being vitiated by fraud.

The Respondent had filed a suit in the High Court in which an interim injunction had been issued restraining the petitioner from acting on the MOU. In the said suit it had been categorically alleged that the Respondents had hatched a conspiracy to defraud the petitioner for the purpose of obtaining bribes, commissions and kickbacks. The matter came before the Supreme Court by way of an application u/s 11 filed by the Petitioner seeking the appointment of an arbitrator. It was pointed out by the Respondents that in terms of the judgment in *SBP & Co. v. Patel Engineering Ltd.*, the Court u/s 11 was obligated to go into the question whether the entire agreement was vitiated by fraud and whether as a result thereof no valid arbitration agreement came into being. It is, therefore, seen that the decision in *India Household & Healthcare Ltd. (supra)* was in the context of the challenge to the existence and the validity of an arbitration agreement in proceedings u/s 11 of the Act. The question really was not whether the Court can examine such a question dehors the Act. In fact, *India Household & Healthcare Ltd. (supra)* indicates that even such questions have to be examined only within the scope of the 1996 Act and not outside it.

35. In the present case, for instance, if the Plaintiffs are aggrieved by the appointment of the learned Arbitrator they might have to seek remedies in terms of Section 11 of the Act. In fact the Plaintiffs seem to assert such a proposition in para 44 of the plaint. If the Plaintiffs are aggrieved by the interim order dated 23rd July 2009 passed by the learned Arbitrator u/s 17 of the 1996 Act, they can appeal against it in terms of u/s 37(2)(b) of the 1996 Act. Therefore, it is not as if the Plaintiffs do not have a remedy.

25. The Division Bench while affirming the above decision in appeal observed as under:

13. We are also satisfied that the learned Single Judge has rightly concluded that the suit is barred u/s 34 of the Specific Relief Act, 1963. It has noted that the consequential relief that would flow from the first prayer, viz. for the declaration that the letter dated 17.7.2009 invoking arbitration proceedings was invalid, would be that proceedings based thereon would also be invalid. Such a relief could not be granted as that would tantamount to restraint of arbitral proceedings, which is precisely what should be assiduously avoided where the existence of an arbitration clause is not in dispute. The consequential relief of injunction was, therefore, deliberately drafted in the manner so as to claim what was essentially and logically the consequential relief. We are reminded of the observations in *T. Arivandandam Vs. T.V. Satyapal and Another*, , which are to the effect that the Court should not fall prey to clever drafting. This case has recently been adverted to in *Abdul Gafur and Another Vs. State of Uttarakhand and Others*, where his Lordship D.K. Jain, speaking for the Bench, had recommended that wherever "the High Court is convinced that the plaint read as a whole does not disclose any cause of action, it may reject the plaint in terms of Order 7 Rule 11 of the Code. As a matter of fact, as observed by V.R. Krishna Iyer, J., in *T. Arivandandam Vs. T.V. Satyapal and Another*, , if on meaningful - not formal -

reading of the plaint, it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, the court should exercise its power under the said provision. And if clever drafting has created an illusion of a cause of action, it should be nipped in the bud.

26. This Court is bound by the decision of the Division Bench of this Court. Having agreed to refer the disputes arising between them to arbitration, including disputes concerning the validity of the SHA itself, Respondents No.1 to 6 cannot seek to prevent CCPCL from invoking the arbitration clause and seeking reference of the disputes to arbitration. No suit for such a relief can be entertained by the Court when CCPCL has prior thereto elected to refer the disputes for arbitration in the manner envisaged in Article 17.9.1 of the SHA.

27. Relying on Wellington Associates Ltd. (supra) Mr. Chandhiok submitted that Article 17.13 used the word "shall" and therefore it was mandatory for parties to approach the court for the relief of specific performance. Since the wording of Article 17.13 indicated that it was mandatory, the intention of the parties was that the reference of the disputes to arbitration under Article 17.9 was not.

28. There is no merit in this contention either. A perusal of the relevant clauses of the agreement in that case show that under Clause 4 it was agreed that if any dispute arose then "only the courts in Bombay would have jurisdiction to try and determine the suit" and that the parties had submitted to the "exclusive jurisdiction of the courts of Bombay." This was followed by Clause 5 which stated that it had "also" been agreed between the parties that any dispute arising between them "may be referred" to arbitration. It was in the said context that it was held in Wellington Associates Ltd. that in the absence of a clause "requiring a reference in a mandatory sense", no reference can be made to the arbitral tribunal. In the present case, Article 17.9 expresses unambiguously the clear intention of the parties that their disputes arising from the SHA would be referred to arbitration. The word "shall" is used in Articles 17.9.1 and 17.9.2 as well. Although the word "shall" is used in Article 17.13 of the SHA as well, it has to be understood in the context of the later part of Article 17.13 which clearly states that the remedy available to the parties thereunder is in addition to the one under the earlier Article 17.9. The wording of Article 17.9 conveys the "mandatory sense" of the arbitration agreement between the parties as envisaged by Section 7 of the Act.

29. Mr. Chandhiok then referred to several passages of the decision in S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, and contended that it is the Court before whom the challenge as to the validity of the arbitration agreement was raised which has to decide that question and not relegate the party to the remedy before the arbitral tribunal u/s 16 of the Act. The said submission fails to notice that the question in SBP & Co. v. Patel Engg. Ltd. concerned the power of appointment of an arbitrator by the Chief Justice u/s 11(6) of the Act. The envisaged sequence was that one of the parties had approached the Chief Justice prior to the making of the reference to an arbitrator, i.e., at a stage prior to

reference being made to an arbitrator in terms of the arbitration agreement. This is clear from the highlighted portion of the following passage (SCC, p. 649) :

20. Section 16 is said to be the recognition of the principle of Kompetenz-Kompetenz. The fact that the Arbitral Tribunal has the competence to rule on its own jurisdiction and to define the contours of its jurisdiction, only means that when such issues arise before it, the Tribunal can, and possibly, ought to decide them. This can happen when the parties have gone to the Arbitral Tribunal without recourse to Section 8 or 11 of the Act. But where the jurisdictional issues are decided under these sections, before a reference is made, Section 16 cannot be held to empower the Arbitral Tribunal to ignore the decision given by the judicial authority or the Chief Justice before the reference to it was made. The competence to decide does not enable the Arbitral Tribunal to get over the finality conferred on an order passed prior to its entering upon the reference by the very statute that creates it. That is the position arising out of Section 11(7) of the Act read with Section 16 thereof. The finality given to the order of the Chief Justice on the matters within his competence u/s 11 of the Act are incapable of being reopened before the Arbitral Tribunal."

(emphasis supplied)

30. In the present case, neither of the parties has approached this Court for appointment of an arbitrator u/s 11 of the Act. In fact, Respondents 1 to 6 are seeking a declaration as to the invalidity of the SHA itself including its arbitration clause. Meanwhile CCPCL has already invoked the arbitration clause and sought reference of the disputes to arbitration under the SIAC Rules. As already held, it is only where the arbitrator is not appointed in terms of the SHA read with the SIAC Rules that the question of this Court exercising powers u/s 11 of the Act arises. If an arbitrator is appointed either by consent of the parties or failing that in terms of the SIAC Rules, then it would be for such arbitrator to determine in the first instance the question concerning the validity of the SHA or any clause thereof.

31. It was then contended by Mr. Chandhiok that in terms of Article 17.9.2 of the SHA, the appointment of the sole Arbitrator has to be decided by the parties and not by the SIAC. Therefore, the notice issued by the SIAC to the Respondents to agree to the appointment of a sole arbitrator as suggested by CCPCL was invalid. There is no merit in this contention. The Rules of the SIAC provide that where the parties fail to agree on the name of the sole arbitrator the SIAC will, in its exercise of Clause 7.2, appoint an Arbitrator. Clause 7.2 of the SIAC Rules reads as under:

7.2. If a party fails to make a nomination within 21 days after receipt of a party's nomination of an arbitrator, the Chairman shall proceed to appoint the Arbitrator on its behalf.

32. Therefore, it is the procedure envisaged in the SHA that will first be given effect to and upon that procedure not resulting in an arbitrator being appointed,

the SIAC will step in. It is only where the SIAC fails to appoint an Arbitrator that it will be open to the parties to invoke Section 11(6) of the Act for appointment of a sole Arbitrator.

33. For the aforesaid reasons, this Court is of the view that the suit is not maintainable as such and it is accordingly dismissed.

The Section 9 petition

34. In relation to petition u/s 9 of the Act, it is not in dispute that Respondents 1 to 6 have not complied with the order dated 9th January 2012 passed by this Court and filed their respective affidavits disclosing the moveable and immoveable assets. The explanation offered is that they had filed two applications, one for vacation of the said order and the other seeking dismissal of the petition on the strength of the decisions of the Bombay High Court in Niskalp Investments and Trading Co. Ltd. Vs. Hinduja TMT Ltd., .

35. As already observed, it is misconceived on the part of Respondent Nos. 1 to 6 to contend that they can avoid arbitration in view of the invalidity of any clause of the SHA or SSA or the amended SHA. The issue concerning the validity of the SHA or SSA as a whole or of any of its articles can well be raised before the arbitrator. Further, as pointed out by Mr. Kaul learned Senior counsel for CCPCL, even if a clause in the SHA or SSA is found to be invalid for any reason whatsoever, that does not affect the arbitration clause. The parties can still refer the disputes arising between them, including the dispute relating to validity of the SHA and SSA to arbitration. Likewise, the question as to the validity of the Put Option clause, in Article 9.6 of the SHA as amended, on the ground that it may be contrary to the provisions of the SCR Act can also be examined by the arbitrator. It would be for the arbitrator to decide what is the kind of relief that can be prayed for and that which can be granted. It would be premature for this Court in a Section 9 of the Act to take a view on this aspect.

36. Consequently there is no merit in IA No. 1572 of 2012 and I.A. No. 1573 of 2012 filed by Respondents 1 to 6 in OMP No. 951 of 2011 and they are dismissed as such.

37. At the hearing of the case on 16th February 2012 it was submitted by Mr. Chandhiok that the Respondents 1 to 6 will, without prejudice to their rights and contentions, comply with the order dated 9th January 2012 and file by the next date their respective affidavits disclosing their assets, including bank accounts and enclose therewith statements of the bank accounts indicating the balance therein. The Respondent No. 4 has, on 22nd February 2012, filed an affidavit disclosing the details of the moveable and immoveable properties of each of the Respondents with a copy thereof being served on the counsel for the Petitioner. Secondly it was submitted by Mr. Chandhiok that that under Article 9.1 of the SHA, the parties have agreed that as long as CCPCL holds 10% of the paid up share capital of SIL, "the Promoters shall not create an encumbrance directly or indirectly, in any manner, on all or any of their shares without obtaining the prior

written consent of the CCPCL." It is submitted that since admittedly Respondents 1 to 6 own more than 72.5% of the paid up share capital of SIL, and the value of the said shares as of date is much much higher than the total claim of CCPCL against them, Article 9.1 itself constitutes sufficient security for the CCPCL. It is reiterated that Respondents 1 to 6 are bound by Article 9.1 of the SHA and will abide by it.

38. The above statement on behalf of Respondent Nos. 1 to 6 is placed on record and it is directed that they will not, either jointly or severally, transfer, alienate, dispose, encumber or part with their shares in SIL without the prior written consent of CCPCL. In addition, Respondents 1 to 6 will jointly and severally ensure, during the pendency of the arbitral proceedings, that they maintain sufficient bank balances and other moveable and immoveable assets in their individual names of the aggregate value of Rs. 50 crores. It will be open to the parties to seek appropriate interim relief, including a variation or modification of the above order, before the sole Arbitrator in accordance with law.

Conclusion

39. CS (OS) No. 277 of 2012 and the pending applications in it are dismissed. IA Nos. 1572 and 1573 of 2012 in OMP No. 951 of 2012 are dismissed. Respondents 1 to 6 will pay CCPCL Rs. 30,000 towards costs of these proceedings within four weeks.