

(2002) 11 BOM CK 0026

In the Bombay High Court

Case No : Appeal from Order No. 799 of 2002 with Civil Application No. 1027 of 2002

GTC Limited

APPELLANT

Vs

Royal Consulting RV and Global Marketing Direct Ltd.

RESPONDENT

Date of Decision : 30-11-2002

Acts Referred:

Arbitration Act, 1940 — Section 33, 34
Arbitration and Conciliation Act, 1996 — Section 10, 11, 44, 45, 5
Civil Procedure Code, 1908 (CPC) — Section 9
Contract Act, 1872 — Section 17, 28

Citation : (2003) 2 ALLMR 608

Hon'ble Judges : F.I. Rebello, J

Bench : Single Bench

Advocate : Shrihari Aney, Gautam Bhat and Amit Tamba, instructed by Desai and Diwanji, for the Appellant; Prashant S. Pratap, Ajit C. Shah and Harsh G. Pratap, for the Respondent

Judgement

F.T. Rebello, J.—The questions for determination in this appeal form order arise from two agreements. The first agreement was between the appellant and the Respondent No. 1 dated 9.11.2000 and the arbitral agreement dated 9th December, 2000. The second agreement is dated 18.1.2001 between the Petitioner and Respondent No. 2. Both the agreements contain arbitral clauses. In the agreement between appellant and Respondent No. 1 the arbitral clauses reads as under:

"All disputes arisen in connection with this agreement shall be referred to arbitration. The arbitrator shall be appointed by the courts of U.K. Hearing shall take place in london. This agreement shall be governed by U.K. "law".

In so far as agreement dated 18.1.2001 between Appellant and Respondent No. 2 is concerned, the arbitral clause is contained in Clauses 13 and 15 and they read as under:

"13. If at any time any dispute or question shall arise between the parties to this Agreement in connection with this Agreement or its validity construction or performance then the same shall be referred to an arbitrator to be agreed upon by the parties and failing such agreement within (15) days of either party requesting the appointment of an arbitrator and suggesting a name, the arbitrator shall be appointed by the President for the time being of the Chartered Institute of Arbitrators and according to the provisions of the Arbitration Acts 1950 and 1979 and the decision of the arbitrator shall be final and binding on both the parties and unless otherwise agreed the cost of arbitration shall be borne by the parties equally".

"15. The construction validity and performance of this agreement shall be governed in all respects by English law."

2. The plaintiffs have filed a suit before the Civil Judge, Senior Division. Thane being Special Civil Suit No. 50 of 2002 against the respondents. The main reliefs sought in the suit read as under:

(a) that this Hon"ble Court declare that the said agreements dated 9th November, 2000 and 18th January, 2001 and the arbitration agreements contained in them are all illegal null and void ab initio, or inoperative and/or incapable of being performed.

(c) That this Hon"ble Court be pleased to grant a perpetual order and injunction restraining the defendants from in any manner implementing and/or acting upon and/or in furtherance of the Agreements dated 9th November 2000 (as amended by the agreement dated 9th December, 2000) and 18th January, 2001 and the arbitration clauses contained in them and from initiating any proceedings arising out of the agreement.

(d) Without prejudice to prayers (a) to (c) this Hon"ble Court be pleased to declare that the 2nd Defendant is not entitled to proceed with the arbitration under the Agreement dated 18th January, 2001 unless and until the arbitration between the plaintiff and the 1st Defendants is finally concluded and the award therein finally executed and enforced in accordance with law."

Plaintiffs had taken out a Notice of Motion, and sought reliefs which substantially are to restrain defendants from in any manner commencing and or proceeding with and or participating in any manner in any proceedings in a court of law and or arbitration against the plaintiffs under the agreements dated 9.11.2000 as amended by agreement dated 9.12.2000 and 18.1.2001. The Application came to be dismissed by order dated 13.8.2001. The cause of action as pleaded in the suit by the Plaintiffs, is that the agreements were entered into by misrepresentation to the Appellant/Plaintiffs by the Defendant/Respondent, by suppressing material facts which were to the knowledge of the defendants and thus defendants played fraud on the plaintiffs. The agreements with Respondent No. 1 and 2 were executed by the appellants under the mistaken belief induced by the respondents, that the same were forming part of the agreement and as

such there was no consensus ad (SIC). In the circumstances it is contended that the agreements were void ab initio and in fact no consent in law and as such are not enforceable as the defendants have no legal right. In spite of the arbitral clause. It is the case of the Plaintiffs, that they are entitled to maintain the suit with the reliefs as sought.

3. The main contention urged by the learned counsel is that in spite of the arbitral agreement and even invocation of the arbitral clauses, there is no ouster of jurisdiction of the Civil Court. Civil Court, it is contended, will retain jurisdiction to decide all issues including issue as to the invalidity of the contract considering Section 9 of C.P.C. The issue involves interpretation of Section 8, 10 and 45 of the Arbitration and Conciliation Act, 1996, read with the other provisions of the Act of 1996.

Let us therefore, examine the various provisions in the Act under which in the case of existence of an arbitral clause the judicial authority can direct parties to arbitration. Section 45 of the Arbitration & Conciliation Act 1996 is a power in the Judicial authority to direct Plaintiffs to direct parties to proceed to arbitration if there be an arbitral clause in the agreement between the parties. If that power is not invoked, the civil court retains jurisdiction. Section 45 reads as under:

"Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in 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 any person 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."

In the instant case, there is no application pending before the Judicial Authority at the instance of the Respondent/Defendant invoking the provisions of Section 45 of the Act. The suit has been filed to contend that the agreements are null and void inoperative or incapable of being performed. Section 45 forms part of Part II of the Act dealing with New York Convention Awards. Under this provision a Judicial Authority unless it finds that the agreement is null and void inoperative or incapable of being performed would direct parties to arbitration. Section 54 of Chapter 2 of Part II deals with Geneva Convention awards. u/s 54 once there is an arbitration clause in the contract, if the agreement is valid u/s 53, the Judicial Authority shall refer the parties to arbitration. In so far as Part 1, Chapter II in case of existence of an arbitral agreement the relevant provision is Section 8. u/s 8 if any proceeding is pending and a party applies not later than submitting the first statement on the substance of disputes to the Judicial Authority, the Judicial Authority shall refer the parties to arbitration. Section 8, Section 45 and Section 54 are therefore, the powers conferred on the judicial authorities in pending proceedings in which there is an arbitral clause to refer the parties to arbitration. However, unlike Section 45 and Section 54, the language of Section 8 does not provide specifically that the Judicial authority can examine the invalidity of the contract on the contrary, u/s 16, this power is specifically conferred on the

arbitral Tribunal what is the extent of that power will be considered in the subsequent discussions.

It is not necessary to set out the facts once again as they have been elaborately set out in the Judgment of the Trial Court.

4. At the hearing of the appeal it was sought to be contended at one stage on behalf of the appellant, needless to say without prejudice that the appellants would have no objection to proceed with the arbitral proceedings. If the claims against Respondent Nos. 1 and 2 are clubbed together and jointly heard by the same Arbitrator. In other words it was sought to be contended that the appellants would have no objection to combining the two arbitral references and for a common award as there the rights of the appellants would be fairly dealt with against the Respondents. At the outset under English law, the court would have no such power unless parties agree support for that can be found in para 3-029 of 21st Edition of Russel on Arbitration for the following observations:

"Where however, the parties to all the related disputes have chosen arbitration the courts will not intervene to stop duplication of proceedings. In these cases, the most that the court may do in the absence of agreement between all the parties on the arbitrators to constitute a tribunal or on an appointing authority, is to appoint the same tribunal to hear a number of different disputes in consecutive hearings. The Court cannot (SIC) the parties to agree to that arbitral tribunal hearing the different cases simultaneously. Judge have noted the benefits that would result from the abolition of the rules preventing joinder but the draftsman of the Arbitration Act 1996 decided this would be too great an interference with the principle of party autonomy. Section 55 of the Act, after confirming that parties are free to agree on consolidation and concurrent hearings goes on to state that an arbitral tribunal has no power to order consolidation or concurrent hearings without the agreement of the parties and nothing is said about any similar power of the court with the result that the court does not have the power."

On behalf of the Respondents their learned counsel contends that Respondents have no objection to the same arbitrator deciding the disputes between the parties but disputes cannot be consolidated or joined. There is no unanimity on the part of the counsel on that count. Though Russel in the very same paragraph has pointed out that this would be desirable perusal of the arbitral clause in the first agreement would show that hearing is to take place in London and the agreement was to be governed by the U.K. law and the arbitrator is to be appointed by the courts of U.K. In so far as second agreement is concerned Arbitrator was to be appointed by the chartered Institute of Arbitrators in United Kingdom and according to provisions of the Arbitration Act 1950 and 1979 of U.K. and governed by U.K. law. In other words, arbitration was to take place outside India and in the United Kingdom and was to be governed by law relating to Arbitration in United Kingdom. Considering the legal position in U.K. as explained in Russel it is prima facie not possible to issue directions for

consolidation in the absence of agreement between the parties or direct the parties to move the court in U.K. for that purpose.

5. With the above we may now briefly advert to the arguments raised on behalf of the Appellants herein. It is contended that even considering the arbitral clauses and the place or venue of the arbitral proceedings, as also the law applicable to the arbitral proceedings as the agreement were procured by fraud they are liable to be set aside and considering Section 45 of the Arbitration & Conciliation Act, 1996, the Court where the suit is instituted, would have jurisdiction to go into those issues and to grant reliefs as prayed for it is also contended that though there are two different agreements between two different respondent, yet if the corporate veil is lifted, it will be clear that Respondent No. 2 is nothing but another face of Respondent No. 1. In these circumstances, to drive the appellant to separate arbitral proceedings would cause irreparable injustice in as much as even if the appellant may succeed against one Respondent, yet considering material on record, they will end up paying another Respondent and unable to recover from the other considering the financial position. It is further contended that English Arbitration Act, 1950 and English Arbitration Act of 1979 have been repealed once the Act had been repealed, there was no valid arbitration clause which was enforceable between the parties. The conduct of the appellant in merely exchanging corresponding in the matter of appointment or Arbitrator cannot amount to acquiescence in arbitration. It is further contended that the learned Judge misdirected himself in law in not addressing himself to the issue of fraud, considering the material on record. If the learned judge had answered this basic question in the affirmative, then the learned Judge would have to consider whether the appellants have established prima facie case for restraining respondents from participating in the arbitral proceedings and or taking further steps in arbitration under the agreement till disposal of the suit. The tests considered by the learned trial court were not the correct legal tests in law and the trial court also did not address itself to the material on record. The finding by the learned trial Judge that considering Section 16 of the Arbitration & Conciliation Act 1996 and Section 7 of the English Arbitration Act 1996, that the court should not go into validity of arbitration agreement is clearly erroneous. Considering the predicates of Section 45 of the Arbitration & Conciliation Act, 1996, if the contract was invalid, the court ought not to force the parties to arbitration. The learned Judge further has given a wrong finding that the appellant had agreed for arbitration, whereas the material on record shows that the solicitors were merely waiting for instructions from the appellant. The learned Judge in holding that writing to the arbitrator would amount to acquiescence in the arbitral proceeding ignored the ratio of the judgment of the Apex Court in U.P. Rajkiya Nirman Nigam Ltd. Vs. Indure Pvt. Ltd. and others, . Various authorities have been relied upon. they will be adverted to, to the extent that they are necessary for the purpose of deciding the issues in controversy.

On behalf of the Respondents it is contended that the contract provides for

reference of disputes to arbitration and not for decision by the Civil Courts. Even if the jurisdiction of the civil court is invoked by the application for interim relief to restrain parties from proceeding with arbitration, the court ought not to grant injunction sought for if the challenge to the arbitration agreement is on the ground that the arbitrator is incompetent to hear and decide the issue of the validity of the contract or even of the arbitral agreement. A reading of the provisions of the Act of 1996 and more particularly Section 5, would make it clear that the jurisdiction is impliedly barred. The Act of 1996 recognizes rights of a party to an arbitration agreement to have the dispute decided by an arbitrator. This right cannot be interfered with except in accordance with the provisions of the Act. There is no provision under the Act which empowers the court to interfere with the arbitral process by granting an injunction restraining a party from so proceeding. The court would grant interim injunction only for protection or assertion of the legal or equitable rights. In the instant case, no legal or equitable right of the appellant has been infringed and no legal injury would be caused if the arbitration is allowed to proceed. If it is the contention of the appellants that the agreement is invalid, the same can be raised before the arbitrator and if aggrieved by the award by subsequently challenging the award before the competent forum. In the case of International commercial arbitration where the parties have agreed to a foreign forum and the law of that country to apply to arbitration the remedy of the party is to do so before the arbitrator by raising the issue u/s 7 and 50 of the English Arbitration Act, 1996, the issue about (SIC) of the agreement can be raised before the arbitral forum. The Award so passed can be challenged in the forum provided under the Act. The appellant therefore, has effective legal remedies available. In these circumstances, the party should be directed to proceed with the forum voluntarily chosen by the parties. The case of the appellant themselves is that there has been misrepresentation or suppression of material facts to the knowledge of the Respondents and as such the agreement having been obtained by fraud is not binding on the appellants. Clearly therefore, the arbitral tribunal would have jurisdiction in such cases to enter upon arbitration and decide the issue. If the Civil Suit is filed in respect of an agreement containing arbitral clause it is open to the defendant or respondent as the case may be to apply to the Judicial authority for referring the parties to Arbitration under the Act of 1996. Under the Act of 1940, there was power to stay proceedings and direct the parties to arbitration.

It is then pointed out that in so far as Respondent No. 1 is concerned, the arbitral process was set in motion as far back as 26.9.2001 when the appellants sent notice to Respondent No. 1 for payment of certain sums failing which they would refer the claim to arbitrators. Respondent No. 1 by letter dated 4.6.2002 made counter claim and suggested the appointment of a sole arbitrator. As the parties did not agree to the name of sole arbitrator and the agreement being subject to English Law; Respondent No. 1 is required to apply to the English High Court u/s 18 of the English Arbitration Act 1996 for appointment of the Arbitrator. The

appellants suit filed subsequently in Thane Court on 2.2.2002 cannot be proceeded with by the appellants once the English High Court appoints arbitrator and nothing will therefore remain to be decided in the said suit. The Award shall not be invalid on the ground that the suit filed by the appellants is pending before Thane Court. As regards Arbitration between appellants and Respondent No. 2, the Arbitrator was appointed by the Chartered Institute of Arbitrators at London. The sole arbitrator was appointed by the Chartered Institute of Arbitrators at London on 24.12.2001. The appointment was communicated to the parties and no objection was taken by the appellants to the said appointment. The suit having been instituted by the appellants in Thane Court on 2.2.2002, after the appointment of the sole arbitrator in accordance with the arbitration agreement between the parties, it is open to the respondent No. 2 to proceed with the arbitration before the sole arbitrator. It is contended that it is not mandatory on Respondent No. 2 to make an application before Thane Court u/s 45 of the Act of 1996 and request the court to refer the parties to arbitration. If Intervention of the court is barred in respect of domestic arbitration, the same principle applies to International commercial arbitration. The principle which applies for grant of anti suit injunction or for the stay of the suit on the ground of forum non conveniency do not apply to arbitration. Arbitration being consensual cannot be enjoined or stayed.

6. From the above, three questions will have to be answered in considering the contention raised by the appellant for the grant of relief as prayed for. The questions that arise are:

(a) Does the Civil Court have jurisdiction to entertain a suit between the parties to an agreement which contains an arbitral clause considering Sections 8, 16 and 45 of the Arbitration & Conciliation Act, 1996 read with Section 9 of Code of Civil Procedure, 1908.

(b) Will a Civil Court, in case of an agreement containing an arbitral clause governed by English law, which agreement in the suit is challenged as null and void, in the absence of the Defendant requesting the Civil Court to direct parties to arbitration considering Section 45 of the Indian Arbitration Act, 1996, refer the parties to arbitration?

(c) On the facts and circumstances of this case, would it be appropriate for this court to grant an injunction directing Respondents from not proceeding with or applying under the arbitral clause on the ground of forum non conveniency.

7. We may firstly deal with the first contention as to jurisdiction of the civil court. The provisions for arbitration whether under the Act of 1940 or Act 1996 is for an arbitral Forum to decide the dispute between the parties which dispute ordinarily would have been decided by a competent Civil Court. Ordinarily any clause in an agreement which bars enforcing of rights through legal proceedings by the ordinary tribunals/courts would be void considering Section 28 of the Indian Contract Act. There is however, a saving by which the agreement shall not be

rendered void if the reference is to arbitration. In other words ordinarily a party cannot be precluded from moving a court of competent jurisdiction in its original ordinary jurisdiction, save and except if there be agreement for arbitration in which event the agreement is saved. Let us consider the relative positions under the Act of 1940 and the Act of 1996.

Under the Act of 1940 power of the civil court was to stay proceedings and direct the parties for arbitration of the dispute once the Arbitral tribunal passed an award, the award had to be filed before the court of competent jurisdiction which would then make the award a decree of the court which decree was then executable. In spite of the arbitral clause, there was discretion in the court, even if an application was made before filing of the written statement or taking any other steps in the proceedings to still proceed with the suit. Unlike the Act of 1940, in the case of domestic arbitration u/s 8 of the Act of 1996, a defendant to the judicial proceeding can apply to the Judicial authority where the subject matter of the suit based on the contract which contains an arbitral clause to direct the parties to arbitration. If the court is satisfied that the subject matter of the suit is covered by the arbitral clause then the court had no choice but to direct the parties to arbitration. See *P. Anand Gajapathy Raju and Ors. v. P.V.G. Raju (deceased) and Ors.* (2000) S.C.C. 539. If the dispute be whether the contract is void or not, it can be decided by the arbitral tribunal u/s 16 of the Act of 1996. If the court directs the parties to arbitration then there remains nothing more in the suit and the parties then would have to seek remedies against the award before the appropriate court.

The issue of jurisdiction of the civil court under the Arbitration Act of 1940 to entertain the suit u/s 9 of the C.P.C. in (SIC) case where the agreement contained an arbitral clause was considered by the Apex Court in *Food Corporation of India v. Yadav Engineers* AIR 1982 SC 1302. At the outset it may be mentioned that neither under the Act of 1940 or the Act of 1996, is there is specific provision barring the jurisdiction of the civil court to entertain the suit, where the cause of action arises from an agreement containing an arbitral clause. There is also no express exclusion in the Act. The jurisdiction of the civil court is also not impliedly barred, because rights to be adjudicated are not rights created by the Act. On the contrary, they are mostly common law rights of existing civil rights based on statute. There is thus no implied ouster of jurisdiction of the civil court. It was only in the event (SIC) party invoked in the case of domestic arbitration the provisions of Section 34 of the Act of 1940 would the court direct the stay of the suit. u/s 9 of the CPC all suits of a civil nature, except suits of which cognizance is either expressly or impliedly barred would be triable by the courts set up for the purpose. IF the dispute is o a civil nature the forum is before one of the courts set up for the purpose Civil Courts have been set up for redressal of grievances and as an easy access for persons who seek resolution of their disputes. The disputes must be of civil nature and the cognizance of which should not be expressly or impliedly barred. Civil Courts set on by the State having defined jurisdiction will be the forum for resolution of

such disputes Ordinary, therefore, whenever a dispute of a civil nature arises, the party claiming relief would approach the court having jurisdiction to resolve the dispute. The party against whom relief is sought will be informed of the cognizance of the dispute being taken by the Court and it must come forth and either concede that the dispute is genuine in whole or in part or defend the action. This is the prescribed mode of access to justice Arbitration Act Carves out an exception to the general rule, that the forum for resolution of civil disputes is the civil court having jurisdiction to deal with the same by providing that the parties to a dispute by agreement between themselves, may choose a forum of their choice for settlement of disputes between them in preference to the State Courts. If the parties enter into an arbitral agreement, implying that they would like that the disputes covered by the agreement will be resolved by a forum of their choice approach of the court must be to hold the parties to the contract to their bargain. It is in that context that Section 28 of the Indian Contract makes contracts void, which restricts a party absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings. However, it carves out an exception in so far as agreement, which provides for redressal by an arbitral forum. If in breach or derogation of a solemn contract a party to an arbitration agreement approaches the court and if the other side expeditiously approaches the court invoking the court's jurisdiction to stay the proceedings, then by this negative process the court forces the parties to abide by the bargain ordinarily the court's approach should be and has been to enforce agreement rather than to find (SIC) therein. If the party therefore in breach of agreement rushes to the court unless a clear case to the contrary is made out, the approach of the court should be to hold the parties to their bargain provided necessary conditions for invoking Section 34 are satisfied. Section 34 of the Act of 1940 clearly indicates that the parties to the contract may waive their right of proceeding before the chosen forum. On the inspection of the judicial proceedings, defendant may choose not to invoke the arbitral clause and instead choose to have the decision of the Civil Court. In such cases it would be presumed that both the parties do not wish to proceed with the arbitration clause by their conduct, in as much as plaintiff has moved the court for breach of the arbitration clause and the defendant by not invoking the arbitral clause for the stay of the suit or other directing to judicial authority to direct the parties to arbitration have waived their right to proceed before the arbitral forum. It is thus clear that merely because of the arbitral clause there is an ouster of jurisdiction of the civil court and the Civil Court, retains jurisdiction to hear and decide the dispute which are within its competence. Thus under the Act of 1940, the Civil Court in the aforementioned circumstances retained jurisdiction, inspite of invocation of the arbitral clause.

Let us examine the position under the Act of 1966. In so far as discretion of the court is concerned to direct parties to arbitration u/s 8 of the Act of 1996, thee apparently is no discretion, if the predicates required are satisfied. See P. Anand Gajapathi Raju and Others Vs. P.V.G. Raju (Died) and Others, . When and what

stage it has to be applied has been considered in a judgment delivered on December 09, 2002 in Arbitration Petition No. 405 of 2002 between Jashu M. Patel v. Shivtatta R. Joshi by this court. The effect is that the judicial authority must direct the parties to arbitration, if they do not waive or acquiesce in the jurisdiction of the civil court. In that extent, the position of law will be the same namely that a competent civil court has jurisdiction to decide the claims even in case of there being an arbitral clause in the agreement from which the claims are preferred.

Does Section 8 confer power on the judicial authority to decide the validity of the arbitration agreement? The answer is no as u/s 8, all that the court does on an application in a case of a contract containing an arbitral clause is to direct the parties to arbitration. That power is now conferred specifically on the Tribunal u/s 10 of the Act. To Konkan Railway Corporation Ltd. v. Rani Construction Pvt. Ltd. (2000) S.C.C. 158 the Apex Court has held that the authority u/s 11 cannot decide the issue of the existence or validity of the agreement and that has to be decided by the Arbitral Tribunal itself. The further discussion will clarify that position.

8. What will now be the position under the Act of 1996 and what would be the prima facie position under English law considering the English Arbitration Act of 1996 of the jurisdiction of a civil court to decide on the arbitrability of the claims and or the validity of the contract itself as to the arbitral clause or the entire agreement. It may be noted that both the Indian and U.K. Acts are partly adopted from the model laws i.e. Uncitral Code. The relevant provisions and the jurisdiction of the arbitral tribunal to decide the arbitrability of the disputes is Section 16 under the Indian Law and Sections 7 and 30 of the U.K. Law. The relevant portion of Section 16 of the Indian Arbitration Act is reproduced below:

"Competence of Arbitral Tribunal to rule on its jurisdiction : (1) The arbitral Tribunal may rule on its own jurisdiction including ruling on any objections with respect to the existence or validity of the arbitration agreement and for that purpose:

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract and

(b) a decision by the arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause"

It is clear therefore that the arbitral clause in an arbitration agreement has to be treated as an independent agreement independent of the other terms of the contract. It is further clear that even if the contract is declared null and void, it shall not entail ipso facto invalidation of the arbitral clause. It is therefore, within the jurisdiction of the Arbitral Tribunal apart from ruling on its own jurisdiction to decide whether the agreement before it is null and void. Even if it has come to the conclusion that the contract is null and void it necessarily does not follow that the arbitral clause is null and void. The pleadings of the parties in the suit will

therefore be relevant to consider the contention as to whether prima facie the arbitral clause itself as contained in the contract is null and void. The position under the Act of 1940 was slightly different. Under the Act of 1940, though issue of jurisdiction could be decided by the arbitral tribunal, yet that decision was not final. That decision was subject to final decision by the Court. That is a law declared by the Apex Court in number of judgments. (See Union of India (UOI) Vs. G.S. Atwal and Co. (Asansole), . The Apex Court there held that the Arbitrator's decision on his own jurisdiction to arbitrate is not final and binding as the court has power u/s 33 of the Act of 1940 to decide the question. The position under the Foreign Awards (Regulation & Enforcement) Act was the same (See para 55 of the Renusagar Power Co. Ltd. Vs. General Electric Company and Another,).

We may now refer to the corresponding provision of the English Arbitration Act 1996. The relevant provisions are Sections 7 and 30 which read as under:

Section 7:

"Unless otherwise agreed by the parties an arbitration agreement which forms of was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid non-existent or ineffective because that other agreement is invalid or did not come into existence or has become ineffective and it shall for that purpose be treated as a distinct agreement."

Section 30:

"Competence of tribunal to rule on its own jurisdiction : (1) Unless otherwise agreed by the parties the arbitral tribunal may rule on its own substantive jurisdiction that is as to:

- (a) whether there is a valid arbitration agreement
 - (b) whether the tribunal is properly constituted and
 - (c) what matters have been submitted to arbitration in accordance with the arbitration agreement
- (2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part."

With that we will now examine the development of law leading to the severability of the arbitration agreement legislative recognising for the consent has been given to that consent by the UNCITRAL Model law and now by the Parliaments of the both India and U.K. The question to be posed is as under:

Where a contract provides for arbitration of disputes which arise thereunder does the invalidity termination nullification or suspension of the contract vitiate the arbitral obligations of the parties?

The question is posed on the assumption that when the agreement contains an obligation to arbitrate the disputes arising from it but the agreement is invalid or

no longer in force the obligation to arbitrate disappears with the agreement of which it is a part. If the agreement was never entered at all then the arbitral clause never came into force. If the agreement was not validly entered into the prima facie it is invalid as a whole as must be all of its parts including its arbitral clause. If the agreement has been nullified or terminated or arguably suspended it must presumably follow that the obligation to arbitrate disputes arising under the agreement is nullified terminated or suspended. Now if, in these various contingencies there is no initial or sustained obligation to arbitrate under an agreement which either never came into force or is no longer in force, then the arbitral tribunal which maybe or is constituted pursuant to the arbitral clause of the void or voided agreement has no standing to do anything. It cannot pronounce or decide upon the validity of the agreement or upon the effect of the tribunal's establishment or upon its jurisdiction or upon the merits of the case because it cannot have a legal status which derives from a vacuum.

This proposition of law has been overcome by presumption and by practice. It has been overcome by necessity. It has been overcome by the essence of the arbitral process. If it is inherent in the arbitral process that a tribunal is the judge of its own jurisdiction that it has competence de la competence, it is no less inherent in that process that an arbitral tribunal shall have the competence to pass upon disputes arising out of the agreement which is the immediate source of the tribunal's creation even where those disputes engage the initial or continuing validity of that agreement. This essential doctrine of modern arbitration is called that of the severability, separability or autonomy of the arbitration agreement. The rationale of the doctrine of the severability of the arbitration agreement has four foundations as set out by Justice S.M. Schwebel.

Firstly, when two parties enter into a contract of a treaty providing for arbitration of disputes arising thereunder and do so as they typically do in comprehensive terms "any dispute arising out of or relating to the agreement" they intend to require arbitration of any dispute not otherwise settled, including disputes over the validity of the contract or treaty, then the will of the parties should be given effect to.

Secondly if one party could deny arbitration to the other party by the allegation that the agreement lacked initial or continuing validity, if by such an allegation it could deprive an arbitral tribunal of the competence to rule upon that allegation upon its constitution and jurisdiction and upon the merits of the dispute then it would always be open to a party to an agreement containing an arbitration clause to vitiate its arbitral obligation by the simple expedient of declaring the agreement void. The intention of the parties and the requirement of effective arbitration combine to give rise to the concept of severability.

Thirdly in reality on if but in reality then in the contemplation of the law and as a matter of legal presumption the parties to an agreement containing an arbitration clause conclude not one agreement but two first the substantive or principal agreement which provides for a certain course of action second an

additional separate agreement which provides for arbitration of disputes arising out of the principal agreement. Even if it be argued or even if it be authoritatively decided that the principal agreement is invalid, or voided nullified terminated, or suspended nevertheless the arbitral agreement is separable and separated and so separated, survives to furnish a viable basis for the arbitration tribunal to rule upon such arguments or arrives at those or other determinations. Thus when the parties to an agreement containing an arbitration clause enter into that agreement, they conclude not one but two agreements, the arbitral twin of which survives any birth defect or acquired disability of the principal agreement.

Fourthly the consideration which militates in favour of the rule of the severability of the arbitral clause because if severability were not the rule the courts would contrary to the norm, be drawn into passing upon the substance of the dispute submitted to arbitration. (See "SEVERABILITY OF THE ARBITRATION AGREEMENT" by Stephen M. Schwabel).

Considering the law evolved and now recognised we may for better understanding consider the position prevailing in English law before the Act of 1996.

To *Smith Coney & Rarrett v. (SIC) Gray & Co.* 1915 (21) Ch 86 the issue arose out of a contract which contained a war clause Delivery could not be effected in view of the happenings pursuant to closure of the port in view of declaration of war. The contract provided that in the event of a German war contracts were to be deemed to be closed and were to be referred to the Sugar Association Council and provisions for arbitration. The Civil Court was considering a motion to restrain arbitral proceedings. The application for injunction was refused against proceeding in arbitration. The court held that though the contract owing to the war and the declaration against trading with the enemy could no longer be carried out; it was not invalid when it was made and that it might have been carried out by delivering the sugar to a warehouse at Hamburg and that the parties were bound by the arbitration clause and there will be no restraint for the party to proceed with arbitral proceedings.

Joe Lee Limited v. (SIC) Dalmeny 1927 (1) Ch. 300 was a case where the proceedings were initiated to restrain the parties from proceeding with arbitration. It was sought to be argued that clause for arbitration be treated as separate agreement and as one not tainted with illegality attached to rules, regulations. The court answered the question by holding that it is not possible to separate that part of the document from the rules and treat the agreement to refer as one distinct and apart from the other contents of the agreement. That there was only one contract and that a contract or agreement by way of gaming of wagering contract which is void cannot be made the foundation of any successful application in the Court. To other words the judgment held that if the contract itself was void the arbitral clause cannot be separated from the rest of the contract.

Next we may consider the case of *Hevmon and Anr. v. Darwins Limited* 1942 A.C. 357. In that case there was a contract between the parties which contained an arbitral clause. It was contended and asserted by one party that circumstances had arisen whether before or after the contract had been validly performed which had the effect of discharging one or both the parties from all subsequent liabilities under the contract such as repudiation of the contract by one party accepted by the other or frustration of the contract. The issue was whether the contract containing a clause for arbitration was ever entered into at all or was void ab initio for example because the making of it was illegal. It was held on the construction of the arbitral clause that the dispute fell within the terms of the arbitrating clause and that the action before the Civil Court ought to be stayed in order to enable the parties to proceed with the arbitration. The leading judgment was by Viscount Simon who summed up the position in so far as arbitration clause is concerned. Considering that the arbitration clause is a written submission agreed to by the parties in the contract. Unlike other submissions to arbitration must be construed according to its language and in the light of circumstances in which it is made. The position was summarised thus:

(a) If the dispute is whether the contract which contains the clause has ever been entered into at all that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submissions.

(b) Similarly, if one party to the alleged contract is contending that it is void ab initio because for example the making of such a contract is illegal, the arbitration clause cannot operate for on this view the clause itself also is void.

(c) In a situation where the parties are one in asserting that they entered into a binding contract, but a difference has arisen between them whether there has been a breach by one side of the other or whether circumstances have arisen which have discharged one or both parties from further performance, such differences should be regarded as differences which have arisen "in respect of" or "with regard to" or "under" the contract and an arbitration clause which uses these or similar expressions should be construed accordingly.

Lord Macmillan speaking in the same matter, discussed the nature of arbitration clause. It can be best expressed in the words of the learned Judge:

"I venture to think that enough attention has been directed to the true nature and function of an arbitration in a contract. It is quite distinct from (SIC) other clauses. The other clauses set out the obligations which the parties undertake towards each other (SIC) but the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution and there is this very material difference that whereas in an ordinary contract the obligations of the parties to each other cannot be

general be specifically enforced and breach of them results only in damages, the arbitration clause can be specifically enforced by the machinery of the Arbitration Acts. The appropriate remedy for breach of the agreement to arbitrate is not damages, but its enforcement.

To the same Judgement lord wright brought about the distinction between a mere submission and a clause providing for arbitration observing as under:

"The distinction between a mere submission and such a clause is clearly stated by Warrington I.J. in *Woodall v. Pearl Assurance Co. Ltd.* (1). A submission may, however, take many different forms. It may be a special agreement to arbitrate on a particular dispute which has already arisen on some matter, such as contract tort, trust or family arrangement. Thus, to take a single instance in *Joseph Constantine Steamship Ltd. v. Imperial Smelting Corporation Ltd.* (2) recently decided by this House, there was a specific submission of the difference whether the charter party in question had been frustrated, the charterers claiming damages because the vessel had not been tendered to load her cargo, the shipowners defending the claim on the ground of frustration. That illustrates clearly one aspect of an arbitration agreement namely, that it is collateral to the substantial stipulations of the contract it is merely procedural and ancillary, it is a mode of settling disputes, though the agreement to do so is itself subject to the discretion of the court. All this may be said of every agreement to arbitrate even though not a separate bargain but one incorporated in the general contract. It may also be noted that the agreement to arbitrate depends on there being a dispute or difference in respect of the substantive stipulation. It appertains to the stage of pleadings or allegations. It is in regard to these that it has to be decided whether the submission applies or should receive effect. It is interlocutory."

In *David Taylor & Son Ltd. v. Barnett Trading Co.* (1953) 1 W.I.R. 562 the court of appeal observed relying on the judgment in *Smith Coney & Barrett v. Becker Gray & Co.* (supra) that the plaintiffs in order to succeed must show that the contract for arbitration with the submission was invalid and if it was illegal then any question of arbitration under the contract would fall with it.

In *Mackender and Ors. v. Faldia (SIC) and Ors.* (1966) 2 All F.R. 847 there was provision for arbitration Diplock (SIC) considering the issue of legality of the clause observed as under:

"They claim that the policy either was void for illegality in English law or was voidable for non-disclosure by the assured of material facts and they have elected to avoid it. Disputes of these kinds, they contend are not disputes arising under the contract but are disputes whether there is a contract at all."

It was further observed that unenforceability and voidness, however are not the same concept. If however, an agreement is wholly enforceable because it is contrary to English law it may if the proper law of the agreement is itself English law accurately be said to be void as a contract that is not to be a contract at all. If however an agreement, though contrary to English law is not illegal by its

proper law it cannot properly be said to be void and thus not a contract at all. It is a contract but one which is unenforceable in the English Courts.

9. Various earlier judgments of the English Courts on the subject including those referred in earlier came up for consideration in (SIC) Schiffbau Und Maschinenfabrik v. South India Shipping Corporation (1981) 1 All FR 289. The respondents therein had a contract with petitioners a German Company to supply ships. There was provision for arbitration. The clause provided that it was German law which would be applicable. The arbitral clause however provided that arbitration proceedings shall be referred to arbitration in London within the meaning of English Arbitration Act, 1950 and the Rules Regulation etc. of the said Act were to apply for various reasons, including that the arbitral claims were barred by limitation and/or that Respondent had not taken steps to proceed with arbitration a suit was instituted to restrain the continuance of the further arbitration proceedings. Injunction was granted. In appeal preferred the injunction was confirmed. This matter came before the House of Lords. The Appeal was allowed and the injunction vacated. One of the questions considered was general jurisdiction of the High Court (England) to grant injunctions as an alternative source of its power to control the conduct in an arbitration of the parties to it or the arbitrator. In so considering the House also considered that analogy between action at law and arbitration. Considering the arbitration clause it was observed that it constitutes a self contained contract collateral or ancillary to main agreement. The Judgment recognizes that the injunction could be granted in two types of cases. First is whether one party claims that arbitration agreement relied on was void or voidable ab initio e.g. for fraud mistake, ultra vires or want of authority. This type of case is to be distinguished from the cases where the arbitration agreement itself is not impeached but one party claims that no dispute has arisen under it. Whether there is a dispute or not is a matter to be decided by the arbitrator and no injunction will be granted. The second type of case case in which injunction have been granted is where the arbitrator is or has become disqualified by reason of bias. In this case we are not really concerned with second aspect of the matter.

Lord Diplock in the same judgment considering the arbitral clause observed as under:

"I would accept that the unperformed primary obligations of the parties under an arbitration agreement, like other contracts may be brought to an and by frustration, or at the election of one party where there has been a repudiatory breach of that agreement by the other party. (I speak of repudiatory breach as covering both what I described in Photo Production Ltd. v. (SIC) Transport Ltd. (1980) 1 All FR 556 as "fundamental breach" and "breach of condition"). I would also accept that when on the commission of such a breach, the party to an arbitration agreement who is not in default has lawfully elected to bring to an end the unperformed primary obligations of both parties to continue with the arbitration up to the issue of an award the High Court has jurisdiction in

protection of that party's legal right to do so to grant him an injunction to restrain the other party from proceeding further with the arbitration"

Also dealt was the issue of fundamental difference between "act at law" and "arbitration". It may be noted that in the case of action, dispute has to arise and the Plaintiff has to approach the court constituted under the ordinary law for its redressal. The defendant if he wants to resist the claim has to submit to the jurisdiction of the court. The Plaintiff has choice whether or not to bring the action in the court of law to enforce the disputed claims against defendant, but if he does want to enforce it the only forum which it can do so is the court of law unless the plaintiff and defendant mutually agreed to submit their dispute about the Plaintiff's claim for termination in some other way. The proceedings in respect of the obligations are imposed on them by the rules and practice of the court. In contract to this, the submission of a dispute to arbitration under a private arbitration agreement is purely voluntary by both claimant and respondent. It is immaterial where the arbitration agreement is in a clause forming part of a wider contract and provides for the reference to arbitration of all future disputes arising under or concerning the contract, neither party knows when the agreement is entered into whether he will be claimant or respondent in disputes to which the arbitration agreement will apply. If it creates any contractual obligation to proceed with reasonable dispatch in all future arbitrations held pursuant to the clause the obligation is in my view, mutual, it obliges each party in cooperate with the other in taking appropriate steps to keep the procedure of arbitration moving.

Another fundamental difference between an action and an arbitration is that in an action the successive steps to be taken by each party and the timetable for taking them are prescribed by the rules and practice of the court. An Underlying principle of civil litigation in the English Courts is that the court takes no action in it of its own motion but only on the application of one or other of the parties to the litigation whereas in an arbitration there is no fixed pattern of procedure.

This position of law in England came to be considered or if it may be put, reconsidered by the Court of Appeal in *Harbour Assurance Co. (UK) Ltd. v. Kansa General International Insurance Co. Ltd.* (1993) 1 LLR 455. The leading Judgment was delivered by Lord Justice Gibson. The question in issue was framed as under "Whether in English law, under the principle of the separability or autonomy of the agreement expressed in an arbitration clause which clause is contained in a written contract the clause can give jurisdiction to the arbitrators under that clause to determine a dispute over the initial validity or invalidity of the written contract upon the assumptions that; upon its true construction the arbitration clause covers such a dispute and that the nature of the invalidity alleged does not attach the validity of the agreement expressed in the arbitration clause itself."

The court then noted that "The orthodox view in English law has always been, it has been said for the plaintiffs that if the contract in which the arbitration clause

is contained is void ab initio, and therefore, nothing so also must be the arbitration clause in the contract. That is the proposition that nothing can come of nothing ex nihilo nihil fit. It has also been called in this case the argument of logic."

The facts of the case need not be referred to suffice it to say that it was alleged by the Plaintiffs against the defendants that there was non-disclosure of material facts and misrepresentation by reason of which the plaintiffs said that they avoided the reinsurance. The trial court in the judgment delivered by Justice Steyn held that he was compelled by authority to hold that the principle of separability could not extend so as to enable the arbitrator to determine whether or not the contract in which the arbitration clause is contained, is in fact void ab initio for illegality. In these circumstances, the court dismissed the application for stay of the proceedings in which Plaintiff sought to establish that illegality. An appeal was preferred against this part of the judgment. It was argued that the logical proposition, however, upon which the orthodox view is based, does not depend upon the terms or construction of the arbitration clause. It asserts that if the containing contract is void ab initio, an arbitration clause contained within it is also void. If this logical argument is applied according to its terms the intention of the parties could be thwarted even if no its true construction, the clause shows not only that the dispute is within those agreed to be referred but also that the clause was intended to survive the validity of the contract. The Court then observed that such a rule of law in the court's judgment should be rejected, if the court can properly hold that it is not part of the English law. The court noted that arbitral clause without special words to ensure survival is usually and has been held to be a self contained contract collateral to the containing contract. As with any other contract, it must be construed according to its terms in and with regard to the relevant factual situation. The leading Judgment of Lord Gibson then dealt with issues arising in the judgments of Mackender (supra), Joe Lee Ltd. (supra), David Taylor (supra) and differentiated them on the ground that those judgments had not taken a view that the arbitral clause was not separable and that the arbitral clause can cover the issue of illegality. The learned judge after considering the issue and culling down the ratio of the judgments referred observed as under.

"The question whether all the promises contained in the agreement were rendered invalid and void at the time when the parties signed the documents by the illegality of the agreement, is in my judgment a dispute arising out of the agreement." The court held that this could be decided by the Arbitral Tribunal.

In a separate judgment, Lord Justice Leggatt, again considered the ratio of the judgments, based on the orthodox view and observed that the arbitration clause is collateral in the main contract in which it is incorporated and it gives rise to collateral primary and secondary obligations. Referring to the judgment in Bremer Vulcan (supra) the learned Judge explained the separability of the arbitration agreement considering the cases cited, which impels the conclusion

that an arbitrator can have no jurisdiction to decide whether the contract in which the arbitration agreement is incorporated is void ab initio. The learned Judge further proceeded to hold that the court is not obliged by authority to prevent the arbitration from determining the issue of initial illegality. The tide is flowing in favour of permitting the arbitrator to do so, and it is no more necessary on grounds of public policy for the Courts to retain exclusive control over the determination of the initial legality of agreements than over their subsequent legality. In particular it would ill become the Courts of the country, by setting their face against this jurisdiction, to deprive those engaged in international commerce of the opportunity of entrusting such disputes in English commercial arbitrators without the need for arbitration clauses containing elaborate self-fulfilling formulae.

Lord Justice Hoffmann also gave a concurring judgment. The learned Lord found that the issue involves two separate questions. The first is whether the arbitration clause would itself be struck down by the alleged illegality. The second is whether as a matter of construction it is wide enough to cover the illegality issue. The learned Judge then considered the various authorities. Next was addressed the contention of counsel therein that the separability doctrine cannot apply to any rule which prevents the contract from coming into existence or makes it void ab initio and in particular it does not apply to statutory or rule and law which make the contract void. Answering that the learned Judge observed that it was impossible to accept so sweeping a proposition as there would be cases in which a claim that no contract came into existence necessarily entails a denial that there was any agreement to arbitrate. The cases of non est factum or denial that there was a concluded agreement or mistake as to the identity of the other contracting party suggest themselves as examples. But there is no reason why every case of initial invalidity should have this consequence. Proceeding further the learned Judge observed that in every case it seems that the logical question is not whether the issue goes to the validity of the contract but whether it goes in the validity of the arbitration clause. The one may entail the other but, as seen it may not. When one comes to voidness for illegality, it is particularly necessary to have regard to the purpose and policy of the rule which invalidates the contract and to ask, as the House of Lords did in *Heyman v. Darwins Ltd.* whether the rule strikes down the arbitration clause as well. Proceeding further the learned Judge observed that saying that arbitration clauses, because separable, are never affected by the illegality of the principal contract is as much a case of false logic as saying that they must be. The learned Judge then referred to the development of the separability clause and the land mark judgment of the German Federal Supreme Court and need to avoid the matter being decided by two different Tribunal."

It is therefore, clear from this judgment that the jurisdiction of the arbitral tribunal in decide on the validity of over the initial invalidity of the arbitral agreement was accepted. The argument that illegality of the contract, would also automatically affect the legality of the arbitral clause was rejected. The doctrine

of severability was confirmed. However, Lord Hoffmann had reservation whether in certain cases the arbitral clauses will perish with the agreement itself. This doubt was now been answered by Section 30 of the English Arbitration Act whereby the validity of the arbitration agreement can be decided by the Arbitral Tribunal.

The position in United States is not different. The leading case is *Prima Paint Corporation v. Flood & Cooklin Mfg. Co.* (SIC) US 395. The question raised was:

"Whether the Federal Court or an Arbitration is to resolve a claim of "fraud" in the inducement under a contract governed by the United States Arbitration Act of 1925. The majority judgment answered the issue thus: "Accordingly, if the claim is fraud in the inducement of the arbitration clause itself - an issue which goes to the "making of the agreement to arbitrate - the Federal Court may proceed to adjudicate it. But the statutory language does not permit the Federal Court to consider claims of fraud in the inducement of contracts generally."

10. The position in India before the enactment of the Act of 1996, considering Act of 1940 was holding for the jurisdiction of the Court to decide the issue rather than the Arbitrator. The jurisdiction of the Civil Court and its jurisdiction to proceed with the suit inspite of the arbitral clause was never doubted. In *Waverly Jute Mills Co. Ltd. Vs. Raymon and Co. (India) Private Ltd.*, , the Apex Court held that if the contract is illegal and void, the arbitration clause which is one of the terms, must perish and it is for the Court to decide the validity of the contract. In *Ramji Dayawala and Sons (P) Ltd. v. Invest Import* AIR 1981 S.C. 7085 the Apex Court observed in the matter of stay of suit as under:

"When parties by contract agree to arrange for settlement of their disputes by a Judge of their choice, by procedure of arbitration voluntarily agreed upon, ordinarily the Court must hold the parties to their bargain. As a corollary, if a party to a subsisting arbitration agreement in breach or violation of the agreement to refer dispute to arbitration approaches the Court, the Court would not lend its assistance to such a party and by staying the suit compel the party in breach to abide by its contract. When the parties have agreed to an arbitration by a foreign arbitral Tribunal, the case for stay would be stronger than if there was a domestic arbitration agreement. This proceeds on the assumption that parties not only sought and agreed upon the forum for resolution of disputes but also the law according to which the dispute would be resolved. However, this is not an absolute rule. Granting or refusing to grant stay, is still a matter within the discretion of the Court. How discretion would be exercised in a given case would depend upon various circumstances."

The position in England is now governed by the Arbitration Act of 1996. As noted earlier both the arbitral agreements are governed by the English Law. We have earlier referred and noted Section 7 and 30 of the English Arbitration Act of 1996. The arbitral clause in the contract is not to be regarded as invalid, non-existent or ineffective, because the agreement is invalid or did not come into

existence or has become ineffective. The arbitral clause has to be treated as a distinct agreement unless otherwise agreed to by the parties. The reservation expressed by Lord Hoffmann in *Harbour Assurance Co. (U.K.) Ltd.*, considering language of Section 7, prima facie no longer survive on account of legislative recognition.

The position of the law in India after coming into force the Act of 1996 is similar. Section 16 has accepted the doctrine of severability of the arbitral clause. Even if the arbitral clause is invalid, the jurisdiction to decide that issue is of the Arbitral Tribunal, considering Section 8 as now interpreted. That jurisdiction would be of the arbitral tribunal. For assistance See *Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd.*, . Considering Section 16, the Court observed that the Tribunal's authority u/s 16 is not confined to the width of its jurisdiction but goes to the very root of its jurisdiction. Once that be the case, it is clear that both under English Law as well as Indian Law, there is no room for doubt, about the jurisdiction of the arbitral tribunal to rule on its own jurisdiction to the exclusion of the judicial authority in India and Civil Courts in England. The object and purpose has been earlier set out namely to facilitate International Commercial Arbitration to avoid multiplicity of proceedings and to allow one tribunal to decide all issues between the parties and further to direct the parties to proceed before the forum of their choice. Therefore, reading Section 8 and 16 of the Indian Arbitration Act together with Section 7, 9 and 30 of the English Arbitration Act, it is clear that all disputes can be decided by the Arbitral Tribunal. The fact however, remains that if the parties acquiesce in the proceeding by not moving u/s 8 or Section 45 or Section 54, the jurisdiction of the civil court will not be ousted. At the same time the issue whether the contract is void ab initio including the arbitral clause, inoperative or incapable of being performed, can now be decided by the Arbitral Tribunal. The first question has to be answered accordingly.

11. We now come to the next submission considering Section 45 of the Act of 1996, whether the Civil Court can proceed with the suit where the relief sought is that the agreement is null and void. The position u/s 45 and Section 54 which fall in part II is slightly different. u/s 45, the Court before directing the parties to arbitration has to consider whether the agreement is null and void. u/s 54, it has to examine whether the agreement is valid and capable of being carried into effect. For the present discussion Section 54 is not attracted. The arbitral clause or agreement will be subject in an application u/s 45. If a suit is filed, the defendant, in a case where there is an arbitral clause, can ask the judicial authority to refer the parties to arbitration. However, in doing so, the court will consider the plea raised that the arbitral agreement is invalid being null and void ab initio or inoperative or incapable of being performed. The expression agreement in Section 45 must be read with Section 44, which speaks of the arbitral agreement. The Civil Court will only in a case where the Defendant seeks resolution of the dispute by arbitration in case of a valid agreement, direct the parties to arbitration. It is only in those cases where the validity of the arbitral

agreement is itself challenged that the civil court on an application by a party for reference to arbitration, can examine the validity and if it finds in favour of the Plaintiff proceed with the suit instead of directing the parties to International Arbitration. If the Defendant does not apply, but acquiesces in the jurisdiction, the suit will proceed. What will be the effect of a conflict in an award passed or decree made is not required to be addressed here if there be no stay of the proceedings. Thus it is clear that the Civil Court retains jurisdiction to decide the dispute before it. There is no ouster of jurisdiction of a civil court even in a case where there is an arbitral clause in an agreement or there is an arbitral agreement. The position is similar in England. See para 7.002, Russall on Arbitration, 21st Edition. When a dispute arises, however, one of the parties may nevertheless commence court proceedings, either because it challenge the validity of the arbitration agreement or because he means to breach it. Where the court action is commenced in breach of an arbitration agreement, the other party may apply to stay the court action, unless he is content to forgo his right to refer the dispute to arbitration and to defend the action before the court.

12. The suit has been filed by the appellant herein as the Plaintiff and the Respondent as defendant. The Respondent has not requested the court by an application u/s 45 of the Arbitration & Conciliation Act of 1996 to direct the parties to arbitration. The Respondent has however, opposed the grant of relief of temporary injunction to restrain the Respondents from proceeding with the arbitral proceedings or taking further steps pursuant to invocation of the Arbitral clause. We proceed on the footing that the Petitioners have made out a prima facie case that subsequent to the agreement, they have discovered facts which were not to their knowledge but within the knowledge of Respondent Nos. 1 and 2 and had these facts been known to the Appellants or disclosed by the Respondent to the Appellants. Appellants would not have entered into the agreements. Learned counsel has taken me through the pleadings, documents and Judgments in support of the proposition as to when the contract can be rendered void in case of misrepresentation or by non-disclosure of facts which were to the knowledge of the party entering into the contract. In *R.C. Thakkar Vs. (The Bombay Housing Board) now The Gujarat Housing Board*, a Division Bench of the Gujarat High Court was considering Section 17 of the Indian Contract Act and the requirements thereto. The court placed reliance on Halsbury's Laws of England (third edition), Volume 26 to hold that representation is deemed to have been false and therefore, a misrepresentation, if it was at the material date false in substance and in fact. Therefore, to constitute the falsity of a representation it should be found false in substance as well as in fact. The further observations are the standard by which the truth or falsity of a representation is to be judged. If the material circumstances are incorrectly stated that is to say, if the discrepancy between the facts as represented and the actual facts is such as would be considered material by a reasonable representee, the representation is false if other wise, it is not. In *Esso Petroleum Co. Ltd. v. Mardon* 1976 (2) All.F.R. 47 the issue was of the case of

negligent misrepresentation Lord Denning speaking for the court relying on various decisions, summing up the proposition set out that those decisions show, that in the case of a professional man, the duty to use reasonable care arises not only in contract, but is also imposed by the law apart from contract and is therefore actionable in tort. It is comparable to the duty of a reasonable care which is owed by master to his servant or vice versa. It can be put either in contract or in tort. The learned Judge then held that if a man, who has or professes to have special knowledge or skill, makes a representation by virtue thereof to another - be at advice information or opinion with the intention of inducing him to enter into a contract with him he is under a duty to use reasonable care to see that the representation is correct and that the advice information or opinion is reliable. If he negligently gives unsound advice or misleading information or expresses an erroneous opinion, and thereby induces the other side into a contract with him he is liable in damages.

Earlier discussion would show that the issue whether agreement is null and void inoperative or incapable of being performed can be decided by the Arbitral Tribunal. By the expression "Said agreement" what really is meant is the agreement as referred to u/s 44 of the Act of 1996. That shows that the foreign award must be made pursuant to agreement in writing for arbitration. It is therefore, not merely the agreement but the agreement in writing for arbitration which is material. This power in domestic arbitration to decide the validity of the arbitration agreement is conferred on the arbitral tribunal u/s 16 of the Act of 1996. In case of an agreement providing for arbitration outside India, a specific power has been conferred on the Civil Court, in the event any party to the agreement seeks referral to arbitration to decide whether the agreement is null and void, inoperative or incapable of being performed. This seems to be part of public policy to confer jurisdiction on municipal courts to decide whether the arbitral agreement is void or inoperative then not to give effect to the arbitral clause but to get the issue decided by the Civil Court, which as a civil court it has jurisdiction to decide. The object being that party ought not to be driven to prosecute arbitral proceedings to the foreign country at considerable time and expenses, where the finding of the court would show that the arbitral agreement is null and void, inoperative or incapable of being performed. It is to avoid a situation, where all that the arbitral tribunal would have to do is to record the same finding that the arbitral agreement is null and void, inoperative or incapable of being performed. It is to avoid a situation, where all that the arbitral tribunal would have to do is to record the same finding that the arbitral agreement is null and void, inoperative or incapable of being performed and then close the proceedings. To that extent in the matter of international commercial arbitration, the law has put a rider on the power of the court to direct the parties to arbitration. In such circumstances, the Civil Court can proceed with the suit, if defendant seeks to direct the parties to arbitration. In the instant case, defendant in the suit, respondent herein has chosen not to take any steps. It may also be relevant to note that there is nothing in Section 45 like Section 8

setting out at what stage the application should be made. As we have discussed earlier. Section 8 requires an application to be made to the judicial authority not later than submitting first statement on the substance of dispute. There is no such limitation u/s 45. However, this exercise is to be done at the instance of the defendant. If the defendant chooses not to invoke the provision of Section 45, nothing will prevent the court from proceeding with the suit. Again what will be the effect of Award and decree on the same cause, need not be decided here, as it is not in issue and can be decided in appropriate proceedings where the issue may arise. The issue will have to be answered in the affirmative, namely that the Civil Court can proceed with the suit.

13. Even if the circumstances were proved would the court in the case where at the instance of Respondent No. 2 there has been constitution of an arbitral tribunal to decide the disputes and in so far as Respondent No. 1 is concerned, there has been invocation of arbitral clause restrain parties from so moving. It is a settled proposition as earlier set out that the Civil Courts ordinarily would give intent to the intention of the parties to move the arbitral forum. It is only in the event in the case of International commercial Arbitration and if the arbitral clause itself is void or in respect of the subject matter not forming part of the arbitral clause and as such does not have jurisdiction to decide on the issue which are relevant for disposal of the dispute would the court then proceed not to direct the parties to the chosen forum. Prima facie, there is no material or from the pleadings to show that the arbitral clause is void or invalid. The pleadings are that the entire agreement is void.

In the contract with Respondent No. 1, the arbitral clause is clear. The agreement itself provides that it shall be governed by U.K. Law. The agreement is of 9.11.2000. It is therefore, clear that the English Arbitration Act of 1996 would be the law applicable to resolve the dispute between Petitioner and Respondent No. 1. In so far as dispute between Petitioner and Respondent No. 2, it was sought to be contended that arbitral proceedings would be governed by the arbitration Act, 1950 and 1979 which had been repealed. However, this is without taking into consideration Clause 15 of the said agreement which reads as under:

"The Construction validity and performance of this Agreement shall be governed in all respects by English Law."

This contract was entered into in January, 2001. It is therefore, clear that the English Law as existing on the date of the contract and date of the termination or invocation of arbitral clause would be the Law. That law would be English Arbitration Act of 1996. Clause 13 as noted earlier really provides for appointment of arbitrators and that would be according to provisions of the Arbitration Act, 1950 and 1979. It is therefore, clear that even if the Acts have been repealed (without going into that issue). The procedural provisions contained there for appointment of Arbitrator would as terms of contract by incorporation which parties have agreed would be applicable for appointment of arbitrators. The Law would be the law for the time being in force in the United

Kingdom. Therefore, in case of both the contracts, the law applicable would be the law as governed by the English Arbitration Act, 1996.

Having so held, it will be clear that in so far as Respondent No. 2 is concerned arbitral clause has already been invoked. In these circumstances, it will not be appropriate for this court in stay the arbitral proceedings but allow the parties to agitate these disputes before the forum chosen. In so far as Respondent No. 1 is concerned, arbitral clause has been invoked. It is left to the parties to how move the court under English Arbitration Act, the law under which they are governed for redressal of their disputes for appointment of an Arbitral Tribunal. The contention of the Petitioner that even if they get an award against Respondent No. 1 it will be a paper award incapable of being executed by itself can be no answer. It is not necessary for this court to go into the issue of tests for anti suit injunction because the legal position and the case law has been set out in the Division Bench Judgment of this court in W.S.G. Cricket Pte. Ltd. Vs. Modi Entertainment Network and Another, .

A last observation. Respondents for reasons for which they are advised have not moved u/s 45 or Section 8 of the Arbitration Act of 1996. Though both sections are attracted to those cases where the arbitral clause has not been involved. In these circumstances and without going into that issue, considering that in one case the arbitral clause having already been invoked and in the other the Arbitrator has been appointed, all that can be said is that the relief sought for by the Petitioners on account of invocation of the arbitral clause and or the arbitral tribunal assuming jurisdiction, it would not be appropriate to grant any relief: The parties have chosen their forum, the place of arbitration and the law that will govern the proceedings. The point of invalidity of the contract, can be dealt with by the chosen arbitral forum as it is now clothed with such jurisdiction. In these circumstances the issue of acquiescence need not be dealt with. The parties must be left to proceed before the forum that they chose.

In the light of the above, appeal dismissed, however without costs.

The learned counsel for the appellant sought stay the Judgment. To my mind, considering the position in English Law and position in so far as this country is concerned. If find no reason as to why the arbitral procedure should not be proceeded with. In the light of that application for stay is rejected.

Personal Secretary to issue authenticated copy of this order.