

(2010) 09 BOM CK 0147

In the Bombay High Court

Case No : Notice of Motion No. 2099 of 2010 in Suit No. 1916 of 2010

IND Synergy Ltd. and Others

APPELLANT

Vs

Clearwater Capital Partners Fund III Pvt. Ltd. and Another

RESPONDENT

Date of Decision : 06-09-2010

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 8
Civil Procedure Code, 1908 (CPC) — Order 1 Rule 3, Order 2 Rule 3
Income Tax Act, 1961 — Section 201, 201(1), 201(1A), 220, 220(2)

Citation : (2011) 7 ALLMR 157 : (2011) 1 BomCR 168

Hon'ble Judges : R.Y. Ganoo, J

Bench : Single Bench

Advocate : I.M. Chagla, Y.A. Khanwilkar, S.V. Doijode, Falgune Thakkar and Rishir Daulat, instructed by Doijode and Associates, for the Appellant; Virag Tulzapurkar and Jayesh Mistry, instructed by RMG Law Associates, for the Respondent

Final Decision : Dismissed

Judgement

R.Y. Ganoo, J.—Before I deal with this motion, few facts are required to be stated as to under what circumstances this notice of motion is filed. Plaintiff No. 1 are engaged in extraction of Iron Ore and plaintiff Nos. 2 to 9 are its promoters. Defendant Nos. 1 and 2 are the companies who invest monies in special circumstances and distressed or otherwise undervalued assets and securities. Plaintiff No. 1, plaintiff Nos. 2 to 9 and defendant No. 1 entered into an agreement titled as Subscription Agreement for Sale of fully convertible debentures of plaintiff No. 1. On the very day i.e. on 11th March, 2008, another agreement was entered into between same parties to regulate the relationship between them about the management of the company. The said agreement is titled as Shareholders' Agreement. As per the aforesaid agreements, plaintiff No. 1 were to extract ore to the tune of 1 million tonnes between 1st April 2009 to 31st March, 2010 and upon failure of plaintiff No. 1 to do so, defendant No. 1 was entitled to have the benefit of put option as per Clause 9.8.1 of

shareholders" agreement.

2. After the allotment of fully convertible debentures of plaintiff No. 1, as per shareholders" agreement, plaintiff No. 1, plaintiff Nos. 2 to 9 agreed with defendant No. 1 that 50% of the fully convertible debentures held by defendant No. 1 can be transferred to defendant No. 2. Accordingly, 50% of the debentures came to be transferred in favour of defendant No. 2. According to defendant No. 2 they were entitled to put option like defendant No. 1. It is the case of defendant Nos. 1 and 2 that by notice dated 18th June, 2008, defendant Nos. 1 and 2 exercised the put option and wanted to enforce the rights conferred upon them in terms of shareholders" agreement.

3. It is the case of the plaintiffs that they could not extract ore as per the agreement for various reasons and that is how they had to file the present suit for a declaration that they have not failed to extract 1 million tonnes of iron ore during the required period. They have also prayed that provisions of shareholders" agreement dated 11th March, 2008 relating to transferability of the promoters" shares held in plaintiff No. 1 company alongwith various clauses are violative of the provisions of law, illegal and hence, null and void. They have also prayed for a declaration that notices dated 18th June, 2010 issued by defendant No. 1 and 2 respectively are misconceived, illegal and null and void. The plaintiffs have also sought an order of injunction restraining defendants from taking any coercive action or acting on the strength of notices dated 18th June, 2010 and interfere with rights of plaintiff No. 1 in getting approval. They have also prayed for injunction restraining defendants from taking action as per aforesaid two agreements. The plaintiffs have taken out Notice of Motion No. 1910 of 2010 for interim reliefs which are in line with the reliefs asked in the suit.

4. The plaintiffs applied for ad-interim reliefs in terms of this Notice of Motion No. 1910 of 2010 and at that stage, the defendants have taken out this Notice of Motion. The defendants have prayed that on account of dispute raised by the plaintiffs through the present suit parties be referred to arbitration u/s 8 of the Arbitration and Conciliation Act, 1997 (Hereinafter referred to as the said Act). In view of this notice of motion, it became necessary for this Court to hear and dispose of this notice of motion first and till then postpone the hearing of the ad-interim application.

5. The defendants have taken out this notice of motion on the basis of Clause No. 16.7.1 in the shareholders" agreement dated 11th March, 2008 as well as similar clause in subscription agreement dated 11th March, 2008.

6. Clause 16.7.1 of the shareholders" agreement dated 11th March 2008 regarding reference of the dispute to the arbitrator reads as under:

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 under the Rules of the Singapore International Arbitration Centre(the "Rules").

(This Clause shall hereinafter be referred to as "arbitration clause")

7. The parties in the said agreement arrived at terms as regards jurisdiction and the clause regarding jurisdiction is 16.8. It runs as under.

Jurisdiction: Subject to Article 16.7 each Party submits to the exclusive jurisdiction of the Courts of Mumbai, India.

8. In addition to these two clauses one finds another clause at Clause 16.11. The said clause is termed as "violation of the terms". The text of the said clause is as under:

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, obligations 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. (This Clause shall hereinafter be referred to as "litigation clause")

9. With the aforesaid background, learned Senior Counsel appearing on behalf of the defendants had taken me through the record and submitted that on account of arbitration clause and Clause 16.8 regarding jurisdiction, it is clear that the parties had agreed to refer the dispute between plaintiffs on one hand and defendant No. 1 on the other to arbitration as set out in Clause 16.7.1. Submissions were advanced by Counsel for defendants that on account of agreement titled as Addendum to Shareholders' Agreement dated 24th November, 2008, 50% of the debentures held by defendant No. 1 came to be transferred by defendant No. 1 to defendant No. 2 and debenture certificate have been duly endorsed and delivered to defendant No. 2. It was contended by learned Senior Counsel for the defendants that on account of transfer of the debentures as aforesaid, rights held by defendant No. 1 under shareholders' agreement got assigned to defendant No. 2 and consequently disputes between plaintiffs and defendant No. 2 are also required to be referred to arbitration as per arbitration clause. Learned Senior Counsel for defendants had submitted that both the defendants were entitled to enforce arbitration clause and that is how notice of motion has been taken out by both the defendants jointly with request that the parties be referred to arbitration. It was submitted by learned Senior Counsel for the defendants that notice of motion taken out by defendants is an application filed by defendants u/s 8 of the said Act requesting the Court to refer the parties to arbitration on account of arbitration clause.

10. Learned Senior Counsel appearing on behalf of defendants had contended that on account of arbitration Clause 16.7.1, the conditions required to refer the

parties to arbitration are fulfilled and it is mandatory for this Court to refer the dispute to arbitration. Learned Senior Counsel for the defendants had relied upon the judgments in the cases of P. Anand Gajapathi Raju and Others Vs. P.V.G. Raju (Died) and Others, Shin-Etsu Chemical Co. Ltd. Vs. Aksh Optifibre Ltd. and Another, and The Branch Manager, Magma Leasing and Finance Limited and Another Vs. Potluri Madhavalata and Another, and submitted that once it is shown that the requirements contained in Section 8 of the said Act are fulfilled, the Court has no option but to refer the dispute to the arbitration. Learned Senior Counsel for the defendants also submitted that it is mandatory for the Court to refer the parties to the arbitration if the requirements contained in Section 8 of the said Act are fulfilled. Learned Senior Counsel for defendants had, therefore, submitted that looking to the arbitration clause, it is the duty of this Court to refer the parties to the arbitration.

11. The defendant No. 2 claims that the plaintiffs and defendant No. 2 be referred to arbitration as defendant No. 2 are entitled to the benefit of arbitration clause in view of assignment of rights held by defendant No. 1 under shareholders' agreement and Clause 2 of Addendum to shareholders' agreement dated 24th November, 2008. Arguments were advanced by learned Senior Counsel for defendants in support of the aforesaid proposition. Certain judgments were cited across the bar in support of the above proposition.

12. Learned Senior Counsel for the plaintiffs had opposed the said submissions and according to him there was no assignment of shareholders' agreement in favour of defendant No. 2. If the Court comes to the conclusion that the plaintiffs and defendant No. 1 are to be referred to arbitration, then arguments advanced by respective Counsels as regards assignment of rights under the shareholders' agreement in favour of defendant No. 2 and whether plaintiffs and defendant No. 2 are to be referred to arbitration can be decided.

13. It may be stated that though arbitration clause finds place in the two agreements as aforesaid, the matter requires further consideration in view of Clause 16.11 appearing in shareholders' agreement by which the parties had agreed that they have a right to approach the Court of competent jurisdiction for reliefs more particularly set out in the said clause. It is in these circumstances, it became necessary for learned Senior Counsel for the defendants who had prayed for reliefs in terms of notice of motion to submit to the Court that the said Clause 16.11 i.e. litigation clause had no effect on the arbitration clause. This was sought to be submitted mainly on the text of opening language of Clause 16.11 namely "without prejudice to the provisions of this agreement".

14. Learned Senior Counsel for the defendants had submitted that the use of the term "without prejudice to the provisions of this agreement" is vital and, therefore, according to him it is necessary to look to meaning of term "without prejudice" and understand the effect of the same. Learned Senior Counsel for the defendants had relied upon meaning of the term "notwithstanding anything contained" and "without prejudice" appearing in the book titled as "Supreme

Court on Words and Phrases", 2nd Edition and had drawn distinction between the two terms namely "notwithstanding anything contained" and "without prejudice". He had relied upon the dictionary meaning of the term "without prejudice" appearing in Wharton's Law Lexicon, 14th Edition, which runs as under. "Without prejudice": A phrase used in offers, in order to guard against any waiver of right; also for the purposes of negotiating a compromise". Learned Senior Counsel for the defendants had also relied upon the dictionary meaning of the term "without prejudice" appearing in Black's Law Dictionary, 7th Edition, which reads as "without loss of any rights; in a way that does not harm or cancel the legal rights or privileges of a party".

15. Learned Senior Counsel for the defendants had by relying upon these references submitted that looking to the clauses namely Clause No. 16.7.1., Clause 16.8 and Clause 16.11, it is clear that the arbitration clause would prevail over litigation clause and parties will have to be referred to arbitration.

16, Learned Senior Counsel for the defendants had relied upon the judgment of the Supreme Court in the case of The Income Tax Officer, "A" Ward, Indore Vs. Gwalior Rayon Silk Manufacturing (Weaving) Co. Ltd., Birlagram, Nagda, where the term "without prejudice" appeared in sub-Section 3 of Section 220 of the Indian Income Tax Act. He had drawn my attention to para 4 and para 5 of the judgment and had also drawn my attention to the scheme of Section 220 of Indian Income Tax Act. He had submitted that in the context of the arrangement of Section 220, the term "without prejudice" will mean that provisions of Sub-section 2 are to be taken care of in the light of the provisions of sub-Section 3. He had, therefore, submitted that the Supreme Court had clarified as to how the term "without prejudice" is to be interpreted and said observations can be applied to the clauses appearing in the present case. Learned Senior Counsel for the defendants had relied upon the judgment in the case of Chairman and M.D., N.T.P.C. Ltd. Vs. Reshmi Constructions, Builders and Contractors, where the Supreme Court had an occasion to discuss the effect of the term "without prejudice". My attention was drawn to para 34 of the said judgment where the Supreme Court has made reference to the very dictionaries on which reliance was placed by the Counsel for the defendants.

17. Learned Senior Counsel appearing on behalf of the defendants had relied upon the judgment in the case of Wellington Associates Ltd. Vs. Mr. Kirit Mehta, . He had taken me through this judgment and pointed out that the Court had an occasion to interpret Clause Nos. 4 and 5 which were apparently in conflict with each other. This judgment was cited to deal with the effect of term "may" appearing in Clause 5 of the said agreement. Learned Counsel for the defendants submitted that in the present case words "shall be referred to" have been used in the arbitration clause and, therefore, it is mandatory for this Court to make use of the said term and refer the parties to arbitration.

18. Learned Senior Counsel appearing on behalf of the defendants had placed emphasis on the term "shall" appearing in the arbitration clause for the purposes

of submitting that the parties are required to be referred to arbitration. Learned Senior Counsel appearing for the defendants had submitted that in a peculiar situation like the present case where the parties in the first place had arrived at an agreement to refer the dispute to arbitration and in the later part of the agreement decided that parties were free to take the dispute between them in a Court, it is the prime duty of the Court to interpret the said agreement by adopting common sense approach. He had also submitted that the Court should understand the intention of the parties as regards resolution of disputes between them. In support of this agreement, he had relied upon the judgment in the case of The Union of India (UOI) Vs. D.N. Revri and Co. and Others, . He had drawn my attention to the para 7 of the said judgment in support of his aforesaid submissions. Learned Senior Counsel for defendants had also relied upon the judgment in the case of Mumbai Metropolitan Region Development Authority v. M/s. Unity Infraproject Ltd. in Arbitration Petition No. 287 of 2007 (Coram; Dr. D.Y. Chandrachud, J.) dated 15/02/2008 and drawn my attention to para 11 of the said judgment where the Court has given indications as to how the Court should interpret the terms of contract. According to learned Senior Counsel for the defendants if the principles laid down in the judgment in the case of The Union of India v. M/s. D.N. Revri and Co. and Ors. and Mumbai Metropolitan Region Development Authority v. M/s. Unity Infraproject Ltd. are applied to the fact of this case, it will be abundantly clear that the parties intended to refer their dispute to arbitration. He, therefore, prayed that the Notice of Motion be made absolute.

19. Learned Senior Counsel for the plaintiffs had opposed the submissions advanced by the Counsel for the defendants and he had placed thrust of his arguments on the interpretation of the two clauses appearing in a contract and the effect thereof. Learned Senior Counsel for the plaintiffs had submitted that in the facts and circumstances of the case, it is necessary for this Court to interpret the relevant clauses namely arbitration clause, jurisdiction clause and the litigation clause harmoniously. He had also submitted that one would not get impressed by the arbitration clause simplicitor and for the purposes of arriving at decision in the notice of motion, one will have to ascertain the intention of the parties. Learned Senior Counsel for the plaintiffs had also submitted that the word "shall" always cannot be interpreted to mean "must" and in a given case the word "shall" can be interpreted to mean "may" depending upon the facts of the case. He had relied upon judgment in the case of Sainik Motors, Jodhpur and Others Vs. The State of Rajasthan,

20. Learned Senior Counsel for the plaintiffs had submitted that the term "without prejudice" needs to be looked into by the Court in the context of two clauses and according to him by the use of the term "without prejudice" certainly, parties had not arrived at a definite conclusion that the matter be referred to arbitration only. He had submitted that in a case where two clauses are required to be interpreted, the interpretation should not lead to making one clause nugatory. Learned Senior Counsel for the plaintiffs had in support of his

contention as regards interpretation of the respective clauses relied upon following judgments i.e. (i) Radha Sundar Dutta Vs. Mohd. Jahadur Rahim and Others, , (ii) Provash Chandra Dalui and Another Vs. Biswanath Banerjee and Another, , (iii) M.O.H. Uduman and others Vs. M.O.H. Aslum, , (iv) Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, .

21. Learned Senior Counsel on behalf of the plaintiffs had in support of his contention as regards use of the word "without prejudice" and how to interpret it, relied upon the judgment in the case of Commissioner of Income Tax, New Delhi Vs. Eli Lilly and Company (India) Pvt. Ltd., . In this case the Supreme Court had an occasion to deal with the two sub-Sections of Section 201 of the Indian Income Tax Act where Sub-section (1-A) of Section 201 provided for certain contingencies without prejudice to provisions of Sub-Section (1) of Section 201.

22. Learned Senior Counsel for the plaintiffs had, therefore, submitted that even looking to the dictionary meanings, which are relied upon by the learned Senior Counsel for the defendants as also looking to the interpretation, which is to be placed so far as the word "without prejudice" appearing in the agreement, the Court will have to come to the conclusion that while parties agreed to refer the dispute to the arbitration, parties had not given up their right to approach a Civil Court for reliefs of injunction and other remedies more particularly set out in Clause 16.11. Learned Senior Counsel for the plaintiffs had, therefore, submitted that this Court should hold that the parties had not arrived at a definite intention of referring the matter to arbitration and, therefore, the notice of motion should be dismissed.

23. Learned Senior Counsel appearing on behalf of the plaintiffs had referred to the judgment in the case of Wellington Associates Ltd. v. Kirit Mehta (relied upon by defendants) and had taken me through paragraph 17 of the said judgment. He submitted that in order to comply with the requirement of referring parties to arbitration, firm intention to have recourse to arbitration was necessary. According to him the judgment relied upon by defendants in the case Wellington Associates Ltd. v. Kirit Mehta has no application to the facts of this case in view of arbitration clause as well as the litigation clause with the opening word appearing in the said litigation clause namely "without prejudice to the provisions of this agreement".

24. At one stage of the hearing of this notice of motion, it was argued by learned Senior Counsel for the plaintiffs that the arbitration clause by itself does not create obligations in favour of a particular party. He had in support of this proposition relied upon the judgment in the case K. Sasidharan Vs. Kerala State Film Development Corpn., where Supreme Court had an occasion to deal with the situation as regards creation of obligations. The relevant part of the said judgment is at para 5, is as under.

The arbitration agreement is collateral to the substantial stipulation of the contract. It is merely procedural and ancillary to the contract and it is a mode of

settling the disputes, though the agreement to do so is itself subject to the discretion of the Court. Arbitration is distinguishable from other clauses in the contract. The other clauses set out the obligations which the parties have undertaken towards each other binding them, but the arbitration clause does not impose on one of the parties an obligation towards the other. It embodies an agreement of both parties with consensus ad idem that if any dispute arises with regard to the obligations undertaken therein which one party has undertaken towards the other, such a dispute shall be settled by a tribunal of their own constitution.

25. It was sought to be contended by the learned Senior Counsel for the plaintiffs by the aforesaid submission that by the arbitration clause appearing in the agreement, no obligations are created by the plaintiffs in favour of defendants or by the defendants in favour of plaintiffs to refer the dispute to arbitration only. This argument advanced by learned Senior Counsel for the plaintiffs was opposed by learned Senior Counsel for the defendants by relying upon the judgment in the case of Jagdish Chander Gupta Vs. Kajaria Traders (India) Ltd., . He had submitted that the Supreme Court had an occasion to go into the aspect of creation of obligation by the parties to the contract as regards arbitration clause and Supreme Court in para 5 of the above judgment has in no certain terms observed that the clause regarding arbitration is a right arising out of contract. Learned Senior Counsel for the defendants had, therefore, submitted that if the parties have arrived at an agreement as regards reference of the dispute to the arbitration, the Court has to refer the parties to the arbitration.

26. It must be mentioned that certain arguments were advanced by learned Senior Counsel for the defendants to contend that if the Court comes to the conclusion that defendant No. 2 do not have benefit of shareholders agreement dated 11th March, 2008 then there would be a mis-joinder of the parties as well as mis-joinder of causes of action and, therefore, the suit is not maintainable. This argument was advanced by the learned Senior Counsel for the defendants by relying upon Order I Rule 3 and Order II Rule 3 of the Civil Procedure Code. The argument advanced by Counsel for the defendants was of course replied to by the learned Senior Counsel for the plaintiffs and certain judgments were referred to. In so far as this aspect is concerned, I am inclined to observe that if the Court comes to the conclusion that the dispute between the plaintiffs and defendant No. 1 is required to be referred to the arbitration in terms of notice of motion and if the argument regarding assignment of shareholders' agreement in favour of defendant No. 2 is rejected then the question can be decided whether there is a mis-joinder of parties and / or mis-joinder of causes of action so far as defendant No. 2 is concerned.

27. I have heard learned Senior Counsels on behalf of both sides and perused the judgments and references cited across the bar. The parties have entered into an agreement dated 11th March, 2008 and by Clause 16.7.1 it is agreed that disputes between the parties shall be resolved by arbitration. Arbitration clause

with the same language is incorporated in the subscription agreement dated 11th March, 2008 between the plaintiffs and defendant No. 1. Same is the position as regards jurisdiction clause and litigation clause. Therefore, there can be common discussion as regards the effect of various clauses appearing in these two agreements.

28. If one peruses the arbitration clause appearing in the shareholders agreement dated 11th March, 2008, it is clear that the parties wanted to have their dispute referred to arbitration. So far as the jurisdiction clause appearing at 16.8, it is clear that parties submitted to the jurisdiction of the Court at Mumbai. Of course this clause is subject to Clause 16.7 i.e. arbitration clause. Learned Senior Counsel for the defendants had contended that the two clauses viz. Clause 16.7.1 and 16.8 support the stand of the defendants that the parties are required to be referred to the arbitration. After scribing the two clauses as mentioned aforesaid, parties while entering into further agreement thought of entering into another clause viz. Clause No. 16.11 titled as "Violation of the Terms" incorporating the litigation clause. The head note to the Clause 16.11 titled as "Violation of the Terms" would clearly go to show that parties wanted to mention as to what shall happen if there is violation of terms as set out in the agreement dated 11th March, 2008. While drafting litigation clause, the introductory words "without prejudice to the provisions of this agreement" have been used. It is to be noted that these key words do not restrict itself to the provisions of the arbitration clause appearing in 16.7.1. The term "without prejudice" which is used alongwith the words "to the provisions of this agreement". This means such use of terminology "without prejudice" is with reference to the agreement in totality. This in my view is required to be considered for the purposes of deciding the effect of the arbitration clause and the litigation clause at one and the same time.

29. Learned Senior Counsel for the defendants had taken me through the dictionary meaning of the term "without prejudice" appearing in Black Dictionary and reading of the said meaning would go to show that a party who agrees by use of the term "without prejudice" would not like to give up the rights which are conferred on the party on account of certain other terms of the agreement or certain other facts which confer rights on the said party. If this is the sense in using the term "without prejudice" while drafting the litigation clause, it is clear that the parties while scribing the litigation clause thought it fit as not to give up the situation which may arise in terms of the arbitration clause. Learned Senior Counsel for the defendants had referred to the judgment in the case of The Income Tax Officer, A Ward, Indore whereby Sub-section 2 of Section 220 of the Income Tax Act, 1961, certain powers were conferred upon the Income Tax Officer and in terms of Sub-section 3, a different power was conferred to exercise without prejudice to provisions of Sub-Section (2). The Court was required to interpret the provisions of these two clauses and the Supreme Court in para 5 has ultimately arrived at a conclusion that Sub-section 2 and Sub-section 3 form part of the same Section namely Section 220 and are therefore closely allied to

each other. In view of the above ratio, the argument advanced by the learned Senior Counsel for defendants that the Court should act on the basis of the arbitration the Court should ignore the litigation clause and refer the parties to the arbitration in terms of Section 8 of the said Act, cannot be accepted. This also on the background of the judgments which have been cited by learned Senior Counsel for the plaintiffs to show that the interpretation of two clauses must be done in a harmonious manner and the interpretation should not make one clause nugatory. In the present case, the parties have brought about a situation where in the first breath the parties thought of providing for resolution of dispute by arbitration and then without giving their rights to refer the matter to the arbitration thought of entering into a clause to be termed as litigation clause providing that a party may adopt proceedings in a Court of law to get the disputes between parties decided. If this is be so, it will not be proper for this Court to accept the submissions advanced by learned Senior Counsel for the defendants that the Court must necessarily yield in favour of arbitration clause and ignore what is stated in the litigation clause.

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.

32. So far as the argument canvassed by learned Senior Counsel for the defendants that the arbitration clause grants a right on a party to have disputes resolved by arbitration as observed in the case of Jagdish Chandra Gupta, in the present case such right came to be countered by litigation clause with special use of the term "without prejudice to the provisions of this agreement." This is one more reason to reject the stand of defendants as regards fulfilment of requirement of conditions mentioned in Section 8 of said Act.

33. In view of the above, I am inclined to observe that requirements of Section 8 of the Arbitration Act are not fulfilled and that is how it is not possible to refer the parties to arbitration as prayed for in terms of this notice of motion.

34. Having observed that parties cannot be referred to arbitration, there is no need to go into the question viz whether on account of transfer of 50% of the debentures in favour of defendant No. 2, the rights of shareholders mentioned in shareholders agreement dated 11th March, 2008 got assigned in favour of defendant No. 2. It is also not necessary for this Court to go into the question whether there has been a mis-joinder of parties or mis-joinder of causes of action.

35. For the reasons mentioned aforesaid, I am inclined to dismiss the notice of motion. Following order is passed to dispose of the notice of motion.

ORDER

(i) The notice of motion taken by the defendants is dismissed. There shall be no order as to costs.

(ii) The present notice of motion was taken out at the stage when the plaintiffs had moved this Court for ad-interim reliefs in terms of the Notice of Motion No. 1910 of 2010. As the notice of motion taken out by the defendants for referring the parties to the arbitration, is dismissed. Plaintiffs would be free to apply for ad-interim reliefs in terms of the aforesaid motion. In view of the present assignment, plaintiffs will have to move before the appropriate Court for seeking ad-interim reliefs in terms of the Notice of Motion No. 1910 of 2010.