

(2006) 07 DEL CK 0019

In the Delhi High Court

Case No : CS (OS) No's. 1084A and 1737A of 1998 and is No. 2411 of 1999

I.T.C. Limited

APPELLANT

Vs

Pradeep Anand and Others
 Pradeep Anand Vs I.T.C.
Ltd. and Others

RESPONDENT

Date of Decision : 03-07-2006

Acts Referred:

Arbitration Act, 1940 — Section 14, 14(2), 16(1), 17, 19, 19
Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, Order 7 Rule 11
Companies (Central Government) General Rules and Forms, 1956 — Rule 11C
Companies Act, 1956 — Section 286, 372, 372(4), 372(5), 373
Foreign Awards (Recognition and Enforcement) Act, 1961 — Section 3, 35
Income Tax Act, 1961 — Section 269UC
International Chamber of Commerce Arbitration Rules, 1998 — Rule 83
Monopolies and Restrictive Trade Practices Act, 1969 — Section 27B, 30B, 30C, 30D,
30E
Securities Contracts (Regulation) Act, 1956 — Section 13, 16, 16(1), 23

Citation : (2006) 3 ARBLR 67

Hon'ble Judges : Sanjay Kishan Kaul, J

Bench : Single Bench

Advocate : S. Ganesh, Pravin Bahadur, Meghalee, Kanika and Rajan Narain, for CS OS Nos. 1084A/1998 and is No. 2411/1999, Suhail Dutt, Anand Singh and Vineet Chaudhary, for CS OS NO. 1737A/1998, Ciccu Mukhopadhaya and Abhijeet Sinha, for CS OS No. 1033/199, for the Appellant; Suhail Dutt, Anand Singh and Vineet Chaudhary for Defendants Nos. 1, 3 and 4, Ciccu Mukhopadhaya and Abhijeet Sinha for Defendants Nos. 2 and 3 for CS (OS) No. 1033/1994 and 1084A/1998 and is No. 2411/1999, S. Ganesh Pravin Bahadur, Meghalee, Kanika and Rajan Narain for Defendant No. 1, Ciccu Mukhopadhaya and Abhijeet Sinha for Defendants Nos. 2 and 3 for CS (OS) Nos. 1033/1994 and 1737A/1998, for the Respondent

Judgement

Sanjay Kishan Kaul, J.—The parties to the present dispute sought to co-operate amongst themselves for furtherance of their business interest and entered into a Co-operation Agreement dated 11.09.1990. Instead of there being any co-operation, the Agreement resulted in serious disputes between the parties, which

gave rise to the arbitral proceedings as also the present proceedings. The substratum of the dispute is the rights and obligations, if any, which came into existence in pursuance of this Co-operation Agreement as also the very legality and validity of the said Agreement.

2. The Co-operation Agreement dated 11.09.1990 contains an arbitration clause in Article 12(b) providing for settlement of disputes under the Rules of Conciliation and Arbitration of the International Chamber of Commerce (for short, ICC) with the arbitration to be held at Bombay, India. The clause reads as under:

Article 12 : General Provisions

(a)...

(b) Any unresolved dispute arising in connection with this Agreement shall be settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with those rules and the arbitration shall be held at Bombay, India. The award of the arbitrator(s) shall be final and binding upon the parties hereto.

3. The disputes between the parties resulted in the appointment of Shri Datuk George KS Seah as the Sole Arbitrator. The Arbitrator made and published a Partial Award dated 24.04.1998.

4. M/s. ITC Limited (for short, ITC) filed a suit bearing CS (OS) No. 1084A/1998 u/s 14(2) of the Arbitration Act, 1940 (hereinafter to be referred to as, the said Act) seeking filing of the said Partial Award in Court. The Award was filed in the suit proceedings and ITC thereafter filed objections vide is No. 2411/1999 thereby seeking setting aside of the Partial Award and for the same to be declared bad in law, non est, null and void. ITC also seeks direction to the effect that the Arbitrator has no jurisdiction to make any further Award or the Final Award.

5. Late Shri C.L. Anand, was one of the parties to the Agreement, but passed away during the pendency of the arbitral proceedings whereby his son, Shri Pradeep Anand was substituted in his place. It may be noticed that late Shri C.L. Anand was claimant before the Arbitrator. M/s. Toshiba Anand Battery Limited (an Indian company) (for short, M/s. Toshiba Anand) went into liquidation in terms of the Orders of the Kerala High Court dated 05.11.1996 and Shri Pradeep Anand was granted permission by the said High Court in terms of the Order dated 11.04.1997 to continue with the arbitration with a direction that the Award shall not bind any of the properties of the said company in liquidation and shall not be executed against that company. Shri Pradeep Anand was, however, given liberty to make appropriate applications to be considered in accordance with law. The Award, thus, refers to Shri Pradeep Anand as the claimant representing the family and associate companies (India) of Shri C.L. Anand (deceased).

6. Shri Pradeep Anand has filed CS (OS) No. 1737/1998 under Sections 14 and

17 of the said Act for filing of the Partial Award dated 24.04.1998 and for making the same Rule of the Court.

7. M/s. Toshiba Corporation and M/s. Toshiba Battery Company Limited, two other parties to the Co-operation Agreement and the Award, filed a suit bearing CS (OS) No. 1033/1994 against ITC, Shri C.L. Anand and M/s. Toshiba Anand for declaration and recovery of Rs. 10 crores along with future interest. One Shri D.P. Barua was also impleaded as defendant No. 2 in the said suit, who was the President, Corporate Finance and Planning of ITC. The declaration sought in the suit is in respect of the same Co-operation Agreement dated 11.09.1990 and for the same to be valid and binding on ITC. The decree for recovery with interest is sought against ITC and Shri C.L. Anand. The alternative prayer made is that Shri D.P. Barua be declared guilty of misrepresenting about his authority to represent defendant No. 1 and a decree be passed against defendants No. 2 and 3 jointly for the amount of Rs. 10 crores along with interest.

8. The aforesaid proceedings were all being taken up simultaneously after a stage and ITC filed an application being No. 5316/2005 in CS (OS) No. 1084/1998 for determination of the jurisdictional issue raised in No. 2411/1999 first out of the objections filed to the Partial Award. This application was allowed vide Order dated 19.11.2005 and consequence of this Order is that arguments have been heard on the jurisdictional objections to the Partial Award of the Arbitrator and it is only that aspect which has to be adjudicated by the present judgment.

9. The Co-operation Agreement dated 11.09.1990 was executed between five parties. It may, however, be stated that, really speaking, the Agreement was in the nature of a tripartite agreement as, on the one hand, there were two parties M/s. Toshiba Corporation and M/s. Toshiba Battery Company Limited (both of Japan), while the other group was M/s. Toshiba Anand Battery Limited of India and Shri C.L. Anand. The third party was M/s. ITC Limited.

10. Article 1 of the Co-operation Agreement provided for Sale of Toshiba Anand Shares of Shri Anand and Its Associates as the heading and M/s. ITC Ltd. or its associated companies, business associates and/or its friends and/or permitted assigns, were to arrange to take over the entire equity shareholding of Shri Anand and its associates at par value of Rs. 10/- each in two lots. These lots were to consist of 24% shares to be so arranged for purchase by 30.09.2000 and the remaining holding by 31.03.1991. Article 2 provided for the resignation of Shri C.L. Anand as Chairman of M/s. Toshiba Anand in a Board meeting to be held in October, 1990 and for Shri D.P. Barua to take over as the Chairman. However, Shri C.L. Anand was to remain as Chairman Emeritus for life and an agreement with M/s. Toshiba Anand had to be entered into by Shri C.L. Anand as per draft Agreement (Annexure A). The draft Agreement had to be approved in the Board meeting. Articles 3 and 4 provided for the appointment of Shri C.L. Anand as Advisor of M/s. Toshiba Anand and Shri Pradeep Anand as a Non Executive Vice-Chairman of M/s. Toshiba Anand for a period of 3 years and Non

Executive Director of M/s. Toshiba Anand for a period of 5 years thereafter. The personal guarantees given by both Shri C.L. Anand and Shri Pradeep Anand to the bankers and financial institutions on behalf of M/s. Toshiba Anand were to be released in terms of Article 5 with the assistance and co-operation of ITC or its associates and friends as soon as possible, but not later than 31.03.1991. The Co-operation Agreement also provided for the sale price of the land and office building as also for exercise of voting rights. Article 10 made the provision for the parties to be entitled to seek specific performance of the terms of the Agreement and their respective obligations and the Agreement was terminable by mutual consent of the parties. Article 12 inter alias provided for the arbitration as also for approval by the Government of India and Japan wherever necessary by 31.03.1991. The Agreement was signed by all the five parties and Shri D.P. Barua signed the Co-operation Agreement on behalf of ITC.

11. The Arbitrator has taken note of the objections of ITC in para 21 of the Partial Award. The objections are three-fold : (i) ITC has no interest in acquiring the shares of M/s. Toshiba Anand, a sick industrial company; (ii) Shri D.P. Barua had no authority to sign the Co-operation Agreement on behalf of ITC; and (iii) the Co-operation Agreement contravenes the law of India and is, Therefore, illegal, null and void.

12. The Arbitrator found that the material on record showed that M/s. Toshiba Anand was not a sick industrial company at the time of execution of the Co-operation Agreement and, thus, ITC was interested in acquiring the shares prior to signing of the Co-operation Agreement. The Arbitrator also found that Shri D.P. Barua was the authorized signatory of ITC.

13. The third aspect of legality and validity of the Co-operation Agreement under the law of India were considered on the basis of the submissions of counsel for ITC on three aspects. The first was that the provisions of Section 30B of the Monopolies and Restrictive Trade Practices Act (hereinafter to be referred to as, MRTP Act) prohibited a body corporate to enter into an Agreement to acquire jointly or severally, whether in their name or in the name of any other person, any equity shares in a public company without previous approval of the Central Government, if the nominal value of the equity shares intended to be acquired exceeded 25% of the paid-up equity share capital of such company. Since Article 1 of the Co-operation Agreement dated 11.09.1990 provided for such a transfer and which was the very substratum of the Co-operation Agreement, the same was hit by the provisions of Section 30-B of the MRTP Act.

14. The second objection arises on the basis of Section 16 of the Securities Contracts (Regulation) Act, 1956 (hereinafter to be referred to as, the SCR Act) and the statutory notification issued there under. A notification bearing SO No. 4661 dated 24.12.1968 is stated to have been issued in exercise of power u/s 16 of the SCR Act, which authorizes such a notification to be issued for prohibition in trading and in terms of the notification, no contract without permission of the Central Government for sale of shares except spot delivery could have taken

place. Since the sales were in future after 6 months, the Co-operation Agreement was alleged to be in violation of the said notification.

15. The third aspect flows from Section 372 of the Indian Companies Act, 1956 (hereinafter to be referred to as, the Companies Act). ITC claimed that the said provision prescribes the procedure to be followed for purchase by a company of shares of other companies and no investment in shares of a company can be made by the Board of Directors unless the investment is sanctioned by a resolution passed at a meeting of the Board with the consent of all the Directors present in the meeting. Sub-section (4) of Section 372 contains a prohibition for a company from making any investment in the shares of any other body corporate in excess of the percentage specified in Sub-section (2) of the said Section unless the investment is sanctioned by a resolution of the investing company in the General Meeting and unless the previous approval of the Central Government is obtained. The Co-operation Agreement is, thus, alleged to have violated the provisions of Section 372(4) of the Companies Act. In this behalf, it may be noted that as per ITC, the Co-operation Agreement was placed before the Management Committee of the Board of ITC in January, 1991 when it was found to be prima facie violate the laws of India and on 19.02.1991, the Board accordingly arrived at a conclusion.

16. It is the aforesaid three legal objections, which have formed the subject matter of submissions by learned Counsel for the parties even before this Court and the effect of the same has to be examined since the Arbitrator found against ITC on all the aforesaid accounts.

17. The Arbitrator in the Partial Award dated 24.04.1998 has referred to the issues to be determined as enlisted in clause 13 of the terms of reference dated 23.04.1996, which are stated to have been signed by all the parties except the two Japanese companies. The Arbitrator has also set forth the circumstances, which gave rise to the Co-operation Agreement dated 11.09.1990. In this behalf, it has been stated that M/s. Punjab Anand Batteries was incorporated in Punjab and the same was a company promoted by late Shri C.L. Anand with Punjab State Industrial Development Corporation. The company was to manufacture and sell dry-cell batteries in India. Shri C.L. Anand and his family and associates subsequently purchased the entire shareholding of the State Corporation in M/s. Punjab Anand Batteries and became the majority shareholders, but the company sustained heavy losses and by the Order dated 09.07.1987 of the BIFR, the said company was declared a sick industrial company under the provisions of Sick Industrial Companies (Special Provision) Act, 1985. The involvement of ITC is stated to have arisen on acceptance of an invitation by the Government of Punjab to revive the said company and ITC submitted a proposal for the said revival, which was favorably considered by the Industrial Credit and Investment Corporation of India. However, the problems persisted and, thus, the Chairman of ITC and Shri D.P. Barua held discussions in December, 1989 with the Japanese companies to protect the reputation of the Japanese companies, who in turn

would help ITC to revive and rehabilitate the said company. The Japanese companies apparently wanted ITC to lend support to the marketing and advertising of the products in India and the Japanese companies would consider giving technical support and technology upgradation of the plant and machinery. The question of investment of ITC was apparently also discussed. However, things did not work out.

18. Learned senior counsel for ITC challenged the very jurisdiction of the Arbitrator to make the impugned Partial Award dated 24.04.1998 on the ground that the Co-operation Agreement dated 11.09.1990 was illegal, null and void and, thus, the arbitration Clause 12(b) must also perish with the said Agreement. The illegality is alleged to be on account of violation of the laws of the land in respect of the three aspects, as mentioned aforesaid, especially in view of Article 1 of the Co-operation Agreement. Article 1 reads as under:

ARTICLE 1

SALE OF TOSHIBA ANAND SHARES OF SHRI ANAND & ITS ASSOCIATES

ITC or its associated companies, business associates, and/or its friends and/or permitted assigns will arrange to take over the entire equity shareholding of Shri Anand and its associates at par value of Rs. 10/- each in two lots. The first lot namely 24% or thereabouts will be arranged for purchase by 30th September, 1990, and the same shall be transferred and registered in the name of ITC or its associated companies, business associates, and/or its friends by 30th September, 1990. The rest of their entire holding as the second lot shall be arranged to be purchased and transferred and duly registered in the name of ITC or its associated companies, business associates, and/or its friends and/or permitted assigns by 31st March, 1991.

19. Learned senior counsel for ITC contended that the aforesaid Article 1 is specifically titled and the title itself makes it clear that what is envisaged is the sale of M/s. Toshiba Anand shares of Shri Anand and its associates. The matter was submitted not only to be one of prescription by the title, but the provisions of Article 1 itself envisaged that the entire equity shareholding of Shri Anand and associates would be taken over in two lots. Article 1 was, thus, stated to be clear in its terms and provided for an Agreement to Sell and purchase the shares held by Anands in M/s. Toshiba Anand. Once Article 1 is an agreement for sale of such shares and the substratum of the Agreement was really this sale of shares, the said Article and the Agreement were contended to be in violation of the provisions of the law of the land.

20. The first, as stated above, is the effect of Section 30-B of the MRTP Act, which reads as under:

30-B Restrictions on the acquisition of certain shares. "(1) Except with the previous approval of the Central Government, no individual, firm, group, constituent of a group, body corporate or bodies corporate under the same

management, shall jointly or severally acquire or agree to acquire, whether in his or its own name or in the name of any other person, any equity shares in a public company, or a private company which is a subsidiary of a public company, if the total nominal value of the equity shares intended to be so acquired exceeds, or would, together with the total nominal value of any equity shares already held in the company by such individual firm, group, constituent of a group, body corporate, or bodies corporate under the same management, exceed twenty-five per cent, of the paid-up equity share capital of such company.

(2) Where any individual, firm, group, constituent of a group, body corporate, or bodies corporate under the same management (hereinafter in this Chapter referred to as the acquirer), is prohibited, by Sub-section (1) from acquiring or agreeing to acquire except with the previous approval of the Central Government any share of a public company or a private company which is a subsidiary of a public company, no

(a) company in which not less than fifty-one per cent of the share capital is held by the Central Government; or

(b) corporation (not being a company) established by or under any Central Act; or

(c) financial institution, shall transfer or agree to transfer any share to such acquirer unless such acquirer has obtained the previous approval of the Central Government for the acquisition of agreement for the acquisition, of such share.

21. The aforesaid Section falls in Chapter III-A, which deals with Restrictions on the acquisition and transfer of shares of, or by, certain bodies corporate. Section 30-B has 4 ingredients : (i) the requirement of prior approval of the Central Government; (ii) acquisition or agreement to acquire equity shares in a public company or a private company, which is the subsidiary of a public company; (iii) the acquisition to be in its own name or in the name of any other person; and (iv) the acquisition to be made in excess of 25% of the paid-up equity share capital of the company.

22. The violation of Section 30-B of the MRTP Act has penal consequences u/s 48B(1) of the MRTP Act, which reads as under:

48-B. Penalty for acquisition or transfer of Share in contravention of Section 27-B, 30-B, 30-C, 30-D or 30-E

(1) Any person who acquires any share in contravention of the provisions of Section 30-B shall be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to five thousand rupees, or with both.

23. The submission of learned senior counsel for ITC was that all the aforesaid parameters were satisfied in respect of Article 1 of the Co-operation Agreement since there was admitted failure to have any prior approval of the Central Government and the acquisition of shares was taking place exceeding 25% of the

paid-up share capital of the company, thus, implementation of the Co-operation Agreement and compliance of the obligations by ITC under the said Agreement would result in penal consequences u/s 48B of the MRTTP Act.

24. Learned senior counsel for ITC referred to judgment of the Supreme Court in *Mannalal Khetan and Others Vs. Kedar Nath Khetan and Others*, to contend that where a contract is prohibited by a statute, no court would lend assistance to give effect to it and such a contract is void if prohibited by a statute under a penalty. It was observed in para 19 as under:

19. Where a contract, express or implied, is expressly or by implication forbidden by statute, no Court will lend its assistance to give it effect. (See *Melliss v. Shirley Local Board* (1885) 16 QBD 446. A contract is void if prohibited by a statute under a penalty, even without express declaration that the contract is void, because such a penalty implies a prohibition. The penalty may be imposed with intent merely to deter persons from entering into the contract or for the purposes of revenue or that the contract shall not be entered into so as to be valid at law. A distinction is sometimes made between contracts entered into with the object of committing an illegal act and contract expressly or impliedly prohibited by statute. The distinction is that in the former class one has only to look and see what acts the statute prohibits; it does not matter whether or not it prohibits a contract; if a contract is made to do a prohibited act, that contract will be unenforceable. In the latter class, one has to consider what act the statute prohibits, but what contracts it prohibits. One is not concerned at all with the intent of the parties, if the parties enter into a prohibited contract, that contract is unenforceable. (See *St. John Shipping Corporation v. Joseph Bank* (1957) 1 QB 267. (See also *Halsbury's Laws of England Third Edition Vol. 8 p.141*).

25. Learned senior counsel for ITC contended that the aforesaid observations made it clear that one is not concerned with the intent of the parties. If the parties enter into a prohibited contract, the same is to be declared as unenforceable where a penalty is provided as such a penalty implies a prohibition.

26. The Arbitrator, on reading of Article 1 of the Co-operation Agreement, found that undisputedly the percentage of shares involved were over the statutory limit of 25%. It was held that the word arrange was, thus, deliberately used whether for purposes of taking over or purchasing of shares and it is this word, which would have to be interpreted. The Arbitrator has held that the word arrange does not mean and cannot be equated with acquisition, a proposal, an offer or even an invitation, thus, arrange was held to be first step towards discussion and negotiation prior to making a proposal or making an offer. The Arbitrator took note of the fact that no resolution had been passed at the General Meeting of ITC pursuant to Article 1 of the Co-operation Agreement and, thus, there was no actual investment, offer to invest, proposal to invest much less an agreement to invest in the equity shareholding. The Arbitrator relied upon judgment of the Bombay High Court in *Brooke Bond India Ltd. v. U.B. Ltd. and Ors.* 1994 (3) Comp LJ 279 : 1994 (79) Comp Cas 346, which had held in para 33 that what

was prohibited in Sub-section (4) of Section 372 of the Companies Act was an investment and not an agreement to invest. It was, thus, held that the prohibition would arise at the time of investment if the conditions stipulated in Sub-section (4) of Section 372 of the Companies Act, i.e., if the resolution of the investing company and the prior approval of the Central Government, are not obtained by that stage.

27. Learned senior counsel for ITC submitted that though the Arbitrator came to the aforesaid conclusion, yet simultaneously the Arbitrator has held that ITC is in breach of its obligations as contained in Article 1 of the Co-operation Agreement. It was, thus, contended that if the interpretation of word arrange of the Arbitrator is correct, then there is no question of there being any contractual obligations of the parties nor could there be any arbitration clause. If, on the one hand, there are such obligations, then the Co-operation Agreement would be hit by the legal provisions as contained in Section 30-B of the MRTP Act.

28. Learned senior counsel for ITC also submitted that preamble to the Co-operation Agreement itself stated, IT IS AGREED BY AND AMONGST THE PARTIES AS FOLLOWS. Article 5 provided for release of personal guarantees of late Shri C.L. Anand and Shri Pradeep Anand and Article 10 provided for specific performance of the terms of the Agreement. If these aspects are considered, learned senior counsel contended that the interpretation put forth by the Arbitrator would not even fall within the definition of a plausible view. Articles 5 & 10 read as under:

ARTICLE 5

PERSONAL GUARANTEES

It is agreed to release all personal guarantees given by Shri Anand and Shri Pradeep Anand to the bankers and financial institutions on behalf of Toshiba Anand with assistance and cooperation by ITC or its associates or by its friends and/or by Toshiba and/or by TBCL as soon as possible but not later than 31st March 1991.

ARTICLE 10

SPECIFIC PERFORMANCE

The parties hereto shall be entitled to specific performance of the terms of this Agreement and their respective obligations including the use of their voting right and also the exercise of their powers as set out in article 9 of this Agreement.

29. Learned senior counsel also drew the attention of this Court to the findings arrived by the Arbitrator in the Partial Award, which would show that there was an agreement between the parties of which ITC has been found to be in breach. The same were set out in para 16 of is No. 5316/2005, which is as under:

16. That there was neither any doubt or confusion as regards the scope and purport of Article 1 of the Agreement would be evident inter alias from the

following findings and/or submissions of the respective parties recorded in the Partial Award as well:

22.12.2 Based on my above findings contained in paragraphs 22.1.1, 22.1.2, 22.3.1, 22.4.1, 22.4.3, 22.4.4, 22.5.1 and 11.11.1, I am satisfied that I.T.C. Limited had an interest in acquiring the shares in Toshiba Anand Batteries Ltd. prior to the signing of the Co-Operation Agreement of 11.09.1990.

35.1.2 I find as a fact this transfer represented the sale and purchase of the first lot mentioned in Article 1 of the C.A.

48.2.1 Article 1 of the said Co-Operation Agreement deals with the arrangement to take over the entire 48% shareholding of the family members of Shri C.L. Anand and his associated companies in two lots by ITC, associated companies, business associates, friends or permitted assigns.

48.6.1 Secondly, Counsel for TOSHIBA and TBCL submits that under Article 1, it was provided that the shareholding of the Claimant would be transferred in the name of ITC, associated companies, business associates, friends or permitted assigns, meaning thereby that the Claimant would have no connection with the shareholding of TABL and ITC would have the full responsibility.

48.8.2 Counsel (for the Claimant) also submits that the Claimant has always been and is always ready and willing to sell the balance shareholding of the family members and associated companies in TABL, but it was ITC, which backed out of the said Agreement ostensibly on the ground that Shri D.P. Barua had no authority to execute such an Agreement. As the balance of the 24% shareholding was also to be purchased by ITC, associated companies, business associates, friends or nominees of ITC, the Claimant could not have sold the same in view of the breach by ITC.

48.9.1 It is plain from the above that after repudiating, the Co-Operation Agreement dated 11.09.1990 ITC did not arrange to take up the remaining 24% of the shareholding in TABL.

48.9.3 On the contrary, I hold and adjudge the ITC, by failing to arrange to take up the balance of the 24% of the shareholding was in breach of Article 1.

30. Learned senior counsel for ITC placed reliance on judgment of the Supreme Court in Waverly Jute Mills Co. Ltd. Vs. Raymon and Co. (India) Private Ltd., which considered the question as to whether the validity of a contract between the parties was a matter only to be decided by the Arbitrator and not open for judicial scrutiny u/s 33 of the said Act. Reliance was also placed on the earlier judgment of the Supreme Court in Khardah Company Ltd. Vs. Raymon and Co. (India) Private Ltd., where it was held that if a contract is illegal and void, an arbitration clause, which is one of the terms thereof, must also perish along with it and that a dispute relating to the validity of a contract is in such cases for the court and not for the Arbitrator to decide.

31. Learned senior counsel for ITC, thus, submitted that since the Co-operation Agreement was illegal and void, it was well within the jurisdiction of this Court to consider that aspect in the objections filed by ITC.

32. Learned senior counsel for ITC emphasized that the interpretation put forth by the Arbitrator cannot have any legal sanction as what is prohibited is not only the actual transaction but even an agreement to acquire in view of the clear provisions of Section 30-B of the MRTP Act.

33. Learned senior counsel for ITC submitted that the legal position is identical in respect of the objection taken on account of the notification issued u/s 16 of the SCR Act. The said Section 16 reads as under:

16. Power to prohibit contracts in certain cases.

(1) If the Central Government is of opinion that it is necessary to prevent undesirable speculation in specified securities in any State or area, it may, by notification in the Official Gazette, declare that no person in the State or area specified in the notification shall, save with the permission of the Central Government, enter into contract for the sale or purchase of any security specified in the notification except to the extent and in the manner, if any, specified therein.

(2) All contracts in contravention of the provisions of Sub-section (1) entered into after the date of notification issued there under shall be illegal.

34. The penal provisions form part of Chapter V of the SCR Act and in terms of Section 23, there is penal consequences for violation of the provisions of Section 16 of the SCR Act. The relevant portion of Section 23 reads as under:

23. Penalties

(1) Any person who

(b) enters into any contract in contravention of any of the provisions contained in Section 13 or Section 16; or shall, on conviction, be punishable with imprisonment for a term which may extend to one year, or with fine, or with both.

35. The notification issued in pursuance of Section 16, which is in question, is as under:

59. Restrictions on sale or purchase of securities. In exercise of the powers conferred by Sub-section (1) of Section 16 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Central Government, being of opinion that it is necessary to prevent undesirable speculation in securities in the whole of India, hereby declares that no person, in the territory to which the said Act extends, shall, save with the permission of the Central Government, enter into any contract for the sale or purchase of securities other than such spot delivery contract or contract for cash or hand delivery or special delivery in any securities as is permissible under the said Act and the rules, bye-laws and regulations of a

recognized stock exchange:

Provided that a contract other than a spot delivery contract or contract for cash or hand delivery or special delivery in any securities list of a recognized stock exchange may be entered into between its members or through or with any such member for the purpose of closing out or liquidating all existing contracts entered into up to the date of this notification and remaining to be performed after the said date, but such contract shall be subject to the rules, bye-laws and regulations of the recognized stock exchange that come into force when further new dealings are prohibited any securities on the cleared securities list and subject also to such terms and conditions, if any, as the Central Government may from time to time impose.

36. Learned senior counsel for ITC contended that a reading of the aforesaid notification bars the entering into any contract for sale or purchase of securities other than spot delivery contract, etc. without the prior permission of the Central Government. Since the sale envisaged under Article 1 of the Co-operation Agreement is a phased sale and that too in future after 6 months, there being no prior permission of the Central Government, the Co-operation Agreement would be hit by the aforesaid provisions.

37. The reasoning given by the Arbitrator in the impugned Partial Award for rejecting this contention is identical as in respect of the provisions of Section 30-B of the MRTP Act based on the interpretation of the word arrange.

38. The third legal objection stems from the provisions of Section 372 of the Companies Act, the relevant provisions of which read as under:

372. (1) A company, whether by itself or together with its subsidiaries (hereafter in this section and Section 373 referred to as the investing company), shall not be entitled to acquire, by way of subscription, purchase or otherwise (whether by itself, or by any individual or association of individuals in trust for it or for its benefit or on its account) the shares of any other body corporate except to the extent, and except in accordance with the restrictions and conditions, specified in this section.

(2) The Board of directors of the investing company shall be entitled to invest in any shares of any other body corporate up to such percentage of subscribed equity share capital, or the aggregate of the paid-up equity and preference share capital, of such other body corporate, whichever is less, as may be prescribed:

Provided that the aggregate of the investments so made by the Board in all other bodies corporate shall not exceed [such percentage of the aggregate of the subscribed capital and free reserves of the investing company, as may be prescribed]:

Provided further that the aggregate of the investments made in all other bodies corporate in the same group shall not exceed [such percentage of the aggregate of the subscribed capital and free reserves of the investing company, as may be

prescribed.]

(3) In computing at any time the percentages specified in Sub-section (2) and the provisos thereto, the aggregate of the investments made by the investing company in other body or bodies corporate whether before or after the commencement of the Companies (Amendment) Act, 1960 up to that time shall be taken into account.

(4) The investing company shall not make any investment in the shares of any other body corporate in excess of the percentages specified in Sub-section (2) and the provisos thereto, unless the investment is sanctioned by a resolution of the investing company in general meeting and unless [previously] approved by the Central Government:

Provided that the investing company may at any time invest up to any amount in shares offered to it under Clause (a) of the Sub-section (1) of Section 81 (hereafter in this section referred to as rights shares) irrespective of the aforesaid percentages:

Provided further that when at any time the investing company intends to make any investments in shares other than rights shares, then, in computing at that time any of the aforesaid percentages, all existing investments, if any, made in rights shares up to that time shall be included in the aggregate of the investments of the company.

(5) No investment shall be made by the Board of directors of an investing company in pursuance of Sub-section (2), unless it is sanctioned by a resolution passed at a meeting of the Board with the consent of all the directors present at the meeting, except those not entitled to vote thereon, and unless further notice of the resolution to be moved at the meeting has been given to every director in the manner specified in Section 286.

39. Sub-section (2) of Section 372 of the Companies Act puts a restriction on the acquisition of shares as per the conditions specified in Section 372. Insofar as Sub-section (2) of Section 372 is concerned, it may be noted that Rule 11C of the Companies (Central Governments) General Rules & Forms, 1956 provides for such investment up to 30% of the subscribed equity share capital or aggregate of the paid-up equity and preference share capital of such other body corporate, whichever is less. Sub-section (4) of Section 372 prohibits making any investment in excess of the percentage specified unless the investment is (i) sanctioned by a resolution of the investing company in the General Meeting; and (ii) previously approved by the Central Government. Sub-section (5) of Section 372 further provides that no investment would be made by the Board of Directors of the investing company in pursuance of Sub-section (2) of Section 372 unless such investment is sanctioned by a resolution passed at a Meeting of the Board with the consent of all the Directors present at the meeting and unless further notice of the resolution to be moved at the meeting has been given to every Director in the manner prescribed in Section 286 of the Companies Act.

Thus, all these restrictive covenants have been prescribed statutorily. In fact, the submission of learned senior counsel for ITC was that the Legislature has deliberately put such a draconian requirement where even one Director can hold out and defeat such an investment.

40. In view of the aforesaid legal position, learned senior counsel for ITC contended that there could not be any question of giving effect to the Co-operation Agreement once the same was rejected in January, 1991 by the Management Committee having been found to be illegal on the advice obtained from a senior counsel. The recommendation was put before the Board of Directors and in the meeting held on 19.02.1991 of the Board of Directors, the recommendation of the Management Committee was accepted. The decision, thus, taken by the Board is not to make the investment and, in fact, all the Directors voted for not making such an investment.

41. Learned senior counsel for ITC further submitted that the findings arrived at by the Arbitrator in the Partial Award that the Co-operation Agreement only referred to the intent of the parties and permission could be taken later on is unsustainable in law specifically in view of the provisions of Sub-section (5) of Section 372 of the Companies Act. Learned senior counsel, thus, submitted that the Arbitrator failed to take note of the supervening illegality, which had come into being as the Board rejected the proposal to invest. The Arbitrator referred only to the provisions of Section 372(4) of the Companies Act though the factum of rejection by the Board in its meeting held on 19.02.1991 has been taken note of by the Arbitrator.

42. Learned senior counsel for ITC submitted that even the judgment of Bombay High Court in Brooke Bond India Ltd.s case (supra) referred only to Sub-section (4) of Section 372 of the Companies Act. It was held that prima facie the prohibition contained in Sub-section (4) of Section 372 of the Companies Act would arise at the time of investment and its absence at the time of the contract would not render it illegal. However, Sub-section (5) of Section 372 of the Companies Act prohibited an investment being made unless sanctioned by resolution of the Board and, thus, it was submitted that even if the view taken by Bombay High Court was to be accepted, the obligations could have come into being at the stage of investment only if there was at least a sanction of the Board of Directors as a pre-requisite to the Agreement. The sanction was neither present as a pre-requisite nor the Board subsequently approved it and, thus, the Co-operation Agreement was non est and unenforceable.

43. Learned senior counsel for ITC took note of the principal objection raised by learned Counsel for Anands to the very consideration of these legal conclusions by this Court. The objections of learned Counsel for Anands emanate inter alias from the fact that before the matter went to arbitration, ITC had filed a petition u/s 33 of the said Act before this Court, but withdrew the same by filing an application that they will raise all issues before the Arbitrator. The objection, thus, was that the matter could not be re-agitated now before this Court in view

of ITC having withdrawn its earlier petition. Learned senior counsel pointed out that Anands raised this very plea before the Arbitrator and the Arbitrator considered the same in para 45 where the objection to the Arbitrator considering these legal pleas has been noted. The objection has been raised on account of withdrawal of the earlier Suit and OMP as noticed in para 45.1.1 of the Partial Award. The Arbitrator, however, found in para 45.9.2 that withdrawal of the earlier proceedings was only to enable ITC to raise the issues, pleas and defenses before the Arbitrator, which were made abundantly clear in the application for withdrawal under Order XXIII Rule 1 of the Code of Civil Procedure, 1908 (hereinafter to be referred to as, the Code) and, thus, the objection of Anands was rejected. Learned senior counsel, thus, submitted that making of the Award has given a fresh cause of action to ITC and the objections can be considered under Sections 30 & 33 of the said Act.

44. Learned senior counsel for ITC submitted that Section 30 of the said Act, which sets out the grounds for setting aside an award, specifies in Clause (c) that an award can be set aside if it is otherwise invalid and since the award is invalid being contrary to the law of the land, the same can always be challenged by ITC.

45. Learned senior counsel for ITC referred to judgment of the Apex Court in *The Union of India (UOI) Vs. Shri Om Prakash*, which discussed the meaning of expression or is otherwise invalid used in Clause (c) of Section 30 of the said Act. It was held that the said words are wide enough to cover every form of invalidity including invalidity of reference and found no reason why the general and qualified language of Clause (c) should not include an award on an invalid reference, which is a nullity. It was, thus, submitted that there could not be any bar arising from the application filed by ITC under Order XXIII Rule 1 of the Code withdrawing the earlier proceedings. Learned senior counsel further submitted that ITC participated before the Arbitrator with the plea/objection that the Arbitrator had no jurisdiction in the matter on account of invalidity of the Co-operation Agreement itself. A valid and legal arbitration agreement was a pre-requisite for the Arbitrator to adjudicate the disputes and once the Co-operation Agreement itself was invalid, there could be no question of the Arbitrator going into the aspects.

46. Learned senior counsel referred to observations of the Apex Court in *Waverly Jute Mills Co. Ltd.s* case (*supra*) to contend that even acquiescence cannot confer jurisdiction on the Arbitrator. It was observed in para 21 as under:

21. Now an agreement for arbitration is the very foundation on which the jurisdiction of the arbitrators to act rests, and where that is not in existence, at the time when they enter on their duties, the proceedings must be held to be wholly without jurisdiction. And this defect is not cured by the appearance of the parties in those proceedings, even it that is without protest, because it is well settled that consent cannot confer jurisdiction. But in such a case there is nothing to prevent the parties from entering into a fresh agreement to refer the dispute to arbitration while it is pending adjudication before the arbitrators, and

in that event the proceedings thereafter before them might be upheld as referable to that agreement & the award will not be open to attack as without jurisdiction. But it will make all the difference in the result whether the parties have entered into an arbitration agreement as defined in Section 2(a) of the Arbitration Act or have merely taken steps in the conduct of proceedings assumed or believed to be valid. In the former case the award will be valid; in the latter, a nullity.

47. Similarly in *Khardah Co. Ltd.s* case (supra), the observations to the effect that if a contract is illegal and void, the arbitration clause being one of the terms of the contract must also perish was relied upon.

48. The last aspect arising from the response of Anands referred to by learned Counsel for ITC was on the question as to the effect of a specific question of law being referred to an Arbitrator. This is so since the plea raised against ITC agitating these legal objections before this Court is that where a legal issue is referred to an arbitrator as a specific question of law, even if there is error apparent, it is not for the court to decide.

49. Learned senior counsel for ITC referred to judgment of the Apex Court in *Seth Thawardas Pherumal Vs. The Union of India (UOI)*, to contend that the principles laid down in the said judgment would not apply in the present case as no specific question of law was ever referred to the Arbitrator. The Partial Award of the Arbitrator only arises from a plea raised by ITC. Learned senior counsel also drew the attention of this Court to the objection raised by the Anands before the Arbitrator disputing the right of the ITC to raise these legal pleas on the ground that ITC was estopped from raising these legal questions. It was submitted that once the Anand Group was disputing the very jurisdiction of the Arbitrator to decide the questions of law on account of withdrawal of the legal proceedings by ITC before this Court, it would not lie in their mouth to even contend that these questions of law were specifically referred to the Arbitrator.

50. The legal distinction arising from and error apparent on the face of the Award in case where a question of law is specifically referred to has been succinctly set out in *Thawardas Pherumal and Anr. case* (supra). It was held that the law in India and England is the same and, thus, the observations made in the said case have to be dealt with at some length since they also form the basis of the submissions of learned Counsel for Anands to be considered hereinafter. It was observed in paras 11 to 14 as under:

11. In India this question is governed by Section 16(1)(c) of the Arbitration Act, 1940 which empowers a Court to remit an award for reconsideration where an objection to the legality of the award is apparent upon the face of it

This covers cases in which an error of law appears on the face of the award. But in determining what such an error is, a distinction must be drawn between cases in which a question of law is specifically referred and those in which a decision on a question of law is incidentally material (however necessary) in order to decide

the question actually referred.

If a question of law is specifically referred and it is evident that the parties desire to have a decision from the arbitrator about that rather than one from the Courts, then the Courts will not interfere, though even there, there is authority for the view that the Courts will interfere if it is apparent that the arbitrator has acted illegally in reaching his decision, that is to say, if he has decided on inadmissible evidence or on principles of construction that the law does not countenance or something of that nature. See the speech of Viscount Cave in *Kelantan Government v. Duff Development Co. Ltd.* 1923 AC 395 (A). But that is not a matter which arises in this case.

12. The law about this is, in our opinion, the same in England as here and the principles that govern this class of case have been reviewed at length and set out with clarity by the House of Lords in *F.R. Absalom Ltd. v. Great Western (London) Garden Village Society* 1933 AC 592, and in 1923 AC 395 (A).

In AIR 1949 334 (Privy Council) the Privy Council applied the law expounded in *Absalom's* case (B), to India: see also AIR 1923 66 (Privy Council) and AIR 1927 164 (Privy Council) The wider language used by Lord Macnaghten in *Gulam Jilani v. Muhammad Hassan* 29 Ind App 51, had reference to the revisional powers of the High Court under the CPC and must be confined to the facts of that case where the question of law involved there, namely limitation, was specifically referred.

An arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. He is a tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not, he can be set right by the Courts provided his error appears on the face of the award. The single exception to this is when the parties choose specifically to refer a question of law as a separate and distinct matter.

13. Reference was made to a decision of this Court in *A.M. Mair and Co. Vs. Gordhandass Sagarmull*, at , where Fazl Ali, J. quoted a passage from Viscount Simon's speech in *Heyman v. Darwins Ltd.* 1942 AC 356 , where the learned Lord Chancellor (Viscount Simon) in turn quoted from Lord Dunedin in another case. It was argued on the basis of this that if you have to have recourse to the contract to establish your case, then the dispute must fall within the arbitration clause.

That is undeniable but it is not enough that the dispute should fall within the clause. It is also necessary that the parties should define what the dispute is and agree to refer to dispute so set out and defined to arbitration, or, if they do not, that the Court should compel them to do so: (see Lord Macmillan in *Heyman's* Case (H), just cited at pp. 369 and 370.

If, Therefore, no specific question of law is referred, either by agreement or by

compulsion, the decision of the arbitrator on that is not final however much it may be within his jurisdiction, and indeed essential, for him to decide the question incidentally. Lord Russell of Killowen and Lord Wright were both in the earlier case (1933 AC 592 (B)), as well as in Heyman's case (H), and they would have pointed to any distinction had there been a likelihood of conflict; but in fact there is none and we do not read Fazl Ali J.'s judgment as a decision to the contrary.

14. We have next to see whether the arbitrator was specifically asked to construe Clause 6 of the contract or any part of the contract, or whether any question of law was specifically referred. We stress the word specifically because parties who make a reference to arbitration have the right to insist that the tribunal of their choice shall decide their dispute according to law, so before the right can be denied to them in any particular matter, the Court must be very sure that both sides wanted the decision of the arbitrator on a point of law rather than that of the Courts and they wanted his decision on that point to be final.

51. A reading of the aforesaid observations makes it clear that in order to preclude the Court from considering such an objection, the parties must be *ad idem* to refer the specific question of law to the Arbitrator and, thus, the Court must be sure that both the sides wanted the decision of the Arbitrator on the point of law rather than of the Court and they wanted the decision on the point to be final.

52. The facts of that case and the dispute sprang out of a series of claims made in the letters written by the contractor to the Additional Chief Engineer, CPWD. The Supreme Court considered the Statement of Claim and Recitals in the Award and as to what constitutes a specific reference was thereafter considered and set out in para 18 of the judgment, which is as under:

(18) We are of opinion that this is not the kind of specific reference on a point of law that the law of arbitration requires. In the first place, what was shown to us is no reference at all. It is only an incidental matter introduced by the Dominion Government to repel the claim made by the contractor in general terms under claim No. 5. In the next place, this was the submission of the contractor alone.

A reference requires the assent of "both" sides. If one side is not prepared to submit a given matter to arbitration when there is an agreement between them that it should be referred, then recourse must be had to the Court u/s 20 of the Act and the recalcitrant party can then be compelled to submit the matter under Sub-section (4).

In the absence of either, agreement by "both" sides about the terms of reference, or an order of the Court u/s 20(4) compelling a reference, the arbitrator is not vested with the necessary exclusive jurisdiction.

Therefore, when a question of a law is the point at issue, unless "both" sides "specifically" agree to refer it and agree to be bound by the arbitrator's decision,

the jurisdiction of the Court to set an arbitration right when the error is apparent on the face of the award is not ousted. The mere fact that both parties submit incidental arguments about a point of law in the course of the proceedings is not enough. The language of Lord Wright in 1933 AC 592 at p. 616 (B), a case similar to this so far as this point is concerned, is apposite here-

There is here no submission of any specific question of law as such and as a specific question of law; no doubt incidentally, and indeed necessarily, the arbitrator will have to decide some questions on the construction of the building contract, but the two matters submitted are both composite questions of law and fact; there is no express submission of the true effect of the contract on the basis of undisputed facts, as in the 193 AC 395 (A), or as a separate and distinct matter on facts to be separately assumed or found, as in "In re Kind and Duveen", 1913-2 KB 32 at p. 36 (I)

The arbitrator was not being asked simply and specifically to decide, upon some agreed or assumed basis of fact, the true interpretation of either Clause 26 or Clause 30 of the conditions or of both together; he was being required to make an award on the two matters submitted on whatever questions of fact and law might emerge.

Clause 32 of the contract in the House of Lords case was the equivalent of Clause 14 in ours. It ran-

Provided always that in case any dispute or difference shall arise... as to the construction of the contract or as to any matter or thing arising there under... such dispute shall be and is hereby referred to the arbitration and final decision of etc.

The arbitrator relied on that to invest him with jurisdiction to determine, as a matter of law, the construction of Clauses 26-30 of that contract. The House of Lords held that in the absence of a "specific" reference about the construction of the contract the jurisdiction of the Courts was not taken away. Lord Russell Killowen put it this way at page 610-

No specific question of construction or of law was submitted. The parties had, however, been ordered to deliver pleadings, and by their statement of claims the contractor had claimed that the arbitrator should under his powers revise the last certificate issued etc....

It is at this point that the question of the construction of condition 30 arose as a question of law, "not specifically submitted", but material in the decision of the matters which had been submitted. This question of law the arbitrator has decided; but if upon the face of the award he has decided it wrongly his decision is, in my opinion, open to review by the Court.

That is exactly the position here. Simply because the matter was referred to incidentally in the pleadings and arguments in support of, or against, the general issue about liability for damages, that is not enough to clothe the arbitrator with

exclusive jurisdiction on a point of law.

53. The principle of law, thus, set forth is that both sides must specifically agree to refer and agree to be bound by the arbitrators decision on a question of law for the jurisdiction of the court to be ousted to set an arbitration right when the error is apparent on the basis of the award.

54. Learned senior counsel for ITC submitted that in view of the aforesaid legal position, the legal objections are fundamental in nature to the rest of the controversy and there is no purpose in continuation of the arbitration proceedings apart from the Partial Award being erroneous in law. Learned senior counsel relied upon the observations of the Supreme Court in *Azhar Hussain Vs. Rajiv Gandhi*, , the consequences arising from a defective election petition were considered, which does not disclose a cause of action. The Supreme Court repelled the contention that the court must proceed with the trial, record the evidence and only then consider whether the petition did not disclose cause of action as specified under Order VII Rule 11 of the Code. It was held that the purpose of confirmation of such power was to ensure that a meaningless litigation is brought to an end, which would be otherwise abortive and should not be permitted to occupy the time of the court. It was stated as under:

12. Learned Counsel for the petitioner has next argued that in any event the powers to reject an election petition summarily under the provisions of the CPC should not be exercised at the threshold. In substance, the argument is that the court must proceed with the trial, record the evidence, and only after the trial of the election petition is concluded that the powers under the CPC for dealing appropriately with the defective petition which does not disclose cause of action should be exercised. With respect to the learned Counsel, it is an argument which it is difficult to comprehend. The whole purpose of conferment of such powers is to ensure that a litigation which is meaningless and bound to prove abortive should not be permitted to occupy the time of the court and exercise the mind of the respondent. The sword of Damocles need not be kept hanging over his head unnecessarily without point or purpose. Even in an ordinary civil litigation the court readily exercises the power to reject a plaint if it does not disclose any cause of action. Or the power to direct the concerned party to strike out unnecessary, scandalous, frivolous and vexatious parts of the pleadings. Or such pleadings which are likely to cause embarrassment or delay the fair trial of the action or which is otherwise an abuse of the process of law. An order directing a party to strike out a part of the pleading would result in the termination of the case arising in the context of the said pleading. The courts in exercise of the powers under the CPC can also treat any point going to the root of the matter such as one pertaining to jurisdiction or maintainability as a preliminary point and can dismiss a suit without proceeding to record evidence and hear elaborate arguments in the context of such evidence, if the court is satisfied that the action would terminate in view of the merits of the preliminary point of objection. The contention that even if the election petition is liable to be

dismissed ultimately it should be so dismissed only after recording evidence is a thoroughly misconceived and untenable argument. The powers in this behalf are meant to be exercised to serve the purpose for which the same have been conferred on the competent court so that the litigation comes to an end at the earliest and the concerned litigants are relieved of the psychological burden of the litigations so as to be free to follow their ordinary pursuits and discharge their duties. And so that they can adjust their affairs on the footing that the litigations will not make demands on their time or resources, will not impede their future work, and they are free to undertake and fulfill other commitments.

55. Learned senior counsel, thus, submitted that as the Supreme Court applied the aforesaid principles to an election petition laying down the principles, similarly the present misconceived arbitration proceedings must be terminated.

56. Learned Counsel for Anands, which is the real contesting party, emphasized on the last aspect urged by learned senior counsel for ITC that where a specific question of law is referred to an arbitrator, even error apparent on the face of the award will not give a mandate to this Court to interfere with the Partial Award. Learned Counsel relied upon judgment of the Apex Court in Tarapore and Company Vs. Cochin Shipyard Ltd., Cochin and Another, . The point of dispute referred to the arbitrator as enumerated in para 5 was as under:

5. The points/disputes referred by the parties to the sole arbitrator read as under:

1. Does the claim of Messrs. Tarapore & Co. on Cochin Shipyard Ltd., for compensation for increase in the cost of imported pile driving equipment and technical know-how fees referred to in Clauses (2) and (3) hereunder fall within the purview of the first paragraph of Clause 40 of the General Conditions of Contract entered into between the two parties?

2. If the answer to (1) above is in the affirmative, in terms of the provisions of the contract are Messrs. Tarapore & Co. entitled to compensation for increase in the cost of imported pile driving equipment and technical know-how fees to be paid to them by Cochin Shipyard Ltd.? If so, what is the amount.

57. The judgment records that when the arbitration clause was invoked, the Opposite Party did contend that the dispute raised by the First Party was not covered by the arbitration clause. Further specifying its demur, the Opposite Party formulated the points in dispute on which the arbitrator was invited to give an award. The same was, of course, without prejudice to the rights to contend that the dispute is not covered by the arbitration clause. The Supreme Court noted in para 10 that the effect of referring the specific question of law to arbitration without prejudice to ones rights to contend to the contrary was, thus, required to be examined. It was held that the parties agreed to submit the specific question even with regard to the scope, ambit, width and construction of the arbitration clause so as to define its parameters and contours. The Arbitrator was, thus, required and called upon to decide first whether the dispute is arbitrable as falling within the width and ambit of the arbitration agreement and

if answer to the same was in the affirmative, then only the second question had to be gone into, which was about the compensation. The Apex Court held that the specific question about jurisdiction of the Arbitrator to arbitrate upon the disputes was specifically referred to the Arbitrator. The Apex Court in para 12 observed as under:

Therefore, the respondent invited the arbitrator by the specific point of reference which involves a specific question of law touching upon the jurisdiction of the arbitrator to decide the same. This becomes further clear from the fact that both the learned Counsel appearing before the arbitrator submitted agreed draft issues for the decision of the arbitrator. The first issue amongst the agreed draft issues reads as under:

Does the claim of the claimant fall within the purview of the first para of Clause 40 of the General Conditions of Contract entered into between the two parties.

This point was not to be incidentally decided while deciding the dispute referred to the arbitrator his jurisdiction to entertain the dispute is questioned.

The formulation of the specific question of law by the respondent along with its suggestion to decide it as a preliminary issue and becoming a party to the agreed draft issue No. 1 would conclusively establish that the specific question of law touching upon the jurisdiction of the arbitrator was referred to the arbitrator for his decision. Therefore, the conclusion is inescapable that a specific question of law touching upon the jurisdiction of the arbitrator which is indisputably a question of construction of Cl. 40 and Therefore a question of law was specifically referred by the parties to the arbitrator for his decision and by the terms of Clause 40 agreed to abide by his decision as final and binding.

58. The plea advanced by learned Counsel for the appellant therein arising from the specific question of law being referred to the arbitrator was discussed in para 13 of the judgment as under:

13. Mr. F.S. Nariman, learned Counsel for the appellant urged that Section 16(1) (c) may permit the court to remit or set aside the award on the ground that there is an error of law apparent on the face of it, yet where a specific question of law has been referred to the arbitrator for decision, the fact that the decision is erroneous does not make the award bad on its face so as to permit its being set aside. Expanding the submission, it was urged that a decision on a question of law by an arbitrator may be given in two different and distinct situations; first where while deciding a dispute referred to him incidentally a question of law may arise which an arbitrator may decide in order to dispose of the reference and if in such a situation any error of law appears on the face of the award, the court can interfere with the award. But there is an altogether independent and a distinct situation in which a question of law might arise such as where the parties to the dispute may frame the specific question of law and refer it to the Arbitrator for his decision. In the later situation, it was urged that the decision of the decision of the Arbitrator even if erroneous would not permit the court to interfere with

the award. Proceeding along, it was urged that in this case a specific question of law touching upon the jurisdiction of the arbitrator was specifically referred to the Arbitrator for his decision and Therefore, the decision of the Arbitrator is binding on the parties and the court cannot proceed to inquire whether upon a true construction of the arbitration clause, the dispute referred to the Arbitrator for arbitration would be covered by the arbitration clause so as to clothe the arbitrator with the jurisdiction to arbitrate upon the dispute.

59. The Apex Court considered the scope and ambit of scrutiny by an arbitrator in such a situation and observed in para 16 as under:

16. Complexity of rights and obligations in national and international trade and commerce would certainly generate disputes between the parties and treated as a normal incident of commercial life and till commercial arbitration came to be recognised as a civilised way of resolving such disputes, prolix and time-consuming litigation was the only method of resolving such disputes. As an alternative to court proceedings, arbitration native to court proceedings, arbitration as a method of resolving disputes by domestic tribunal constituted by the choice of parties became acceptable. The basic difference between the court proceedings and the arbitration is the choice of the tribunal. Ordinarily, all matters in which relief can be claimed from the court may become subject matter of arbitration. Now if in a law court incidental questions of law arise in the course of proceedings, the court has an obligation to decide those questions of law. But when it came to a tribunal not endowed with the judicial power of the State but by conferment by the parties to the dispute or which acquires jurisdiction by a submission of the parties to the dispute to invite the decision by the forum of their choice and to be bound by it a question arose whether a pure question of law it at all can be referred to an arbitrator for his decision and even if he decides, can the decision be questioned on the ground that there is an error apparent on the face of the award in deciding the question. Now as stated a short while ago, a question of law figure before an arbitrator in two ways. It may arise as an incidental point while deciding the main dispute referred to the arbitrator or in a given case parties may refer a specific question of law to the arbitrator for his decision. There is no more gainsaying the fact that a pure question of law may and can be referred to an arbitrator for his decision. Russel on the Law of Arbitration Twentieth Edition at page 22 states as under:

A pure question of law may be referred to an arbitrator and where such an question is specifically referred his award will not be set aside merely upon the ground that his decision is wrong.

In Halsbury's Laws of England Vol.2 Para 623 4th Edition the statement of law reads as under:

If a specific question of law is submitted to the arbitrator for his decision and he decides it, the fact that the decision is erroneous does not make the award bad on its face so as to permit its being set aside; and where the question referred

for arbitration is a question of construction, which is, generally speaking, a question of law, the arbitrator's decision cannot be set aside only because the court would itself have come to a different conclusion.

With the ever widening expansion of international trade and commerce, complex questions of private International Law, effect of local laws on contracts between parties belonging to different nations are certainly bound to crop up. Arbitration has been considered a civilised way of resolving such disputes avoiding court proceedings. There is no reason why the parties should be precluded from referring a specific question of law to an arbitration for his decision and agree to be bound by the same. This approach manifests faith of parties in the capacity of the tribunal of their choice to decide even a pure question of law. If they do so, with eyes wide open, and there is nothing to preclude the parties from doing so, then there is no reason why the court should try to impose its view of law superseding the view of the Tribunal whose decision the parties agreed to abide by. Therefore, on principle it appears distinctly clear that when a specific question of law is referred to an arbitrator for his decision including the one touching upon the jurisdiction of the arbitrator, the decision of the arbitrator would be binding on both the parties and it would not be open to any of the two parties to wriggle out of it by contending that the arbitrator cannot clutch at or confer jurisdiction upon himself by misconstruing the arbitration agreement.

60. The Apex Court considered the decisions from the earliest time onwards and observed in para 18 as under:

18. The earliest case to which we would refer is the decision of the House of Lords in *Kelantan Government v. Duff Development Co. Ltd.* 1923 All ER (Rep) 349 in which Lord Trevethin in his speech said as under:

If your Lordships should be of opinion that the award is bad in law upon its face, it should be set aside, for this is not, in my view, a submission to arbitration of such a nature that, although the law is bad upon the face of the award, the decision cannot be questioned. That happens only when the submission is of a specific question of law and is such that it can be fairly construed to show that the parties intended to give up their rights to resort to the King's courts and in lieu thereof to submit that question to the decision of a tribunal of their own.

Same distinction was also brought out by Lord Parmoor when he said that the principle applicable where a specific question of law has been submitted to the decision of arbitration is well expressed by Channel ,J., in *Re: Kind and Duveen* (1913) 2 KB 32, in which it was said that where a specific question of law is referred to an arbitrator for his decision, the award cannot be set aside on the ground of an error apparent on the face of the award because the question of law was wrongly decided." At a later stage, it was observed that if the court, before which it is sought to impeach the award, comes to the conclusion that the alleged error in law even if it can be maintained, arises in the decision of a question of law directly submitted to the arbitrator for his decision, then the

principle stated by Channel, J., in *Re: Kind and Duveen* applies, is attracted and the parties having chosen their tribunal, and not having applied successfully to the court under either Section 4 or Section 19 of the Arbitration Act, 1889, are not in a position to question the award or to maintain a claim to set it aside." This decision is an authority of the proposition that where a question of construction is the very point referred for arbitration, then the decision of the arbitrator upon that point cannot be set aside by the court only because the court would itself have come to a different conclusion.

61. The Supreme Court took into consideration its earlier judgment in *Alopi Parshad and Sons Ltd. Vs. Union of India (UOI)*, where the observations made in *Thawardas Pherumal and Anr. case (supra)* were reiterated and it was observed that if a specific question is submitted to the Arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law, does not make the Award bad on its face so as to permit of its being set aside. The Supreme Court concluded in paras 32 to 34 of the judgment in *M/s. Tarapore and Companys case (supra)* as under:

32. On a conspectus of these decision, it clearly transpires that if a question of law is specifically referred and it becomes evident that the parties desired to have a decision on the specific question from the arbitrator about that rather than one from court, then the court will not interfere with the award of the arbitrator on the ground that there is an error of law apparent on the face of the award even if the view of law taken by the arbitrator does not accord with the view of the court. This view of law taken in England was stated by this Court to be the same in this country and since the decision in *Seth Thawardas Pherumal Vs. The Union of India (UOI)*, which follows earlier decisions in England and India, it has not been departed from. The view canvassed for by Mr. Pai that common law courts were very reluctant to part with its jurisdiction has hardly any relevance where a specific question of law including the one touching the jurisdiction of the arbitrator is referred to the arbitrator for his decision. Even if the decision of the arbitrator does not accord with the view of the court, the award cannot be set aside on the sole ground that there is an error of law apparent on the face of it.

33. Before we conclude on this point we must take note of a contention of Mr. Pai that the respondent cannot be estopped from contending that the arbitrator had no jurisdiction to entertain the dispute as the respondent agreed to the submission without prejudice to its rights to contend to the contrary. It is undoubtedly true that in the letter dated March 29, 1976 by which the respondent agreed to refer the dispute to the arbitrator, it was in terms stated that the reference is being made without prejudice to the position of the respondent as adopted in the letter meaning thereby without prejudice to its rights to contend that the claim of the appellant is not covered by the arbitration clause. In the context in which the expression "without prejudice" is used, it would only mean that the respondent reserved the right to contend before the

arbitrator that the dispute is not covered by the arbitration clause. It does not appear that what was reserved was a contention that no specific question of law was specifically referred to the arbitrator. It is difficult to spell out such a contention from the letter. And the respondent did raise the contention before the arbitrator that he had no jurisdiction to entertain the dispute as it would not be covered by the arbitration clause. Apart from the technical meaning which the expression "without prejudice" carries depending upon the context in which it is used, in the present case on a proper reading of the correspondence and in the setting in which the term is used, it only means that the respondent reserved to itself the right to contend before the arbitrator that a dispute raised or the claim made by the contractor was not covered by the arbitration clause. No other meaning can be assigned to it. An action taken without prejudice to one's right cannot necessarily mean that the entire action can be ignored by the party taking the same. In this case, the respondent preferred the specific question of law to the arbitrator. This was according to the respondent without prejudice to its right to contend that the claim or the dispute is not covered by the arbitration clause. The contention was to be before the arbitrator. If the respondent wanted to assert that it had reserved to itself the right to contend that no specific question of law was referred to the arbitrator, in the first instance, it should not have made the reference in the terms in which it is made but should have agreed to the proposal of the appellant to make a general reference. If the appellant insisted on the reference of a specific question which error High Court appears to have committed, it could have declined to make the reference of a specific question of law touching his jurisdiction and should have taken recourse to the court by making an application u/s 33 of the Arbitration Act to have the effect of the arbitration agreement determined by the court. Not only the respondent did not have recourse to an application u/s 33 of the Arbitration Act, but of its own it referred a specific question of law to the arbitrator for his decision, participated in the arbitration proceeding invited the arbitrator to decide the specific question and took a chance of a decision. It cannot Therefore, now be permitted to turn round and contend to the contrary on the nebulous plea that it had referred the claim/dispute to the sole arbitrator without prejudice to its right to contend to the contrary. Therefore, there is no merit in the contention of Mr. Pai.

34. In this case, as earlier pointed out a specific question as to whether the claim of compensation made by the appellant-contractor and demurred and disputed by the respondent would be covered within the scope, ambit and width of the arbitration clause, was specifically referred by the parties for the decision of the arbitrator. Therefore, it is a case where a specific question of law touching upon the jurisdiction of the arbitrator was referred for the decision of the arbitrator by the parties. Even if the view taken by the arbitrator may not accord with the view of the court about the scope, ambit and width of the arbitration clause, the award cannot be set aside on the ground that there is an error of law apparent on the face of the award. The view taken by the High Court is palpably untenable and has to be reversed. On this short point, the appeal can be allowed. However,

it was strenuously urged by both the sides that the dispute arising out of the claim for compensation made by the appellant or account of the increase in the cost of the pile driving equipment and technical know-how fees would or would not be covered by the first paragraph of Cl. 40, we would briefly examine the same to point out that it would be covered.

62. Learned Counsel for Anands referred to the Division Bench judgment of Calcutta High Court in *Durga Prosad Chamria v. Anardeyi Sethani* A.I.R.1947 34 Cal 75 which held that in case of specific point of law referred to arbitration, the Award cannot be set aside even if the Arbitrator wrongly decides it. The Division Bench of Calcutta High Court observed that in submissions to arbitration, the rule is that as the parties choose their own arbitrator to be a Judge in the dispute between them, they cannot, when the award is good on its face, object to his decision either upon the law or the facts. However, an error whether of fact or of law apparent on the face of the award will be set aside unless the error is immaterial to the decision. An exception has been engrafted on this doctrine to the effect that when specific point of law is referred to arbitration, the award cannot be set aside if the Arbitrator wrongly decides the point of law. It was further observed in paras 19 and 20 as under:

19. Ordinarily in reference to arbitration without the intervention of the Court people usually refer their whole disputes in general terms and it is in exceptional cases that specific questions of law and/or facts are referred to arbitration. Even when the arbitration agreement is initially in general terms, (as was cl. 21 of the agreement in the case of *[In re King and Duveen]* (1913) 2 K.B. 232 the actual reference, after disputes arise, may comprise only specific questions of facts and/or of law, as did the terms of reference in that very case. Again, even if the arbitration clause is initially in general terms the arbitrator may call for pleadings, as was done in the *Kelantan* case and in the *Absalom* case. The preponderance of views of learned Judges appears to be that the terms of reference or even those pleadings may be looked at for ascertaining whether specific questions of law were as such referred to the arbitrator or such questions of law arose incidentally as material in the decision of the disputes referred to arbitration in general terms.

20. When matters in dispute in a pending suit are, however, referred to arbitration by or under an order of Court one may legitimately be inclined to infer that the parties intend to refer specifically each and every one of the disputes arising on the pleadings. Even if this inference may not be laid down as a broad general proposition, I have no doubt whatever, when the order of reference is made in a pending suit after the issues arising on the pleadings have been settled, that by referring all outstanding matters in the suit at that stage the parties did intend to refer those specific issues which were then the only outstanding matters in the suit, so as to bring the reference within the exception rather than the general rule, and that the award made by the arbitrator appointed in the suit under such circumstances cannot be challenged even if the

decision is manifestly wrong. Such a reference appears to me to be covered by the decision of the Judicial Committee in the case of Ghulam Jilani v. Muhammad Hassan in I.A. 51 : 29 Cal. 167. In that case after the issues had been settled by the Court the parties referred the case to two arbitrators, one named by each party. The reference to arbitration stated:

The arbitrators will have the power to decide the points at issue framed in the case. Should the arbitrators not agree they will have the power to themselves to appoint an umpire. In that case the decision will rest with the majority. The parties will have no objection to the award of the arbitrators. The decision of the whole of the case is left in the hands of the arbitrators, any one particular point is not referred to them for decision.

63. Learned Counsel for Anands submitted that the aforesaid principles have to be applied to the facts of the present case and sought to refer to the pleadings of the parties at various stages including before the Arbitrator to substantiate the plea that the questions were specifically referred to the Arbitrator. In this behalf, learned Counsel referred to certain annexures filed along with is No. 10280/2005 in CS (OS) No. 1084A/1998. The said application sought recall / review of the Order dated 19.11.2005 and seeking that is No. 5316/2005 for determination of the jurisdictional issue should, in fact, be dismissed. This application was disposed of as not pressed on 15.12.2005 and it was noted that the counsel for ITC had argued the three legal issues on the ground that the Arbitrators findings on these aspects were erroneous.

64. One of the annexures was the plaint filed by ITC before this Court in Suit No. 50/1995 for declaring the arbitration clause and the Co-operation Agreement dated 11.09.1990 as not binding. The averments in the suit claimed that the Co-operation Agreement dated 11.09.1990 was illegal, null and void and vocative of the provisions of various statutes. Similarly, in OMP No. 16/1995 filed by ITC u/s 33 of the said Act again such an averment was made in paras 32 and 33. Shri C.L. Anand had filed an application in OMP No. 16/1995 u/s 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961 seeking stay of the proceedings and in the said application, it had been alleged in para 7 that the arbitration clause was wide enough for the Arbitrator even to decide this issue of validity of the Agreement. In the same application in para 12, a reference has also been made to ICC Rules of Conciliation and Arbitration where Rule 83 reads as under:

Should one of the parties raise one or more pleas concerning the existence or validity of the agreement to arbitrate, and should the International Court of Arbitration be satisfied of the prima facie existence of such an agreement, the Court may, without prejudice to the admissibility or merits of the plea or pleas, decide that the arbitration shall proceed. In such a case any decision as to the arbitrator's jurisdiction shall be taken by the arbitrator himself.

65. It was pleaded that this Rule is deemed to be incorporated in the arbitration clause and is, thus, wide enough to include the dispute as regards the validity,

existence and effect of the arbitration clause. In Suit No. 50/1995 also, the petition was filed u/s 35 of the Foreign Awards (Recognition and Enforcement) Act, 1961 as is No. 1315/1995, which was considered by the Order dated 21.08.1995. The Court on consideration of the matter framed issues and Issue No. 6 framed was as under:

Issue No. 6 :

Whether non-compliance with the provisions of Section 372 of the Companies Act, 1956 and of other laws of India render the Agreement dated 11th September, 1990 of no effect, null and void and not binding on ITC Ltd? Onus on petitioner company

66. Learned Counsel for Anands submitted that it is only thereafter that the application for withdrawal of the suit was filed under Order XXIII Rule 1 of the Code. Such an application was filed both in the OMP and the Suit. In para 4 of the application, the petitioner therein (ITC) stated as under:

4. The petitioner is agreeable to having the said issue regarding the existence and binding effect of the document dated 11.09.1990, determined by the Arbitrator, along with all other issues arising out of the claim made by the First Respondent in the arbitration proceedings and the defenses raised by the parties thereto.

67. The prayer made was that Suit/OMP may be disposed of as withdrawn. On the said application being filed, the Order passed was, the Suit / OMP is dismissed as withdrawn.

68. The aforesaid pleadings have been referred to by learned Counsel for Anands to contend that the facts set out show the clear intention of ITC to get the legal issue adjudicated upon by the Arbitrator. The three objections had to be considered by the Court, but it is ITC, which chose to withdraw the proceedings to get the same adjudicated before the Arbitrator.

69. Learned Counsel for Anands also drew the attention of this Court to the terms of reference as recorded by the Arbitrator. The plea of ITC was noted in para 5.5 as under:

5.5 The 1st Defendant will contend that the said Cooperation Agreement is bad in law and Therefore null and void as per provisions of the Indian Contract Act 1872 and/or other Indian Laws.

70. The response of Anands was noted in para 8.14, which is as under:

8.14 The claimant submits that the contention of the 1st Defendant that the conditions of Section 372 of the Indian Companies Act not being complied with thereby rendering the said Cooperation Agreement null and void is totally misconceived. It is the submission of the claimant that the purchase of shares by Balmoral Investments And Finance Private Ltd. (a private company dealing in the business of the investment and shares) did not attract the provisions of Section

372 because the investment was not made by the 1st Defendant but by BALMORAL INVESTMENTS AND FINANCE PRIVATE LTD. on the request of the 1st Defendant as postulated in the said Cooperation Agreement.

and thereafter in para 13, the definition of issues to be determined were set out:

13) DEFINITION OF THE ISSUES TO BE DETERMINED

13.1(a) Whether the family members and associated companies of C.L.ANAND are necessary parties to these arbitration proceedings?

13.1(b) If the answer to the above question is in the affirmative then whether the non-joinder of the family members and associated companies of C.L. ANAND as parties to these arbitration proceedings:

i) nullifies this Reference, or

ii) is an irregularity which can be rectified by amendment

13.2(a)(i) Whether the Co-operation Agreement dated 11.09.90 was validly executed and binding on the 1st Defendant-ITC Limited?

13.2(a)(ii) Whether the Document dated 11.09.1990 was a concluded contract to which ITC Limited was a party?

13.2(a)(iii) Whether the document dated 11.09.1990 is bad in law, null and void as per the provision of the Indian Contract Act, 1872 and/or other Indian Laws?

13.2(a)(iv) Whether assuming that the Document dated 11.09.1990 constituted a concluded contract binding on ITC Limited, the same was abandoned and given a go-by by the parties?

13.2(b) Alternatively, whether the 1st defendant is estopped and/or debarred from denying or disputing the validity of the said Co-operation Agreement in this Reference having regard to the action and conduct of the said 1st Defendant after 11.09.1990?

13.3 Whether Article 5 of the Cooperation Agreement dated 11.09.1990 to be construed in accordance with the interpretation given by:

a) the Claimant, or

b) the Defendants?

13.4(a) Whether the Cooperation Agreement dated 11.09.1990 was vitiated by failure of consideration inasmuch as the 1st Defendant ITC Limited was never the user of the "TOSHIBA" trademark?

13.4(b) Whether the document dated 11.09.1990 is otherwise vitiated for failure of consideration and mutual mistake and suppression of material facts by the Claimant?

13.5(a) Whether the withdrawal of Delhi High Courts Civil Suit No. 50 of 1995

and OMP No. 16 of 1995 by the 1st Defendant ITC LIMITED?

i) would or

ii) would not,

debar or estop the said 1st Defendant from raising the same pleas, contentions or defenses before the Arbitrator in these arbitration proceedings?

13.5(b) Whether by withdrawal of Delhi High Courts Civil Suit No. 50 of 1995 and OMP NO.16 of 1995 the 1st Defendant, ITC Limited had abandoned and/or must be deemed to have abandoned all claims and/or rights (if any) determinable there under?

13.6(a) Whether the Claimant is entitled to all and/or any of the reliefs claimed in this Reference?

13.6(b) Whether the Claimant is at all entitled to claim any relief on behalf or in respect of any members of his family or his associated companies?

13.7(a) Whether the claimant waived his claim against defendants 2 & 3 by virtue of Article 8 of the Co-operation Agreement dated 11.09.1990?

13.7(b) Whether the Claimant and Defendant No. 1 committed breach of Article 1 of the said Co-operation Agreement and as such they are not entitled to any claim against Defendants 2 & 3?

71. Learned Counsel for Anands contended that issues as set out in para 13.2(a) (ii) clearly set out the question whether a concluded contract was arrived at between the parties and in para 13.5 as to the ramification of the withdrawal of Suit No. 50/1995 and OMP No. 16/1995. Learned Counsel submitted that thereafter the issues were signed both by ITC and Anands.

72. Learned Counsel for Anands further referred to the written submissions filed by ITC before the Arbitrator where the submissions on 13.2(a)(iii) dealing with the question of the document dated 11.09.1990 being bad in law, null and void under the Indian laws had been advanced. ITC, in fact, wanted this issue to be determined as a preliminary issue, but this request was rejected by the Arbitrator on 28.07.1997.

73. All the aforesaid is cited as a material in support of the contention of learned Counsel for Anands that the present case is one where the questions were specifically referred to the Arbitrator and do not come within any exception.

74. Learned Counsel further submitted that, without prejudice to the aforesaid, there was even otherwise no error apparent on the face of the Award. As to what constitutes an error apparent on the face of the Award, it was contended, as being discussed in the judgment of the Apex Court in N. Chellappan Vs. Secretary, Kerala State Electricity Board and Another, where it was observed as under:

12. The High Court did not make any pronouncement upon this question in view of the fact that it remitted the whole case to the arbitrators for passing a fresh award by its order. we do not think that there is any substance in the contention of the Board. In the award, the umpire has referred to the claims under this head and the arguments of the Board for disallowing the claim and then awarded the amount without expressly adverting to or deciding the question of limitation. From the findings of the umpire under this head it is not seen that these claims were barred by limitation. No mistake of law appears on the face of the award. The umpire as sole arbitrator was not bound to give a reasoned award and if in passing the award he makes a mistake of law or of fact that is no ground for challenging the validity of the award. It is only when a proposition of law is stated in the award and which is the basis of the award, and that is erroneous, can the award be set aside or remitted on the ground of error of law apparent on the face of the record.

Where an arbitrator makes a mistake either in law or in fact in determining the matters referred, but such mistake does not appear on the face of the award, the award is good notwithstanding the mistake and will not be remitted or set aside.

The general rule is that as the parties choose their own arbitrator to be the judge in the disputes between them, they cannot when the award is good on its face, object to his decision, either upon the law or the facts. (see Russell on Arbitration, 17th ed p.322)

13. An error of law on the face of the award means that you can find in the award or a document actually incorporated thereto, as, for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous (see Lord Dunedin in AIR 1923 66 (Privy Council) In Union of India (UOI) Vs. Bungo Steel Furniture Pvt. Ltd., this Court adopted the proposition laid down by the Privy Council and applied it. The Court has no jurisdiction to investigate into the merits of the case and to examine the documentary and oral evidence on the record for the purpose of finding out, whether or not the arbitrator has committed an error of law.

75. Learned Counsel for Anands, thus, submitted that unless a proposition of law is stated to be erroneous, can the Partial Award be said to suffer from an error of law apparent on the face of the Partial Award, which is legal in nature.

76. Learned Counsel thereafter referred to the Partial Award to show that the Arbitrator considered the role of ITC, recorded the summary of submissions and considered clauses of the Co-operation Agreement including Article 1 in the conspectus of the Indian laws and it is on consideration of the aforesaid that the Arbitrator came to the conclusion that the provisions would apply only at the stage of investment and the Co-operation Agreement itself was not invalid. It was, thus, submitted that the Arbitrator rightly took note of the true intent of the parties, which was to word the Co-operation Agreement carefully to take care of

the provisions of law and not to enter into a void contract. Learned Counsel relied upon judgment of the Apex Court in Nathulal Vs. Phoolchand, where it was held that an agreement to transfer the property must be deemed to be subject to the implied condition that the transferor will obtain sanction of the authority concerned. It was, thus, contended that if the same principle would apply in the present case, here also an implied condition of obtaining sanction from the Central Government must be deemed to be incorporated in the Agreement.

77. Learned Counsel sought to draw an analogy from the said case where sanction had to be obtained from the Income Tax Authorities u/s 269UC-UC of the Income Tax Act, 1961 prior to concluding a sale for immovable property.

78. Learned Single Judge of this Court in Rajesh Aggarwal Vs. Balbir Singh and Another, held that the suit for specific performance could not be defeated on the plea that the Agreement to Sell is illegal in view of the provisions of Section 269-UC of the Income Tax Act. It was held that no transfer could take place in the absence of non-compliance of the provisions, but the plea that the Agreement to Sell was illegal was rejected.

79. In U.P. Hotels and Others Vs. U.P. State Electricity Board, , the scope of scrutiny by a court in respect of the allegation of error apparent on the face of the award was considered. It was held that where a question of law regarding statutory interpretation in the light of a decision of the Supreme Court involved or arose during the course of arbitration proceedings and the arbitrator in compliance with the principles of natural justice arrived at a possible view, the award was not open to courts interference on the ground of the view being wrong. A reference was also made to the judgment in M/s. Tarapore and Companys case (supra) for purposes of drawing a distinction between the two different ways in which a question of law may figure before an arbitrator. Such a question may arise as an incidental point while deciding the main dispute or in a given case, the parties may refer a specific question of law to the arbitrator for decision. The parties are not precluded from referring a specific question of law and where they do so with open eyes, there was nothing to preclude the parties from doing so. In such a case, the court would not interfere with the award of an arbitrator on the ground that there was an error of law apparent on the face of the award even if the view of law taken by the arbitrator did not accord with the view of the court. In the conclusion, it was observed as under:

28. We are, Therefore, of the opinion that the view taken by the Umpire on Section 49 was a possible view in the light of the decision of this Court in Indian Aluminium case. In the premises, a question of law arose certainly during the course of the proceedings. Such a question has been decided by the Umpire on a view, which is a possible one to take. Even if there was no specific reference of a question of law referred to the Umpire, there was a question of law involved. Even on the assumption that such a view is not right, the award is not amenable to interference or correction by the courts of law as there is no proposition of law which could be said to be the basis of the award of the Umpire, and which is

erroneous.

80. Learned Counsel for Anands also sought to refer to the objections filed by ITC to contend that the allegation of mere misconduct and erroneous consideration is not a ground for the court to interfere with the Partial Award. Learned Counsel submitted that in *Sudarsan Trading Co. Vs. Government of Kerala and Another*, it has been held that the interpretation of a contract is a matter for the arbitrator. If the view taken by the arbitrator is a possible view, the court had no jurisdiction to examine the same to substitute its own view with that of an arbitrator.

81. Learned Counsel for Anands in the end referred to the judgment of Avadh Behari Rohatgi, J. of this Court on a reference arising from a difference between two Hon'ble Judges in *Union of India Vs. Rampur Distillery and Chemical Co. Limited and Another*, . The difference of view arose since one of the learned Judges was of the considered opinion that a specific question of law had been referred to the arbitrator and the arbitrator having answered the question of law, the decision of the arbitration was final and binding on the parties. The other learned Judge held that no specific question of law was referred to the arbitrator and that a general reference was made. Secondly, the award of the arbitrator was a speaking award and that it disclosed an error on its face. The subject matter was disputes arising between the parties relating to the interpretation of certain clauses of the award of tender. The difference was on the interpretation of a particular clause. Avadh Behari Rohatgi, J. held that it was not a general reference, but the specific question of law had been referred to the arbitrator as to the meaning and construction of Clauses 2 and 3 of the contract. It was thereafter observed as under:

16. This being a reference of a specific question of law as a separate and distinct matter the rule laid down by the House of Lords in *Government of Kelantan v. Duff Development Co.* 1923 AC 395 will apply. In that case the House of Lords approved the following dictum of Channel ,J. in *Re King and Duveen* (1913) 2 K.B. 32:

It is equally clear that if a specific question of law is submitted to an arbitrator for his decision, and he does decide it, the fact that the decision is erroneous does not make the award bad on its face so as to permit of its being set aside. Otherwise it would be futile ever to submit a question of law to an arbitrator.

Viscount Cave said:

No doubt an award may be set aside for an error of law appearing on the face of it and no doubt a question of construction is (generally speaking) a question of law. But where a question of construction is the very thing referred for arbitration then the decision of the arbitrator upon that point cannot be set aside by the court only because the court would itself have come to a different conclusion

17. The Supreme Court in *Kapoor Nilokheri Co-op. Dairy Farm Society Ltd. Vs.*

Union of India (UOI) and Others, has held that where an arbitrator is called upon to decide the effect of the agreement, he has really to decide a question of law, i.e. of interpreting the agreement and hence his decision is not open to challenge. Sachar J was of the view that this observation of the Supreme Court at page 1342 was mere obiter. I do not agree. Even an obiter dicta of the Supreme Court is binding on us, though I do not think that it is mere obiter. The Supreme Court following the Privy Council in AIR 1949 334 (Privy Council) positively held that the effect of the agreement is a question of law. whether it is a question of construction of the cancellation deed as was the case in Kelantan Government (supra) or the effect of the agreement as in the case of Nilokheri the question is one of law, pure and simple. And where a matter of law has been specifically referred to arbitration the courts have no right to view the decision of the arbitrator.

82. Learned senior counsel for ITC in rejoinder referred to certain pronouncements to expound as to when a question of law can be said to have been referred to an arbitrator. Learned senior counsel emphasized that in order for such a reference, the question of law has to be referred as a separate and distinct matter as set out in Thawardas Pherumal and Anr. case (supra).

83. Learned senior counsel for ITC referred to judgment of the Supreme Court in Union of India (UOI) Vs. A.L. Rallia Ram, which dealt with the issue relating to the reference of a specific question by the parties. The judgment noted the said principle of law that where the parties refer such a question, they desire to have a decision from the arbitrator on those questions rather than from the court and the court will not, unless it is satisfied that the arbitrator has proceeded illegally, interfere with the decision. The dispute arose out of a case where arbitrators had called upon the parties to file their respective pleadings and the parties were agreed that the dispute be tried on the issues framed. Evidence was led thereafter, but since the arbitrators were unable to agree upon a decision, the case was referred to the Umpire. The Umpire thereafter on the basis of the records filed before the arbitrators proceeded to pronounce the award after recording reasons in support of his conclusion on the diverse issues, which were raised before the arbitrators. The Supreme Court held that the filing of pleadings pursuant to directions of the arbitrators and agreeing to trial of disputes on the issues raised by the arbitrators cannot be regarded as reference of specific questions implying in agreement between the parties that they intend to give up their rights to resort to the courts even if the award was vitiated on account of an error apparent on the face thereof. The only inference from the agreement recorded by the arbitrators was held to be that the parties agreed to have the disputes adjudicated on the issues raised and not to submit the issues raised for adjudication. The communications appointing the arbitrators were found to contain no reference to any specific questions to be referred to the arbitrators. The judgment in Thawardas Pherumal and Anr. case (supra) was referred to as also the distinction between a specific reference of a question of law and a question of law arising for determination by the arbitrator in the decision of the

dispute. It would be useful to reproduce some of the observations of the Apex Court as under:

14. ... But filing of pleadings pursuant to the directions of the arbitrators and agreeing to a trial of the dispute on the issues raised by the arbitrators cannot be regarded as reference of specific questions implying an agreement between the parties that they intended to give up their right to resort to the Courts even if the award was vitiated on account of an error apparent on the face thereof. The only permissible inference from the agreement recorded by the arbitrators was that the parties agreed to have the disputes adjudicated on the issues raised and not to submit the issues raised for adjudication. The terms of Clause 13 of the contract F.D.(M) 70 which incorporated the arbitration agreement are general. By his letter dated June 26, 1946, the respondent intimated the Director of Purchases that he had appointed an arbitrator on his behalf in accordance with clause No. 13 of the general conditions of the contract and the appointment of an arbitrator by the Union by their letter dated July 7, 1948, (subject to the reservation of a right to contend that there was no dispute) for adjudication of the claim made by the respondent. In these two letters there is no reference to any specific questions to be referred to the arbitrators; nor can the filing of pleadings in support of their respective cases by the parties pursuant to the direction given by the arbitrators, and the framing of issues arising thereon with the object of focusing the attention of the parties on the question to be decided for adjudicating upon the dispute amount to a reference on specific questions, rendering the award binding upon the parties. In *Seth Thawardas Pherumal Vs. The Union of India (UOI)*, , Bose, J., delivering the judgment of the Court observed in dealing with the contention that there was a reference of a specific question, and the award was not liable to be questioned even on the ground that it disclosed an error on its face.

Therefore, when a question of law is the point at issue, unless both sides specifically agree to refer it and agree to be bound by the arbitrator's decision, the jurisdiction of the Courts to set an arbitration right when the error is apparent on the face of the award is not ousted. The mere fact that both parties submit incidental arguments about a point of law in the course of the proceeding is not enough.

16a. The test indicated by Lord Russell of Killowen in 1933 AC 592 adequately brings out the distinction between a specific reference of a question of law and a question of law arising for determination by the arbitrator in the decision of the dispute. It was observed at p-607:

x x, it is, I think, essential to keep the case where disputes are referred to an arbitrator in the decision of which a question of law becomes material distinct from the case in which a specific question of law has been referred to him for decision. xxx. The authorities make a clear distinction between these two cases and as they appear to me they decide that in the former case the Court can interfere if and when any error of law appears on the face of the award, but that

in the latter case no such interference is possible upon the ground that it so appears that the decision upon the question of law is an erroneous one.

84. Learned senior counsel for ITC sought to distinguish the facts in the case of Waverly Jute Mills Co. Ltd.'s case (supra) relied upon by learned Counsel for Anands and contended that the facts of each case have to be seen. In this behalf, learned senior counsel referred to the fact that a specific point / dispute was framed and thereafter referred to the arbitrator as set out in para 5 of the judgment. There were further agreed draft issues for the decision of the arbitrator. Similarly in Durga Prosad Chamria v. Anardeyi Sethani's case (supra), the suit was pending, issues had been framed including questions of law and thereafter the matter was referred to arbitration.

85. Learned senior counsel for ITC submitted that in U.P. Hotels and Ors.'s case (supra), it is only the consequences of a specific question of law being referred, which have been discussed. Thus, the judgment is on the premise and assumption that a specific question of law has been referred. The contention in respect of Union of India v. M/s. Rampur Distillery and Chemical Co. Ltd. and Anr.'s case (supra) is on the similar ground that a specific question was referred.

86. Learned senior counsel referred to the ICC Rules of Conciliation and Arbitration and pointed out that under Article 13, the arbitrator is mandated to draw the terms of reference. The said Article reads as under:

Article 13

Terms of Reference

1. Before proceeding with the preparation of the case, the arbitrator shall draw up on the basis of the documents or in the presence of the parties and in the light of their most recent submissions a document defining his Terms of Reference. This document shall include the following particulars:

- a) the full names and description of the parties
- b) the addresses of the parties to which notifications or communications arising in the course of the arbitration may validly be made.
- c) a summary of the parties respective claims
- d) definition of the issues to be determined
- e) the arbitrator's full name, description and address
- f) the place of arbitration
- g) particulars of the applicable procedural rules and if such is the case, reference to the power conferred upon the arbitrator to act as amiable compositor .
- h) such other particulars as may be required to make the arbitral award enforceable in law, or may be regarded as helpful by the International Court of

Arbitration or the arbitrator.

2. The document mentioned in paragraph 1 of this Article shall be signed by the parties and the arbitrator. Within two months of the date when the file has been transmitted to him, the arbitrator shall transmit to the Court the said document signed by himself and by the parties. The Court may pursuant to a reasoned request from the arbitrator or if need be on its own initiative, extend this time-limit if it decides it is necessary to do so.

Should one of the parties refuse to take part in the drawing up of the said document or to sign the same the Court, if it is satisfied that the case is one of those mentioned in paragraphs 2 & 3 of Article 8 shall take such action as is necessary for its approval. Thereafter the Court shall set a time limit for the signature of the statement by the defaulting party and on expiry of that time-limit the arbitration shall proceed and the award shall be made.

3. The parties shall be free to determine the law to be applied by the arbitrator to the merits of the dispute. In the absence of any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law by the rule of conflict which he deems appropriate.

4. The arbitrator shall assume the powers of an amiable compositor if the parties are agreed to give him such powers.

5. In all cases the arbitrator shall take account of the provisions of the contract and the relevant trade usages.

87. It was submitted that it is in pursuance of the said Article that the Arbitrator framed the issues, which is distinct from a reference of specific issue / question of law being referred to the Arbitrator. In this behalf, learned senior counsel further canvassed that the arbitration was not between only two entities, but was really in the nature of a tripartite arbitration. It is not even disputed that the Japanese companies never signed the issues of the terms of reference as noted by the Arbitrator. The result would be that even if the argument of learned Counsel for Anands was to be accepted, there would be no specific question referred to the Arbitrator insofar the Japanese companies are concerned. It was, thus, submitted that there cannot be different parties to an arbitration having different capacities to challenge the same Award.

88. Learned Counsel sought to draw a distinction between the parties agreeing to go to arbitration as against a specific question of law jointly being referred to the arbitrator. The Anands even resisted the decision by the Arbitrator on these questions raising a plea of estoppel, which was repelled by the Arbitrator and any decision on the merits is only a consequence to the decision of the Arbitrator on this legal issue.

89. Learned senior counsel for ITC in the alternative sought to canvass a proposition that even if a specific question of law was referred to the Arbitrator, the implications of the same must be understood in the proper perspective.

90. Learned senior counsel referred to judgment of the House of Lords in *Kelantan Government v. Duff Development Co. Ltd.* (1923) All E.R. 349 where it was observed at pages 354-55 as under:

... No doubt an award may be set aside for an error of law appearing on the face of it; and no doubt a question of construction is generally speaking a question of law. But where a question of construction is the very thing referred for arbitration, then the decision of the arbitrator upon that point cannot be set aside by the court only because the court would itself have come to a different conclusion. If it appears by the award that the arbitrator has proceeded illegally, for instance, that he has decided on evidence which in law was not admissible, or on principles of construction which the law does not countenance, then there is error in law which may be ground for setting aside the award, but the mere dissent of the court from the arbitrator's conclusion on construction is not enough for that purpose....

This judgment has also been referred to in *Thawardas Pherumal and Anr.* case (supra) towards the end of para 11.

91. Learned senior counsel for ITC contended that economic policy laws of the country must be upheld and, thus, this Court cannot be prevented from striking down an award, which is contrary to the law of the land. There was, thus, no impregnable shield insofar as this Court is concerned. It is in view thereof learned senior counsel contended that even in *Union of India v. A.L. Rallia Ram*'s case (supra), the Supreme Court observed that the award of an arbitrator on a specific question being referred to is binding upon the parties and the Court will not, "unless it is satisfied that the arbitrator has proceeded illegally", interfere with the decision. Thus, where an arbitrator proceeds illegally, the power of the Court is still not taken away.

92. It was the submission of learned senior counsel for ITC that Article 1 of the Co-operation Agreement dated 11.09.1990 has to be read in this context as one for transfer of shares. In any case, the prohibition u/s 30-B of the MRTP Act is against agreeing to acquire share. Thus, there cannot be an issue of sanction at the stage of transfer since what is prohibited is even an agreement to acquire shares and not only acquisition itself. Similarly, u/s 16(2) of the SCR Act, any contract in contravention of a notification is illegal per se and the contract certainly was entered into for sale and purchase of shares. The justification given by the Arbitrator for holding that the agreement was not hit by the legal provisions was contended to be fallacious and contradictory inasmuch as if there was agreement to transfer, it would be hit by the provisions of law and if the word "arrange" has to be read as not casting any obligation, then ITC cannot be said to be in breach of any obligation. This contention was raised even though it was contended that on a plain reading of Article 1, it cannot be held that the same was a pre-offer or proposal stage specifically in view of Article 10, which provides for specific performance. A reading of Articles 1, 5 and 10 was, thus, to be made together where Article 5 seeks to release the Anands of their personal

guarantees. Thus, the expression "arrange to purchase" cannot be read in isolation, especially when the Arbitrator comes to a finding that ITC is in breach of its obligations as per the finding recorded in paras 48.9.1 and 48.9.3 of the Partial Award. It is in this context that learned senior counsel once again emphasised the observations made in Mannalal Khetan etc."s case (supra) that a contract is void if prohibited by a statute under a penalty and that one is not concerned with the intent of the parties if the parties entered into a prohibited contract and that contract would be unenforceable.

93. Learned senior counsel for ITC further submitted that even if the contract was presumed to be not a nullity u/s 372(4) of the Companies Act, the contract became a nullity when it was repudiated / rejected by the Board of Directors of ITC in view of the provisions of Section 372(5) of the Companies Act. Learned senior counsel referred to the submission advanced by learned Counsel for Anands that the statutory provisions only required permission before transfer and not before agreement. Learned senior counsel submitted that it is the relevant provision, which will have to be considered since in Nathulal v. Phoolchand"s case (supra) referred to by learned Counsel for Anands, the permission was required prior to transfer. The same would be the position in the case of Shri Rajesh Aggarwal v. Shri Balbir Singh and Anr."s case (supra) where permission u/s 269-UC of the Income Tax Act was required prior to actual transfer of the property. It was submitted that the legal prohibitions and the provisions in question are different in the present case as Section 30-B of the MRTP Act and Section 16(2) of the SCR ACT prohibited even entering into an agreement. The nature of prohibition is, thus, different in the present case.

94. There seems to be a change of heart so far as the Japanese companies are concerned as they sided with ITC on submissions by their counsels on the aforesaid aspects.

95. I have given a thoughtful consideration to the rival submissions advanced by learned Counsel for the parties.

96. In order to deal with the contentions, in my considered view, it would be appropriate to first consider the question, Whether the present case is one where a specific question of law was referred to the Arbitrator and whether this Court is consequently precluded from going into that matter even if an erroneous decision is arrived at by the Arbitrator? It is only if the finding is arrived at in favor of ITC on this account, would the next question arise about the merit of the decision of the Arbitrator and as to whether the Partial Award suffers from an error of law apparent on the face of the Award.

97. The Arbitrator is a Judge chosen by the parties to decide the dispute. The scope of interference with an award is, thus, restricted and in order for a party to succeed in the objections, the conditions as specified in Sections 30 and 33 of the said Act must be satisfied. A reading of the provisions as also the consistent legal view taken in this behalf leaves no manner of doubt that if there is an error

of law apparent on the face of the award, the court is not precluded from correcting such an error. There is, however, an exception carved out to this principle where the parties by mutual agreement agree to refer a question of law for determination by the arbitrator and in such a case even if the arbitrator has fallen into an error, the court would not normally interfere because the parties have chosen to get the question of law adjudicated upon by the arbitrator rather than by the court. The intention of the parties must, however, be clear in this behalf as it precludes the jurisdiction of the court to go into the legality of the award. Thus, it is not a matter, which should be based on inferences since the consequence would be that even an erroneous decision in law by the arbitrator would have to be accepted by the parties without having the benefit of scrutiny by the court.

98. The principles as to when a question of law can be said to have been referred have been considered in various judgments, which have been cited both by learned senior counsel for ITC and learned Counsel for Anands. In *Thawardas Pherumal and Anr.* case (supra), the matter was considered in depth. The Supreme Court, thus, emphasised that an arbitrator does not have the freedom to ignore law or misapply it when he thinks it just and reasonable. The powers of an arbitrator are circumscribed by the law of the land and if he does not apply the law, the error can be set right by the courts. The only exception to this is the case where the parties chose specifically to refer a question of law as a separate and distinct matter. It is this aspect which is of utmost importance, as observed above, in coming to a conclusion, whether the matter falls within the exception. The parties to the arbitration, thus, must be *ad idem* to refer the question specifically as a separate and distinct matter. It was further emphasised that a reference requires the assent of "both sides". Thus, if one of the sides is not prepared to submit a given matter to arbitration, then it cannot be said that the arbitrator is vested with the necessary exclusive jurisdiction.

99. If the aforesaid principle is applied to facts of the present case, one will find that there are, in fact, three groups to the arbitration in the present case. The third party to the arbitration is two Japanese companies. It is not even a case made out that those companies were party to reference of any question of law to the Arbitrator. I, thus, fail to appreciate how any two out of three parties could have referred such a question of law for the exclusive adjudication by the Arbitrator. The emphasis laid on the word "both" in *Thawardas Pherumal and Anr.* case (supra) is only in the contest of there being two sides to arbitration. The principle is that all the parties before an arbitrator must agree to such a reference. This is clearly absent in the present case.

100. The emphasis of the submissions of learned Counsel for Anands, insofar as reference of the question between ITC and Anands is concerned, was on the legal proceedings filed by ITC by initiation of suit proceedings and OMP mentioned herein-before. Undoubtedly, ITC was seeking to raise the issues regarding legality and validity of the Co-operation Agreement in view of the Agreement

being hit by various legal provisions in different statutory enactments. The matter was contested and even issues were framed. However, no adjudication took place on the same, but, on the other hand, ITC withdrew the proceedings by filing applications for withdrawal and, thus, the suit and the OMP were dismissed as withdrawn. The averments made by ITC in para 4 of the application have to be read in the context in which they were made. The averments only emphasise the Agreement of ITC to raise the objection before the Arbitrator instead of inviting a decision by the Court prior to even the arbitration proceedings reaching any adjudicatory stage. In fact, all that has been stated is that these issues and other issues may be considered by the Arbitrator and the petition be disposed of as withdrawn. No prayer was ever made that the question should be specifically referred for adjudication by an arbitrator as a question of law so as to fall within the exception.

101. The stand of Anands before the Arbitrator is also material in this behalf. ITC wanted really a preliminary adjudication by the Arbitrator on the legal issues, which was opposed by Anands. The Arbitrator did not deem it fit to decide the same as a preliminary issue, but deemed it appropriate to make a Partial Award. The Anands took a stand that withdrawal of the proceedings filed by ITC earlier before the Court implied that the legal question stands abandoned by ITC and raised a plea of estoppel. The Anands did not want the Arbitrator to adjudicate this question on the plea that such a matter was not even open for adjudication by the Arbitrator. The Arbitrator, however, held against Anands and proceeded to decide the matter. In view of such a stand, Anands can hardly be permitted to contend that there was any *ad idem* of the parties to refer a specific question of law for the exclusive adjudication by the Arbitrator so as to preclude the jurisdiction of the Court from going into that issue.

102. Learned Counsel for Anands also laid great emphasis on the fact that specific issues were framed by the Arbitrator in this behalf. It, however, must be remembered that the arbitration being one under the ICC Rules of Conciliation and Arbitration, Article 13 itself mandates the Arbitrator to draw up the terms of reference. The so-called issues framed are really these terms of reference. The observations of the Supreme Court in *Union of India v. A.L. Rallia Ram*'s case (*supra*), thus, squarely apply to facts of the present case where it was held that the filing of pleadings pursuant to directions of arbitrator and agreeing to trial of dispute on the issues cannot be regarded as a reference of a specific question implying an agreement between the parties that they intend to give up their rights to resort to the courts even if the award was vitiated on account of an error apparent on the face thereof. A distinction was, thus, carved out to emphasise that the only permissible inference from such an agreement recorded by the arbitrator was that the parties agreed to have the disputes adjudicated on the issues raised and not to submit the issues raised for adjudication. It is in this context that the test indicated by Lord Russell of Killowen in *F.R. Absalom Ltd. v. Great Western (London) Garden Village Society Ltd.* 1933 AC 592 was said to bring out correctly the distinction between a specific reference of a question of

law and a question of law arising for determination by the arbitrator in the decision of the dispute. In the present case, it is the question of law which has arisen for determination by the Arbitrator in the decision of the dispute and not a specific reference of a question of law.

103. It may be appropriate at this stage to note as to what can be done even where a question of law is referred. In Kelantan Government's case (supra), the House of Lord had emphasised that mere dissent of the court from the arbitrator's conclusion on construction is not enough for an intervention by the court, but if it appears by the award that the arbitrator has proceeded illegally on principles of construction, which law does not countenance, then there is an error of law, which may be a ground for setting aside the award. The exception carved out is in a case of reference of a specific question of law where the parties intended to give up their rights to resort to the King's Court. As stated above, this judgment has been even noticed in Thawardas Pherumal and Anr. case (supra). An arbitrator cannot be a knight in a shining armour to do what he thinks is just and reasonable. He is bound to follow and apply the law.

104. I find force in the contention of learned senior counsel for ITC that the judgments referred to by learned Counsel for Anands are distinguishable since in the facts of those cases, there was such a specific reference made. Learned Counsel for Anands had strongly relied upon the observations of the Apex Court in M/s. Tarapore and Companys case (supra), but as noticed before, a specific question was framed and was referred to the arbitrator and it is in that context that the observations made by the Apex Court must be read. The findings in para 12 of the judgment are that the specific question about the jurisdiction of the Arbitrator to arbitrate upon the disputes was specifically referred to the Arbitrator. Similarly, the Division Bench of the Calcutta High Court in Durga Prosad Chamria v. Anardeyi Sethani's case (supra) dealt with the matter where a suit was pending, issues were framed including question of law and then the matter was referred to arbitration. The principles of the said judgment cannot be applied to the facts of the present case on the ground that in the present case also the issues had been framed. No doubt, issues had been framed including the legal issue, but there was never any specific reference made to the Arbitrator, but, on the other hand, the proceedings were withdrawn by ITC. One of the clinching factors is that the stand of Anands themselves before the Arbitrator that the Arbitrator should not decide this question as the withdrawal of earlier proceedings amounted to an estoppel against ITC from raising the issues.

105. The position is no different in U.P. Hotels and Ors.'s case (supra) and Union of India v. Rampur Distillery and Chemical Co. Ltd. and Anr.'s case (supra).

106. I am of the considered view that there was never any specific question of law referred to the Arbitrator in the present case, but the questions did arise from the pleadings filed by the parties and the Arbitrator adjudicated the same. The case is not one which falls within the exception carved out where a court is precluded from deciding the merit of the controversy even if there is an error of

law.

107. In view of the aforesaid conclusion, the merit of the pleas raised by learned senior counsel for ITC as to the impact on the Co-operation Agreement dated 11.09.1990 of the statutory provisions of the MRTTP Act, the SCR Act read with the notification there under and the Companies Act, have to be examined on merits. This is so since these are really legal pleas and it has to be seen as to whether there is an error of law in which the Arbitrator has fallen, which would require to be corrected by this Court.

108. In order to appreciate the legal pleas, the intent and nature of the Co-operation Agreement is to be considered. The Arbitrator has given the recital as to the circumstances under which the Co-operation Agreement came into being and the role played by the representatives of ITC prior to the Co-operation Agreement. It is the conclusion of the Arbitrator that the Agreement was the result of thoughtful consideration by the parties to ensure that no legal impediments arise in implementation of the Agreement. It is in view thereof that the word "arrange" used in Article 1 has been construed to represent a pre-offer or proposal stage. It is trite to say that this Court does not sit as a court of appeal over matters of interpretation of the terms of contract and merely because this Court would come to an equally plausible but different view would be no ground for the Court to interfere. The matter, thus, has to be decided as to whether the view taken by the Arbitrator can at all be said to be plausible.

109. The Agreement has to be read as a whole and words and phrases of the Agreement cannot be segregated for determining the true intent and purpose of the Agreement. The Agreement is between five parties and after description of parties, it begins with IT IS AGREED BY AND AMONGST THE PARTIES AS FOLLOWS. This itself shows that the parties have agreed to a certain arrangement specified in the Agreement apart from the description of the document being that of a Co-operation Agreement. Article 1 envisaged the role for ITC either itself or through its associated companies and business associates to take over the entire equity shareholding of Anands and their associates at a specified value. Such take over has to take place in two stages for which dates have been specified as also the percentage of shares to be taken over. Thus, Article 1 clearly is an agreement to take over the shares albeit not immediately, but in future as per the specified dates.

110. Article 1 again has to be read along with the said Articles including Articles 5 and 10. Article 5 is material since simultaneously on the take over of the shares what is envisaged is the discharge of personal guarantees of both Shri C.L. Anand and Shri Pradeep Anand given to the bankers and the financial institutions for which necessary arrangement has to be made by ITC. Such discharge has to take place not later than 31.03.1991. The enforceability of the rights conferred under the Agreement have been made clear by Article 10 which provides for specific performance of the terms of the Agreement and the respective obligations of the parties.

111. In my considered view, such an arrangement hardly brooks of any two interpretations and the only plausible interpretation is that the parties did envisage and reduced into writing an arrangement for transfer of shares and discharge of personal liabilities. The word "arrange" cannot, thus, be given a meaning de hors the complete Agreement and, in my considered view, the Agreement did not brook at all an interpretation put forth by the Arbitrator.

112. A reading of the provisions of Section 30-B of the MRTTP Act makes it clear that not only is there a bar to acquisition of shares, but there is also a bar even to agree to acquire shares without meeting with the requirements as specified in the said Section. Thus, prior approval of the Central Government is mandatory once the acquisition of shares exceeds a certain percentage. It has to be kept in mind that these are economic legislations, which must be construed strictly and if a restriction has been placed for the mode and manner of transfer of shares, the same cannot be defeated nor given a go-bye by any agreement or arrangement arrived at between the parties.

113. The provisions of Section 48-B of the MRTTP Act further make it clear that contravention of the provisions of Section 30-B of that Act will result in punishment with imprisonment. Thus, the consequences are penal in nature. A reading of the said two provisions, thus, makes it clear that no arrangement contrary to the said statutory provisions could have been arrived at. The Supreme Court has made the legal position abundantly clear in *Mannalal Khetan etc.*'s case (supra) where a contract was held to be enforceable and void if it was prohibited by a statute under a penalty even without express declaration that the contract is void because the penalty implies prohibition.

114. The position is no different when one comes to the legal objection arising from the provisions of Section 16 of the SCR Act read with the notification issued there under. Sub-section (1) of Section 16 empower the Central Government to issue a notification. Such notifications in terms of that Sub-section are with the object and arising from the necessity to prevent undesirable speculation in specified securities. There is, thus, a larger public and economic objective to such a notification. Sub-section (2) of Section 16 provides that all contracts in contravention of the provisions of Sub-section (1) or the notification issued there under shall be illegal. Thus, once a contract is in violation of the provisions of Section 16, nothing more is required to be done. Section 23 falling in Chapter V provides for penal consequences for violation of Section 16. The notification issued is prior to the contract being SO No. 4661 dated 24.12.1968. It prohibits without the prior permission of the Central Government of entering into any contract for sale or purchase of securities other than such spot delivery contract or contracts of cash or hand-delivery or special delivery. It can hardly be doubted that the notification would apply to the transaction in question. The Arbitrator seeks to save the contract only on the plea that the Agreement is pre-contractual stage and permissions could have been obtained subsequently.

115. In my considered view, there cannot be generalisations in this behalf as the

consequences of each statute has to be considered depending on the wordings of that particular statute. Unless the statutes are *para materia*, the principles applicable to one statute cannot be made applicable to another statute insofar as the consequences are concerned. The statutes in question provide for prior permission, which was not the case in respect of the two judgments referred to in this behalf and relied upon by learned Counsel for Anands. In *Nathulal v. Phoolchand*'s case (*supra*), the matter was one of transfer of property. The actual transfer required a prior permission and it is in that context, it was held that the agreement to transfer the property must be deemed to be subject to the implied condition that the transferor would obtain the sanction of the authority concerned. Similarly, in *Shri Rajesh Aggarwal v. Shri Balbir Singh and Anr.*'s case (*supra*), the permission u/s 269-UC of the Income Tax Act could be obtained prior to the transfer. I am in agreement with the submission of learned senior counsel for ITC that it is the nature of prohibition as contained in a statute, which will have to be considered. If the statute prohibits even entering into an agreement, then the same will nullify a contract, which is even in the form of an agreement.

116. In my considered view, the Partial Award in the present case suffers from an error of law as it is based on a legal proposition, which is erroneous. Thus, it falls within the mischief of the parameters set down by the Supreme Court in *N. Chellappan v. Secretary, Kerala State Electricity Board and Ors.*'s case (*supra*). This is not a case where the requirement is to investigate into the merits of the case by looking to re-examine the documentary and oral evidence, but it is only the Co-operation Agreement read with the statutory provisions, which have to be perused and considered.

117. The third legal objection raised arises from the provisions of Section 372 of the Companies Act. The words used in Sub-section (1) of Section 372 are the entitlement to acquire or purchase and Sub-section (4) of Section 372 prohibits the investing company from making any investment in the shares unless the investment is sanctioned by a resolution of the investing company and approved by the Central Government. Thus, there is a twin requirement both of approval of the Central Government and a resolution of the investing company. The manner of sanction of the resolution by the investing company is also prescribed in Sub-section (5) of Section 372 of the Companies Act, which requires the consent of all the Directors present at the meeting to be mandatory after the notice of the meeting has been given to every Director in the manner specified in Section 286 of the Companies Act. Thus, even one Director present there can put a spoke in the wheel and the conditions, thus, are stringent in nature.

118. Even if it be assumed that ITC could have obtained, insofar as the provisions of this Section is concerned, permissions of the Central Government and passed a resolution after the Co-operation Agreement, the fact remains that such a resolution was never passed. On the contrary, the Management Committee of ITC in January, 1991 on the basis of the legal advice came to the

conclusion that the Co-operation Agreement was prima facie in violation of laws and, thus, the Agreement ought not to be given effect to. The matter was thereafter placed before the Board of Directors of ITC on 19.02.1991 when the Board accepted the recommendations of the Management Committee. Thus, instead of there being a unanimous approval, there was a unanimous rejection of the Agreement.

119. The Co-operation Agreement must be deemed to include the condition that the same can be given effect to only if the two parameters are satisfied. The rejection by the Board of Directors of ITC would make the Agreement unenforceable and that is exactly what has happened in the present case.

120. The Arbitrator has placed reliance on the judgment of Bombay High Court in Brooke Bond India Ltd.s case (supra) to the effect that the Section could be complied with at the time when the stage come for investment. It was held that the contract was not rendered illegal or unenforceable at the stage of entering into the contract. However, the ramifications of Sub-section (5) of Section 372 of the Companies Act were not considered in the said judgment. Be that as it may, the position remains that the Board of Directors of ITC have ultimately rejected the Co-operation Agreement and consequence of the same in view of the provisions of Sub-sections (5) and (4) of Section 372 would be that the Co-operation Agreement would be unenforceable in law at least on such rejection taking place. There is, in fact, no discussion on the ramifications of Sub-section (5) of Section 372 of the Companies Act in the Partial Award.

121. It may also be noticed that the Arbitrator, on the one hand, proceeded to hold that the rights and obligations of the parties were yet to fructify and, on the other hand, has simultaneously held that ITC is in breach of its obligations. If there were no obligations, there could be no question of any breach and if there were obligations, then the provisions of the statutes would come in the way of enforceability and legality of the Co-operation Agreement.

122. In view of the aforesaid position, I am of the considered view that the Co-operation Agreement dated 11.09.1990 is not enforceable and the Partial Award dated 24.04.1998 of the Sole Arbitrator, Shri Datuk George KS Seah, suffers from errors of law on the face of the Award, which call for interference by this Court and the Award is consequently set aside. The Award is a Partial Award. There is no purpose in continuation of the arbitration proceedings, which must be terminated since ITC has succeeded on the legal objections raised about enforceability and legality of the contract itself.

123. The result is that the objections of ITC filed vide is No. 2411/1999 are allowed and the Partial Award dated 24.04.1998 made and published by Shri Datuk George KS Seah, Sole Arbitrator is set aside. The Partial Award having been filed in Court, CS (OS) No. 1084A/1998 stands disposed of, while CS (OS) No. 1737A/1998 for making the said Partial Award Rule of the Court is dismissed; and CS (OS) No. 1033/1994 would proceed in accordance with law as there is

prayer for recovery made in the suit and the said suit be listed before the appropriate Bench on 07.07.2006.

124. The parties are left to bear their own costs.