
(2014) 09 BOM CK 0148

In the Bombay High Court

Case No : Notice of Motion (L) No. 2036 of 2013 in Suit (L) No. 870 of 2013

Lotus Refineries Private Limited

APPELLANT

Vs

National Spot Exchange Limited

RESPONDENT

Date of Decision : 10-09-2014

Acts Referred:

Advocates Act, 1961 — Section 30
Arbitration Act, 1940 — Section 34
Arbitration and Conciliation Act, 1996 — Section 11, 16, 16(1), 18, 2(1)(b)
Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1, Order 6 Rule 4
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2014) 09 BOM CK 0148

Hon'ble Judges : S.J. Kathawalla, J

Bench : Single Bench

Advocate : N.H. Seervai, Senior Advocate and Meenakshi Iyer, instructed by Advaya Legal, Advocate for the Appellant; Virag Tulzapurkar, Senior Advocate, B.B. Saraf, Ameet Naik, Chirag Kamdar and Abhishek Kale instructed by Naik Naik and Co, Advocate for the Respondent

Final Decision : Disposed Off

Judgement

S.J. Kathawalla, J.—The present Notice of Motion is taken out by the Applicant/Defendant ("the Defendant") in the above Suit under the provisions of Section 8 of the Arbitration and Conciliation Act, 1996 ("the Act"), seeking to refer the parties to the above Suit to arbitration as contemplated under the Arbitration Agreement between the Plaintiff and the Defendant contained in Clause 3.1.2 and Clause 15.4 of the Bye-Laws of the Defendant Exchange ("Bye-laws"), as also Clause 11.11 of the Undertaking for Internet Based Trading ("UIBT") given by the Plaintiff to the Defendant Exchange.

2. The Plaintiff is a private limited company incorporated under the provisions of the Companies Act, 1956, and is inter alia engaged in the business of manufacturing and selling edible oils. The Defendant is an unlisted public company incorporated under the provisions of the Companies Act, 1956, and is

the national-level institution that carries on business as a trading exchange providing for an electronic trading platform for spot contracts in various commodities on a compulsory delivery basis.

3. According to the Plaintiff, in or around March, 2012, the Plaintiff sought to participate in the Defendant Exchange based on the representations made by the officials of the Defendant and with an understanding that the Defendant is duly constituted under Indian laws and that the Defendant is authorized to offer various types of contracts on the Exchange under the supervision and control of the Forward Markets Commission ("FMC").

4. The Plaintiff commenced trading on the Exchange under its Membership ID No. 14180 on 5th March, 2012. At the time of taking membership of the Defendant, the Plaintiff was verbally informed by the representatives of the Defendant that the documentation for membership would be completed subsequently and accordingly, the Plaintiff was only provided with Membership ID No. 14180.

5. On 5th March, 2012, the Plaintiff entered into various agreements and addendums (each valid for a period of 11 months viz. until 4th February, 2013) with the Defendant to avail the warehousing services provided by the Defendant at various locations. In terms of the said agreements and addendums ("Warehouse Agreements"), the Defendant offered its warehouse management services at the charges specified therein.

6. On 22nd August, 2012 and 3rd September, 2012, vide emails of even dates, the representatives of the Defendant requested the Plaintiff to execute and provide (a) the Membership Agreement in the format provided therein; (b) a postdated cheque (PDC) as per Clause 9 of the said Agreement; and (c) a postdated cheque declaration (PDC Declaration) in the format provided therein. The Defendant refers to the Membership Agreement as the "Exchange-Member Agreement".

7. On 25th March, 2013, the Plaintiff by hand delivery, delivered a blank cheque bearing No. 635423 along with the PDC Declaration to the Defendant, the receipt of which was acknowledged by the Defendant. The said cheque was issued by the Plaintiff under the advice of the Defendant as the Plaintiff did not have any predetermined trading exposure contemplated under Clause 9 of the said Agreement. On 17th April, 2013, the Plaintiff executed and sent the said Agreement to the Defendant.

8. As a matter of practice, whenever the members/participants of the Exchange were allowed to commence trading in any commodity, the Defendant would issue a circular setting out (i) the contract specifications; (ii) the quality and quantity parameters; (iii) the charges relating to trading settlement and delivery; (iv) the procedures, norms, conditions of delivery, quality check and withdrawal process, (v) the auction procedure; and (vi) other terms and conditions applicable to such trades.

9. Every trade conducted by the members on the Defendant Exchange was intended to be an independent trade with an obligation cast on the seller that each contract entered into by it should result in compulsory delivery. As a matter of illustration, "T" means the Trade Day i.e. the day on which the trade took place, and "+2" or "+25" means the number of days within which delivery and/or payment would be effected or settled. For instance, T+2 means that the trade is concluded on "T" day and the delivery and/or payment would be settled within 2 days. Such a contract was called a "T+2 Contract". Similarly, T+25 means that the trade is concluded on "T" day and the delivery and/or payment would be settled within 25 days. Such a contract was called a "T+25 Contract". The Plaintiff sold goods under a series of T+2 Contracts and purchased the same category of goods under a series of T+25 Contracts.

10. For trading in contracts offered by the Defendant Exchange (including T+2 Contracts and T+25 Contracts), the Bye-Laws specified that the Plaintiff would place an electronic order with the Defendant on its website. The Defendant represented that it matched the best buy order with the best sell order. Accordingly, the counter parties to an order were matched on a price-time priority basis through National Electronic Spot Trading(NEST) or other permitted electronic trading system. Hence, the Plaintiff neither had any discretionary power nor did it exercise any control in selecting the counter party to an order and the same was determined by the trading system of the Exchange on the basis of the aforesaid order matching rules set out in the Bye-Laws.

11. Each contract was an independent contract governed by the set of terms provided in the relevant business rules set out in the circular issued by the Defendant in relation to the specific commodities ("Business Rules") in accordance with the terms of the Bye-Laws and the Rules.

12. All payments were received or made to the Defendant by the Plaintiff through a clearing and settlement account bearing No. 00990680024515 held with the HDFC Bank which was the clearing bank designated as such by the Defendant.

13. During the period commencing from 5th March, 2012, up to 31st July, 2013, the Plaintiff had undertaken a series of trades offered on the Exchange. The Plaintiff undertook total sales worth INR 2606,40,78,400/- (Rupees Two Thousand Six Hundred and Six Crores Forty Lakhs Seventy Eight Thousand and Four Hundred only) and total purchases worth INR 2665,04,67,078/- (Two Thousand Six Hundred and Sixty Five Crores Four Lakhs Sixty Seven Thousand and Seventy Eight only). Owing to the practice of Netting Off carried on by the Defendant (i.e. netting off the pay-out obligations under sales contract of the Plaintiff against its pay-in obligations towards purchase contracts and thereby, crediting the Settlement Account with the differential amount only, if any), the Settlement Account of the Plaintiff had only been credited with a sum of INR 455,81,89,603.82/- (Rupees Four Hundred and Fifty Five Crores Eighty One Thousand Eighty Nine Lakhs Six Hundred and Three only) since 2012.

14. During the said period, the Plaintiff had purchased commodities such as Cottonseed Wash Oil, Refined Sunflower Oil (Chennai and Shamshabad), RBD Palmolein Oil, Mustard Oil, Soya Oil, Mustard Seeds and Soybean Seeds under various T+25 Contracts. In relation to these respective purchases, the Defendant had transferred various respective warehouse receipts in favour of the Plaintiff, and levied warehouse receipt transfer charges towards the same. The title in the said goods vested with the Plaintiff as a result of the warehouse receipt transfers endorsed by the Defendant in favour of the Plaintiff. However, according to the Plaintiff, the said commodities/goods remained in the possession of the Defendant who was acting in fiduciary capacity for the Plaintiff, and were kept in the warehouse owned and managed by the Defendant.

15. According to the Plaintiff, whilst the Plaintiff had taken deliveries of certain commodities viz. Mustard Seeds and Soya Seeds (described in paragraphs 40(g) and 40(h) of the Plaintiff) where such commodities had been offered for delivery by the Defendant by way of a delivery order issued in favour of the Plaintiff, the Defendant, despite having levied charges for issuing warehouse receipt transfers in favour of the Plaintiff, had neither provided the original warehouse receipts nor issued any delivery order in respect of other commodities (described in paragraphs 40(a) to 40(f) of the Plaintiff) so as to enable the Plaintiff to take delivery of such commodities.

16. Thereafter, on 22nd July, 2013, the Defendant vide its circular bearing reference no. NSEL/TRD/2013/061, unilaterally changed the payment and delivery terms of the existing transactions, thereby modifying the payment and delivery dates of all the T+25 Contracts into that of a T+10 contract, which according to the Plaintiff added undue burden and hardship. In terms of the said circular, the Plaintiff was now required to make payments on the tenth day and not on the twenty fifth day on the purchases made under the T+25 Contracts that were pending settlement on 23rd July, 2013.

17. On 31st July, 2013, the Defendant vide its circular bearing reference no. NSEL/TRD/2013/065, once again unilaterally modified the settlement period of the contracts pending settlement on such date and stated that the delivery and settlement of all pending contracts would be merged and deferred for a period of 15 days. According to the Plaintiff, as per the said circular, the Defendant was under the obligation to settle all pending contracts by making delivery of goods after 15th August, 2013 for which the Plaintiff had completed its pay-in obligations, and which obligation the Defendant failed to fulfil.

18. The Plaintiff further alleges that on 2nd August, 2013, the Defendant vide an email sent a draft agreement, purporting to be a settlement agreement, to the Plaintiff to pay an amount of INR 252,45,43,194/- (Rupees Two Hundred and Fifty Two Crores Forty Five Lakhs Forty Three Thousand One Hundred and Ninety Four only) without making any commitment of making deliveries of goods purchased until 31st July, 2013.

19. The Plaintiff with an intention to resolve this dispute in respect of the claim, sought the interjection of the FMC vide its letter dated 13th August, 2013, stating that the claim raised by the Defendant was incorrect and unsubstantiated, while also expressing its willingness to pay the amount that might be due and legally payable, subject to appropriate resolution of the disputes.

20. However, on 14th August, 2013, the Defendant by way of a circular, issued a settlement calendar setting out the pay-in obligations of the Plaintiff for an amount of INR 252,45,43,194/- as due and payable by 16th August, 2013, although the Defendant did not set out its obligation to settle the pending contracts by way of delivery towards the Plaintiff.

21. The Plaintiff alleges that through various reports circulating in the media, it contemplated that a fraud might have been played on it by the officials of the Defendant, and that in fact, the goods of the Plaintiff may have been misappropriated and not be present for delivery. As a result of this, the Plaintiff apprehended that even if it makes payment to the Defendant, the Defendant may not be in a position to deliver the commodities to the Plaintiff.

22. Accordingly, on 19th August, 2013, the Plaintiff invoked conciliation proceedings as per Clause 3.1.2 of the Bye-Laws of the Defendant Exchange, by sending a notice of conciliation to the Defendant. However, the Defendant vide letter dated 23rd August, 2013, inter alia rejected the same stating that "the provisions for Arbitration and reconciliation proceedings as contained in the Bye laws of the Exchange pertain to dispute between (a) member and a client; (b) member with another member. It does not pertain to dispute between Exchange and its members. In fact, as a member of the Exchange, you have submitted an Undertaking that you will abide by the decisions of the Exchange and so you cannot resort to arbitration proceedings by raising dispute against Exchange dues".

23. In the meantime, on 21st August, 2013, the Defendant, according to the Plaintiff, arbitrarily, illegally, irrationally presented the PDC to the bank for payment despite having complete knowledge of the fact that the cheque would not be honoured. Subsequently, the bank did not honour the cheque and returned the same to the Defendant. Pursuant to that, the Defendant vide circular dated 22nd August, 2013, bearing reference no. NSEL/LEGAL/2013/071 unilaterally declared the Plaintiff as a Defaulter, thereby causing serious reputational loss to the Plaintiff and sent a notice of claim of the same date alleging that despite having previous knowledge, the Plaintiff had failed to fulfil its payment obligations as per the settlement calendar and informed the Plaintiff that the Defendant would take appropriate action against the Plaintiff as per the Rules and Bye-Laws of the Defendant Exchange.

24. The Plaintiff submits that thereafter, on 27th August, 2013, it informed the Defendant that it intended to meet its payment obligation subject to the

appropriate settlement of the disputes in relation to the claim by way of arbitration/conciliation. By the said notice, the Plaintiff intimated the Defendant that an invitation for conciliation was sent to the Defendant on 19th August, 2013 and consequently requested the Defendant to notify the Plaintiff the conciliation/arbitration panel so that the proceedings could be initiated at the earliest to resolve the said disputes. However, on 28th August, 2013, the Defendant sent a notice u/s 138 of the Negotiable Instruments Act, 1881, on return of the cheque on 21st August, 2013. In the said letter the Defendant alleged that the said cheque was submitted by the Plaintiff on 16th August, 2013, towards the discharge of the payment obligation of the Plaintiff fixed under the settlement calendar, whereas according to the Plaintiff the Plaintiff had in fact provided a PDC on 25th March, 2013, as a security as per the Defendant's requirements.

25. The Plaintiff thus apprehended that despite its letters dated 19th August, 2013 and 27th August, 2013, the Defendant will proceed against the Plaintiff without affording the delivery of any commodity to the Plaintiff and will continue to declare/treat the Plaintiff as a defaulter and take steps towards the attachment of properties of the Plaintiff for recovering the purported claim and also pursue criminal action u/s 138 of the Negotiable Instruments Act, 1881.

26. Since the request of the Plaintiff to invoke the conciliation and consequent arbitration process was rejected by the Defendant, the Plaintiff was compelled to file the above Suit praying for the following reliefs:

(a) that the Defendant be ordered, decreed and directed by this Hon''ble Court to specifically perform its obligation of delivering the said goods/commodities described in paragraph 40(a) to 40 (f) of the Plaint to the Plaintiff forthwith;

(b) For the purposes aforesaid, the Defendant be ordered and directed by this Hon''ble Court to do all such, acts, deeds and things as are necessary to effectuate delivery of the said goods/commodities described in paragraph 40(a) to 40(f) of the Plaint to the Plaintiff;

(c) Strictly without prejudice and in the alternative to what is prayed for hereinabove and only in the event of this Hon''ble Court coming to a conclusion that specific performance as prayed for hereinabove cannot or ought not to be granted, the Defendant be ordered and decreed to pay to the Plaintiff as and by way of compensation and/or damages in lieu of specific performance a sum of INR 2640,79,80,600/- (Two Thousand Six Hundred and Forty Crores Seventy Nine Lakhs Eighty Thousand and Six Hundred Rupees only) as per particulars of claim (marked as EXHIBIT - SS) with interest thereon at the rate of 18% per annum from the date hereof till payment and/or realization;

(d) that this Hon''ble Court be pleased to declare that the letter circular dated 22nd August, 2013 posted on the website of the Defendant declaring the Plaintiff as a defaulter is illegal, unjust and arbitrary and the notice of claim dated 22nd August, 2013 addressed by the Defendant is also illegal, unjust and arbitrary;

(e) that this Hon''ble Court be pleased to pass an order of permanent injunction restraining the Defendant from taking any action as stated in the notice of claim dated 22nd August, 2013 addressed by the Defendant;

(f) that this Hon''ble Court be pleased to order the Defendant to remove/delete the name of the Plaintiff from the list of defaulters in the circular dated 22nd August, 2013 appearing on the website of the Defendant;

(g) that this Hon''ble Court be pleased to order and restrain the Defendant, its promoters, shareholders, directors, officers, representatives, servants, agents, successors or assigns by a permanent order of injunction from in any manner selling, transferring, encumbering, alienating, dealing with or creating any third party right title or interest in any manner whatsoever in respect of goods/commodities described in paragraph nos. 40(a) to 40 (f) of the Plaint which are in the possession of the Defendant;

(h) that this Hon''ble Court be pleased to order and restrain the Defendant, its promoters, shareholders, directors, officers, representatives, servants, agents, successors or assigns by a permanent order of injunction from disposing of its assets in any manner whatsoever;

(i) that the Defendant be ordered and decreed to pay to the Plaintiff a sum of INR 132,49,56,805/- (One Hundred and Thirty Two Crores Forty Nine Lakhs Fifty Six Thousand Eight Hundred and Five Rupees Only) as per the Particulars of Claim (EXHIBIT - TT hereto) together with interest thereon at the rate of 18% per annum from the date of filing of the suit till payment and/or realization;

(j) that pending the hearing and final disposal of the present Suit, this Hon''ble Court be pleased to restrain the Defendant its promoters, shareholders, directors, officers, representatives, servants, agents, successors or assigns by an order of injunction from in any manner selling, transferring, encumbering, alienating, dealing with or creating any third party right title or interest in any manner whatsoever in respect of goods/commodities described in paragraph nos. 40(a) to 40 (f) of the Plaint which are in the possession of the Defendant;

(k) that pending the hearing and final disposal of the present Suit, this Hon''ble Court be pleased to restrain the Defendant its promoters, shareholders, directors, officers, representatives, servants, agents, successors or assigns by an order of injunction from in any manner disposing of its assets;

(l) that pending the hearing and final disposal of the suit, the Court Receiver, High Court, Bombay be appointed Receiver of the goods/commodities described in paragraph nos. 40(a) to 40(f) of the Plaint belonging to the Plaintiff and in possession of the Defendant together with all powers under Order XL Rule 1 of the Code of Civil Procedure, 1908 including taking inspection of the goods/commodities, securing them and taking charge of them;

(m) that pending the hearing and final disposal of the suit, this Hon''ble Court be pleased to order and direct the Defendant to withdraw the notice/circular dated

22nd August, 2013 declaring the Plaintiff as a defaulter and restrain the Defendant from taking any actions pursuant thereto;

(n) that pending the hearing and final disposal of the suit, this Hon''ble Court be pleased to order and direct the Defendant to remove/delete the Plaintiff's name from the list of defaulters appearing in the circular dated 22nd August, 2013 on the website of the Defendant;

(o) for interim and ad interim reliefs in terms of prayers (j), (k), (l), (m) and (n) above;

(p) for costs; and

(q) For such further and other reliefs as the nature and circumstances of the case may require.

27. Subsequently, the Defendant has taken out the present Notice of Motion, requesting the Court to refer the parties to the Suit to arbitration, as per Section 8 of the Arbitration and Conciliation Act, 1996, based on the Arbitration Agreement/s contained in Clauses 3.1.2 and 15.4 of the Bye-Laws of the Defendant as also Clause 11.11 of the UIBT given by the Plaintiff to the Defendant.

28. The Plaintiff has submitted that the above Suit cannot be referred to arbitration. Briefly, the main contentions put forward by the Plaintiff in its written submissions and before the Court during the hearing are as follows:

i. That the requirements laid down in the case of P. Anand Gajapathi Raju and Others Vs. P.V.G. Raju (Died) and Others, are not met in the present case and that the said judgment has no application to the facts of the present case.

ii. That the Membership Agreement between the Plaintiff and the Defendant, contained in the document annexed at Exhibit O to the Plaint, does not contain any agreement to arbitrate and that the Membership Application at Annexure A to the Notice of Motion does not reflect the Membership Agreement between the parties.

iii. That on an interpretation of Clauses 3.1.2 and 15.4 and the fourth proviso to Clause 15.10 of the Bye-Laws and Rule 7, it is evident that neither the Bye-Laws nor the Rules of the Defendant Exchange provide for arbitration between the Defendant Exchange and a trading member such as the Plaintiff.

iv. That the UIBT executed by the Plaintiff not having been signed by both the parties, is merely a unilateral undertaking and is not a valid arbitration agreement between the parties as defined in Section 7 of the Act.

v. That independently of the above, even if it is presumed that the purported arbitration clause contained in Clause 11.11 of the UIBT is an arbitration agreement u/s 7 of the Act, it does not cover the disputes raised in the present Suit as the arbitration clause contained in the UIBT is restricted to the disputes/

differences that may arise between the parties pertaining to the "Terms" of the UIBT and nothing else. Hence, the question of referring the disputes raised in this Suit to arbitration u/s 8 of the Act does not arise.

vi. That considering the absolute bar on legal representation contained in Clause 15.22 of the Bye-Laws, even if it were to be presumed that a valid arbitration agreement does exist, this Court could hardly countenance a situation where the parties will have to fend for themselves and argue the matter on both fact and law, unrepresented and unaided by Counsel, Attorney or Advocate in a matter requiring compliance of procedure as set out in the Bye-Laws of the Defendant Exchange, as also involving voluminous documentary evidence and intricate issues of fraud and misrepresentation.

vii. That there are intricate questions of fact and law involving voluminous documentary evidence/record and serious issues of fraud which cannot be arbitrated and hence, the same must be tried in Court.

viii. That even presuming that in law such a right existed in its favour, the Defendant has expressly and irrevocably by its letter dated 23rd August, 2013, waived its right to refer the dispute to arbitration u/s 8 of the Act.

ix. That the reliance placed by the Defendant on the Order of this Court in National Spot Exchange Ltd. v. M/s. N.K. Proteins Ltd.¹ is misplaced in the light of the facts and circumstances of the present case.

29. The Defendant has in support of this application u/s 8 of the Act, in its written submissions and before the Court during the hearing contended the following:

i. That the parties to the above Suit ought to be referred to arbitration in light of the arbitration agreement contained in Clauses 3.1.2 and 15.4 of the Bye-Laws and the arbitration agreement contained in Clause 11.11 of the UIBT, which are each independent, valid and binding arbitration agreements, between the parties to the suit.

ii. That the document at Exhibit O to the Plaint, which the Plaintiff has alleged in paragraph 3 of the Plaint to be the duly executed Membership Agreement, is not the Membership Agreement. The Defendant has instead asserted that the said document is a Warehouse Agreement which does not contain the terms on which the Plaintiff was permitted to trade on the Exchange. The Defendant has stated that the Membership Application executed by the Plaintiff on 11th June, 2012, which is at Annexure A to the Notice of Motion is in fact the true Membership Agreement.

iii. That the bar to legal representation contained in Clause 15.22 of the Bye-Laws is a procedural clause and the invalidity of the said clause does not vitiate the arbitration agreement itself, and that the same clause can be struck down by the Court while upholding the validity of the reference.

iv. That the present dispute is arbitrable and there is no restriction on referring the dispute to arbitration due to any alleged intricate questions of fact and law involving voluminous evidence or the alleged issues of fraud.

v. That the Plaintiff cannot be permitted to resist the reference of the disputes to arbitration since it was the Plaintiff who had first invoked arbitration under Clause 3.1.2 of the Bye-Laws.

vi. That the Order of this Court in National Spot Exchange Ltd. Vs. M/s. N.K. Proteins Ltd. (supra) specifically rejected the interpretation of Clause 15.4 of the Bye-laws so as to imply that the said clause precluded the Exchange from being a party in a reference to arbitration.

30. Before this Court proceeds to consider/examine the rival contentions discussed hereinabove, it may be useful to recall, at the outset, the legal principles developed as regards Section 8 of the Act. That provision reads as follows:

"8. Power to refer parties to arbitration where there is an arbitration agreement --

(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under subsection (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

31. This section is modelled on the lines of Article 8 of the UNCITRAL Model Law. The corresponding provision in the Arbitration Act of 1940 was Section 34, but with some difference. What Section 8 of the Act requires is for a judicial authority before which an action is brought in the matter to recognise and give effect to the arbitration agreement, by referring the parties to arbitration on the application of a party to the dispute. It has been made amply clear by the Honourable Apex Court's ruling in P. Anand Gajapathi Raju v. P.V.G. Raju (Dead) (supra), that in cases where there is an arbitration clause in the agreement, it is "obligatory" and "peremptory" for the court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitrator. This is consistent with the language of the provision, whereby the scope for exercising discretion as provided for under the old Act has been taken away.

32. However, this does not imply that the operation of the provision is automatic.

Certain conditions are to be fulfilled by the party bringing the application, and it is for the Court to decide whether those conditions have indeed been satisfied. The conditions are as follows:

- (i) there is an arbitration agreement;
- (ii) a party to the agreement brings an action against the other party to the agreement;
- (iii) the subject-matter of the action is the same as the subject-matter of the arbitration agreement;
- (iv) the other party moves the court for referring the parties to arbitration before it submits its first statement on the substance of the dispute.

33. Moreover, it cannot be said that Section 8 admits of no exceptions, even where the applicant has satisfied all the conditions envisaged therein. There are certain situations when it would be permissible for the judicial authority to decline to refer the parties to arbitration and continue adjudication of the proceedings. The Hon'ble Apex Court refused to bifurcate the proceedings in *Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another*, where multifarious reliefs were claimed not only against the parties to the arbitration agreement but also against third persons, who are strangers to the arbitration agreement, as it would cause delay, additional costs and possibly anomalous results. Equally, principles of estoppel, waiver and acquiescence are applicable to a party seeking reference of a matter to arbitration and may be applied to decline to refer the parties to arbitration.

34. With these principles in mind, I proceed to consider the rival contentions of the parties. There is no question of involvement of any third party or delay in making this application in the present case. Hence, to decide this application, I must examine (A) whether there is a binding arbitration agreement between the parties and; (B) if yes, whether the subject-matter of the present action falls within the scope of the arbitration agreement.

(A) EXISTENCE OF AN ARBITRATION AGREEMENT BETWEEN THE PARTIES

35. For the sake of convenience, I shall consider each agreement that the Defendant contends is an arbitration agreement between the parties, separately. I shall first consider: (a) the alleged "Membership Agreement", which is the document annexed at Exhibit O to the Plaint, (b) Clauses 3.1.2 and 15.4 and the fourth proviso to Clause 15.10 of the Bye-Laws and Rule 7 of the Rules of the Defendant Exchange and finally (c) the UIBT.

(a) Membership Agreement -

36. It has been submitted by the Plaintiff that the document annexed at Exhibit O to the Plaint is the duly executed "Membership Agreement" and the same does not contain an arbitration agreement. Clause 19 of the said Agreement states:

"All disputes and/or differences arising in connection with this Agreement, shall, to the extent possible be settled amicably".

Clause 20 of the said Agreement states:

"This agreement shall be governed by Indian Laws and be subject to the exclusive jurisdiction of the Courts in Mumbai alone".

37. It is the Plaintiff's case that the said document was intended by the parties to be the membership agreement between the Plaintiff and the Defendant as evidenced by the emails sent by the Defendant, dated 22nd August, 2012 (Exhibit L to the Plaintiff), 3rd September, 2012 (Exhibit M to the Plaintiff) and 6th April, 2013. This indicates the format of the draft of the agreement, which is at Exhibit O to the Plaintiff.

38. However, the Defendant argues that a perusal of the said document which was executed on 17th April, 2013, shows that it is in fact an agreement for the protection of investors and to ensure the proper management of warehouses and thus is a "Warehouse Agreement". The Defendant has further argued that the said Agreement was executed on 17th April, 2013, i.e. approximately three months prior to which trading on the Exchange was suspended and approximately a year after the Plaintiff commenced trading on the Exchange. The said Agreement was at no point of time referred to as the Membership Agreement. It was in fact referred to as the "Exchange-Member Agreement" as is apparent at Exhibit M to the Plaintiff (i.e. a copy of the email dated 3rd September, 2012, sent by the Defendant to the Plaintiff) and this reference was simply due to the fact that the agreement was executed between the Exchange and a member. The Defendant submits that the same could not be a basis of calling the same a Membership Agreement. The Defendant further explains that such an agreement was executed with only nineteen Trading Members who also provided warehousing facilities/services to the Defendant and that no other Trading Members have executed such "Exchange-Member Agreement". These other members have traded on the Exchange on the basis of the Membership Application alone. The Defendant has thus stated that the Membership Application (Annexure A to the Affidavit in Support of the Notice of Motion) which was executed on 11th June, 2012, is the true Membership Agreement as it ostensibly covers all the terms relevant to trading on the Exchange platform and wherein the Plaintiff has undertaken to abide by and conform to the binding nature of the Bye-Laws and thereby the arbitration agreement contained therein. The Defendant has also submitted that a perusal of the Recitals of the Agreement at Exhibit O to the Plaintiff demonstrates that the Plaintiff was already a member of the Defendant Exchange at the time of the Execution of the said Agreement. The Plaintiff's membership therefore pre-dated the execution of the said Agreement.

39. The Plaintiff has however denied that the Membership Application at Annexure A to the Notice of Motion reflects the Membership Agreement between

the parties. The Plaintiff has submitted that Annexure A to the Affidavit in Support of the Notice of Motion is merely an application expressing a desire on the part of the Plaintiff of becoming a Trading-cum-Clearing Member of the Defendant Exchange. By this application, the Plaintiff had undertaken to "apply for the said membership and undertake to conform to and abide by the Memorandum and Articles of Association, and the rules, bye-laws, regulations, business rules, circulars and orders issued by the exchange from time to time".

40. I am in agreement with the submission of the Defendant that the said Agreement at Exhibit O is not the Membership Agreement. As correctly pointed out by the Defendant, the same was never referred to by the Defendant as the Membership Agreement. A perusal of the said agreement indicates that the said document does not, at any point of time, discuss the terms or manner of trading on the Defendant Exchange platform and hence, considering the fact that the primary purpose of applying for membership on the Exchange was trading/transacting in the purchase or sale of commodities, it cannot be deemed to be a Membership Agreement. Also, the Defendant has correctly stated that both, the Agreement at Exhibit O to the Plaintiff and the Membership Application are independent of each other and are not overridden by one another.

41. I do recognize that irrespective of the nomenclature of this Agreement, if certain reliefs sought relate to matters covered under the scope of this agreement, then Clause 19 and Clause 20 will be applicable as regards resolution of the dispute. I propose to deal with the issue below, when considering the scope of the arbitration agreements in question.

(b) Provisions in the Bye-laws and Rules of the Defendant Exchange -

42. The Plaintiff submits that Clauses 3.1.2 and 15.4 and the fourth proviso to Clause 15.10 of the Bye-Laws and Rule 7 of the Rules of the Defendant Exchange, do not envisage an arbitration between the Defendant Exchange and a trading member such as the Plaintiff. On the contrary, the Plaintiff argues that when these clauses are read with the other relevant Bye-Laws and the Rules, it becomes abundantly clear that the Bye-Laws deliberately and consciously excluded the Defendant Exchange from the purview of arbitration.

43. Clause 3.1.2 of the Bye-Laws is reproduced hereunder:

"3.1.2 CONCILIATION AND ARBITRATION

In all claims, differences and disputes, irrespective of whether the Exchange is a party or not, arising out of or in relation to transactions on the Exchange including any agreements and contracts, made subject to these Bye-Laws or the Business Rules or Regulations of the Exchange or with reference to anything incidental thereto or in pursuance thereof or relating to their validity, construction, interpretation, fulfilment or the rights, obligations and liabilities of the parties thereof and including any question of whether such agreements, contracts and transactions have been entered into or not, the parties shall adopt

conciliation proceedings subject to the provisions of these Bye-Laws and the Arbitration and Conciliation Act, 1996. In case the conciliation proceedings do not result in any settlement, the dispute shall be referred to and decided by arbitration, as provided in these Bye-Laws and Business Rules and Regulations as prescribed by the Board or the committee appointed for the purpose from time to time. For that purpose, the Board or such committee may provide for.

3.1.2.1 Norms, procedures, forms, jurisdiction, terms, conditions and scale of arbitration fees and other charges for reference to arbitration.

3.1.2.2 Appointment of conciliation officers, arbitrators, substitute arbitrators and umpires.

3.1.2.3 Procedure for serving notice of hearing and adjournment of hearings and communications to the parties and witnesses.

3.1.2.4 Procedure for appearance, hearing, filing of information and counter claims and taking witnesses and evidence of assessors and experts.

3.1.2.5 Procedure for issue of arbitration awards.

3.1.2.6 Procedure for implementation of arbitration awards."

44. The Plaintiff submits that a mere reference to the Exchange in Clause 3.1.2 of the Bye-Laws does not make the Exchange amenable to arbitration. The Plaintiff argues that whereas in relation to conciliation, it has been provided that the parties i.e. a Member on the one hand and the Exchange on the other "shall adopt conciliation proceedings subject to the provisions of the Bye-Laws and the Act", the provision in relation to arbitral proceedings makes no reference to the Act and provides that: "In case the conciliation proceedings do not result in any settlement, the dispute shall be referred to and decided by arbitration, as provided in these Bye-Laws and Business Rules and Regulations as prescribed by the Board or the committee appointed for the purpose from time to time". The Plaintiff contends that consequently, in order to ascertain whether a dispute between parties is amenable to arbitration, one has to turn to the Bye-laws, business rules and regulations, as prescribed by the Board and that Clause 3.1.2 read in isolation is of no assistance in determining the presence of an arbitration agreement as contemplated hereinabove.

45. The Plaintiff next submits that Clause 15 of the Bye-Laws exhaustively deals with the reference to arbitration in 69 sub-clauses. Clause 15.4 of the Bye-Laws is reproduced hereunder:

"15.4 Reference to Arbitration All claims, differences or disputes between the members inter se or between a member and a constituent member or between a member and a registered non-member client or arising out of or in relation to trades executed on the Exchange and made subject to the Bye-Laws, Rules, Business Rules and Regulations of the Exchange or with reference to anything incidental thereto or in pursuance thereof or relating to their validity,

construction, interpretation or fulfilment and/or the rights, obligations and liabilities of the parties thereto and including any question of whether such transactions have been entered into or not shall be submitted to arbitration in accordance with the provisions of these Bye-Laws and Regulations that may be in force from time to time.

Provided these Bye-Laws shall not in any way affect the jurisdiction of the Exchange on the clearing member through whom such member has dealt with or traded in regard thereto and such clearing member shall continue to remain responsible, accountable and liable to the Exchange in this behalf."

46. The Plaintiff submits that the Exchange has not been expressly included within the purview of Arbitration under the said clause and only those disputes arising between the members inter se or between a member and a constituent member or between a member and a registered non-member client are amenable to arbitration.

47. Developing this submission further, the Plaintiff contends that Clause 15.10 of the Bye-Laws is titled as "Reference of the Claims, Differences or Disputes". The Plaintiff argues that the Fourth Proviso to Clause 15.10 conclusively establishes that the Exchange cannot be a party to an arbitral reference. The fourth proviso of Clause 15.10 is reproduced hereunder:

"15.10 Reference of the Claims, Differences or Disputes

[...]

Further provided that no reference can be filed against the Exchange, its officers, Board of Directors or any office bearer in respect of anything done or not done."

48. The Plaintiff has also drawn my attention to Rule 7 of the Defendant Exchange's Rules, which provides for the function of the Arbitration Panel. The Plaintiff states that by restricting the right of the Arbitrators to give an award only in cases between different classes of Members of the Exchange, but not between a Member and the Exchange, the Rule evidences that there is no scope for an arbitration between a Member and the Exchange which can culminate in an award. Rule 7 is reproduced hereunder:

"7. Functions of the Members of the Arbitration Panel To give arbitration award in cases preferred for arbitration, which shall be between different classes of Members of the Exchange inter-se, and between Members of the Exchange and their clients in terms of the Rules, Articles and Bye-Laws of the Exchange."

49. It is thus submitted on behalf of the Plaintiff that when the aforesaid provisions are read together, it establishes that the draftsman of the Bye-Laws, Rules, etc. chose to exclude the Exchange from the purview of a reference to arbitration, relegating the disputant to file a civil suit. The Plaintiff contends that Clause 15.4 must be read in light of the Fourth Proviso to 15.10 and Rule 7 to avoid any self-contradictory provisions and to bring about the harmonious

interpretation of the Bye-laws without rendering any of the clauses nugatory/otiose.

50. The Defendant submits that a bare reading of Clauses 3.1.2 and 15.4 of the Bye-Laws indicates that an arbitration agreement is contained in each of the Bye-laws. The Defendant argues that though Clause 3.1.2 does not explicitly indicate the parties to which that Clause is applicable, the plain language clearly contemplates an arbitration in relation to "all claims, differences and disputes, irrespective of whether the Exchange is a party or not, arising out of or in relation to transactions on the Exchange." The Defendant emphasizes that Clause 15.4 of the Bye-laws contemplates an arbitration agreement in relation to "all claims, differences or disputes" not only specific to the particular parties referred to therein i.e. "members inter se"; "member and a constituent member" and "member and a registered non-member client", as the Plaintiff has argued, but also more widely to the claims, differences or disputes "arising out of or in relation to trades executed on the Exchange".

51. The Defendant further submits that the reliance of the Plaintiff on the Fourth Proviso to Clause 15.10 in order to render Clause 15.4 inapplicable to disputes between a Member and the Defendant Exchange is incorrect. On the contrary, the Defendant asserts that the Fourth Proviso to Clause 15.10 is nothing but a logical extension of Clause 3.8 of the Bye-Laws which reads as under:

"3.8 PROTECTION FOR ACTS DONE IN GOOD FAITH No claim, suit, prosecution or any other legal proceedings shall lie against the Exchange or any member of the Board of Directors or any Committee duly appointed by it or any other duly authorised person acting for and on behalf of the Exchange, in respect of anything which is done or intended to be done or omitted or intended to be omitted in good faith in exercise of any power under these Bye-Laws or Business Rules or Regulations of the Exchange or in pursuance of any order or any other kind of communication received by the Exchange, in writing, from any court, tribunal, Central or State Government or any other competent regulatory or revenue authority empowered under any law or delegated legislation for the time being in force in that behalf."

52. The Defendant also submits that Clause 15.48 of the Bye-Laws demonstrates that arbitration by/against the Exchange is specifically contemplated by the Bye-Laws. Clause 15.48 reads as under:

"15.48 INDEMNITY

No party shall bring or file any suit or proceeding whatever against the Exchange, the Board of Directors, Managing Director, Relevant Authority, or any employee or employees of the Exchange acting under his/its authority or against the arbitral tribunal for or in respect of any matter or thing purported to be done under these Bye-Laws, Rules, Business Rules and Regulations of the Exchange, save and except any suit or proceeding for the enforcement of the award against the other party or parties to the reference."

The Defendant submits that such a scenario could only arise where the Exchange is a party to the arbitration agreement contemplated in the Bye-Laws.

53. This Court had sought a clarification from the Plaintiff as to its interpretation of Clause 15.5 of the Bye-Laws, which reads:

"15.5 Deliveries and Transactions Subject to Arbitration:

In all deliveries and transactions, which are made or deemed to be made subject to the Bye-Laws, Rules, Business Rules and Regulations of the Exchange, the provisions relating to arbitration as provided in these Bye-Laws and Regulations shall form and shall be deemed to form part of the contract relating to deliveries and transactions and the parties shall be deemed to have entered into an arbitration agreement in writing by which all claims, differences or disputes of the nature referred to in Bye-Law above shall be submitted to arbitration in accordance with the provisions of these Bye-laws, Rules, Business Rules and Regulations that may be in force from time to time."

54. In response to this query, the Plaintiff submitted that Clause 15.5 stipulates that all contracts dealing with deliveries of and transactions in commodities, concluded on the platform provided by the Defendant shall include or shall be deemed to include requisite provisions for arbitration mandating reference of all disputes arising thereunder to arbitration in the manner contemplated by the Bye-laws, Rules, etc. The Plaintiff further submitted that the deemed arbitration provision set forth in Clause 15.5 is qua any dispute or difference that may arise between trading Members inter se in respect of transactions and deliveries between such parties; and thus does not cover claims, disputes or differences between a Member and the Exchange qua the transactions or the deliveries actually carried out on or facilitated by the Exchange. The Plaintiff argued that such an interpretation of Clause 15.5 allowed for harmonious interpretation with the other relevant provisions of the Bye-laws, which have been discussed earlier.

55. The Defendant in relation to this query submitted that the applicability of Clause 15.5 is to "all deliveries and transactions", and that all reliefs prayed for by the Plaintiff arise out of transactions executed by the Plaintiff on the Defendant Exchange platform and relate to the Plaintiff's claim of entitlement to delivery of the goods. The Defendant hence asserted that the provision does cover claims, disputes or differences between a Member and the Exchange.

56. The Court also asked the Defendant to clarify its interpretation of Clause 15.4 of the Bye-laws in light of Rule 7 and Clauses 3.4, 15.11 and 15.12, which respectively read as follows:

"3.4 LOCATION FOR ARBITRATION BETWEEN MEMBERS OF THE EXCHANGE, OTHER INTERMEDIARIES AND CLIENTS

The location where arbitration shall take place shall be such place as may be identified by the Exchange from time to time and intimated to the arbitrator and the parties to the dispute accordingly."

"15.11 Limitation Period for Reference to Arbitration All claims, differences or disputes referred to in the Bye-Laws above shall be submitted to arbitration within six months from the date of last transaction or delivery (relate to 15.5) or payment effected between the member and his client or between two members of the Exchange, provided where the claim/complaint is not settled/resolved through the process of conciliation by the Exchange within three months of the receipt of the claim/complaint, the Exchange shall in such cases advise the concerned client to refer the case to arbitration. The time taken in dispute resolution and/or conciliation proceedings, if any, initiated and conducted in accordance with the provisions of the Arbitration and Conciliation Act and these Bye-Laws and the time taken by the Managing Director or Relevant Authority to administratively resolve the claims, differences or disputes shall be excluded for the purpose of determining the limitation period of six months under the Bye-Laws, Rules, Business Rules and Regulations of the Exchange. Any claim made or any difference/dispute raised by any complainant/aggrieved person, after expiry of the time limit specified herein, shall become time-barred for the purpose of availing of the remedy under the Bye-Laws, Rules, Business Rules and Regulations of the Exchange and may not, however, be invalid for seeking remedy under appropriate civil laws."

"15.12 Penalty on Failure to Submit to or Abide by Award in Arbitration An exchange member, who fails or refuses to submit to or abide by or comply with any award in arbitration between Members of the Exchange or between an exchange member and a non-trading member/client, as may be provided in these Bye-Laws, and Regulations shall be declared a defaulter or expelled by the Relevant Authority at its sole discretion, as is applicable, and thereupon the other party shall be entitled to institute legal proceedings to enforce the award under the CPC in the same manner as if it is a decree of the court."

57. In its response to this query of the Court, the Defendant submitted that Clauses 3.1.2 and 15.4 of the Bye-laws contain an all-encompassing arbitration agreement, whereas Clauses 3.4 and 15.11 and 15.12 are provisions made specifically in respect of disputes between its members and/or their clients and other intermediaries, so as to enable the Defendant Exchange to ensure that the disputes could be effectively resolved through arbitration. Thus these clauses cannot be construed as limiting the scope of the arbitration clause/agreement. Further, the Defendant submitted that Rule 7 and Clauses 3.4, 15.11 and 15.12 deal with matters of procedure and u/s 20(3) of the Act, the arbitrator is empowered to determine the procedure applicable to the arbitration in the event that the parties have not agreed to the same. The Defendant added that where it was itself a party to the arbitration, it would not be proper for it, as the Exchange to dictate the terms of the procedure to the members with whom the arbitration is proceeding, and it was for that reason that these provisions were made.

58. The Defendant further argued that the existence and scope of the arbitration agreement must be determined on its own terms and without any reference to

the remaining Bye-Laws. The interpretation of an arbitration agreement must be done independently, flowing from the principle of severability and separability recognised u/s 16(1) of the Act as well as the decisions of the Hon'ble Supreme Court in SMS Tea Estates Pvt. Ltd. Vs. Chandmari Tea Company Pvt. Ltd., and World Sport Group (Mauritius) Ltd. Vs. MSM Satellite (Singapore) Pte. Ltd., The Defendant asserts that an arbitration agreement must be interpreted in the widest possible manner as laid down in the case of Renusagar Power Co. Ltd. Vs. General Electric Company and Another, The Defendant submits that consequently, the mere fact that the said Rule and Clauses relates only to disputes between members of the Exchange and/or between members and their intermediaries/clients and do not refer to Exchange-member arbitrations cannot imply that the Arbitration Agreement contained in Clauses 3.1.2 and 15.4 of the Bye-laws does not contemplate its participation as a party.

59. The Plaintiff has also submitted that the Defendant's reliance on the Order of this Court in National Spot Exchange Ltd. v. M/s. N.K. Proteins Ltd. (supra), which was an Arbitration Petition filed by NSEL against M/s. N.K. Proteins Ltd. u/s 9 of the Act, is misplaced in the light of the facts and circumstances of the present case. The Plaintiff has respectfully submitted that the said Order is per incuriam and it cannot be considered as having any precedent value in the present case. Developing this submission, the Plaintiff contends:

- (a) that the issues raised by the Plaintiff in its Reply, including those of waiver, fraud, intricate questions of fact and law were never raised in the N.K. Proteins case, and therefore not dealt with or pronounced upon;
- (b) that though the fourth proviso to Clause 15.10 of the Bye Laws has been referred to, there is no discussion or reasoning as to why, despite the plain language of that proviso, it does not exclude the Exchange from arbitration proceedings. The Plaintiff has submitted that there is a mere conclusion arrived at, devoid of any reasoning and instead an entirely irrelevant Bye Law i.e. Clause 15.48 is referred to in the Order to justify the conclusion that the fourth proviso to Clause 15.10 does not preclude the Exchange from being a party to an arbitration;
- (c) that there is no reference to, or analysis or interpretation of Rule 7 of the Rules which is a rule that is decisive on the issue;
- (d) that there is no reference to, or analysis or interpretation of Clause 3.1.2 of the Bye-Laws. As a matter of fact, though Clause 15.4 is mentioned, it is not discussed, analyzed or interpreted by the Court in its Order;
- (e) that the effect and consequences of Clause 15.22 of the Bye Laws was not even presented to the Court; and
- (f) that none of the case law cited by the Plaintiff, including on the aspect of agreement in writing, waiver, fraud, etc. were cited before the Court and hence, the Court has not discussed or considered any of these judgments.

The Plaintiff reiterates that under the doctrine of precedent, what is binding is not a conclusion arrived at by the Court on the facts of a particular case, but the ratio decidendi i.e. the legal principle underlying the conclusion, as emphasized in Delhi Administration (Now N.C.T. of Delhi) Vs. Manohar Lal, Assistant Commissioner, Commercial Tax Department, Works Contract and Leasing, Kota Vs. Shukla and Brothers, and Vishnu Dutt Sharma Vs. Manju Sharma,

60. The Defendant, on its part, submits that the decision of this Court in N.K. Proteins case (supra) has precedential value as it is a legal interpretation of a particular clause of the Bye-Laws i.e. Clause 15.4, for the very same purpose i.e. existence of an arbitration agreement and on an identical argument being raised i.e. whether the clause amounts to an arbitration agreement between the Exchange and a Trading Member. The Court in that case specifically rejected an interpretation of Clause 15.4 of the Bye-laws, which implied the Exchange was precluded from being a party in a reference to arbitration. The Defendant submits that this order of the coordinate Court must be treated as binding in the present case, relying on the decision of the Hon'ble Supreme Court in Vishnu Traders v. State of Haryana [1995 Supp. (1) SCC 461 - paragraph 3], where the importance of ensuring consistency in the treatment of parties similarly placed was specifically emphasized.

61. To decide the rival contentions, it is convenient to first consider the prerequisites of a valid and binding arbitration agreement. Section 2(1)(b) of the Act defines "arbitration agreement" to be an agreement referred to in Section 7. Section 7 of the Act states that an "arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. The arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement and shall be an agreement in writing. It follows that an arbitration agreement cannot be inferred by implication.

62. In all cases where a court is required to interpret a contract in a dispute, first it will look at the express terms. In the N.K. Proteins case (supra), this Court considered Clause 15.4 of the Bye-laws, which is the arbitration agreement in question in this case. Specifically, it considered an argument in relation to the interpretation of the said arbitration agreement, which in my view, was similar to the one raised by the Plaintiff in this case. The Learned Judge in that case concluded that the Exchange can be a party to an arbitration. The Learned judge sets out at paragraph 8 of the order the reasons for the conclusion, which are reproduced hereunder:

"8. The Petitioner has sought to invoke the arbitration under clause 15.4 of its bye laws by which the members are governed. Respondent No. 1 claims that the bye law no. 15.4 is not applicable to the dispute between the Petitioner and Respondent No. 1 and that it would apply to a dispute between members inter se or between a member and a constituted member or between a member and a

registered non-member client. The argument cannot be accepted as aside from these three transactions between parties, all transactions arising out of or in relation to the trades executed on Petitioner's exchange and subject to the bye laws are covered under clause 15.4. It may be mentioned that reading of bye law clause 15.4 as sought to be argued on behalf of the Respondent No. 1 would render the important conjunction "or" in line 3 of the clause otiose. [...] The Respondent No. 1 would also contend that since no suit or proceeding could be filed against the Petitioner under clause 15.48 except suit for enforcing an award against it, no arbitration would lie against the Petitioner and conversely, therefore the Petitioner cannot invoke the arbitration. In fact clause 15.48 is a pointer to the fact that arbitration is contemplated as an award may be enforced against the Petitioner. [...]"

63. I am bound by the decision of the Learned Single Judge in N.K. Proteins case (supra) that the clauses read together spell out an arbitration agreement between the member and the exchange.

64. I am unable to agree with the Plaintiff that the decision in N.K. Proteins case (supra) is per incuriam. It is an established practice followed in Constitutional Courts of the country that co-ordinate benches (i.e. benches of equal strength) of a Court observe judicial propriety by following the decisions of earlier benches. The doctrine of per incuriam is meant to be an exception to this practice. In *Young v. Bristol Aeroplane Company Limited* [(1994) All ER 293] the House of Lords observed that though "Incuria" literally means "carelessness", In practice per incuriam appears to mean per ignoratium. In an earlier decision of *Huddersfield Police Authority v. Watson* [(1947) 2 All ER] 193, the House of Lords held that where a case or statute had not been brought to the court's attention and the court gave the decision in ignorance or forgetfulness of the existence of the case or statute, it would be a decision rendered per incuriam. These principles have been accepted to form part of Indian law. These principles were highlighted by the Hon'ble Apex Court, most notably in *State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another*,

65. Nothing is pointed out to the effect that any relevant statute or case law has been disregarded by the Learned Judge or not pointed out to her or considered by her. The question before the Court was whether this agreement contained an arbitration clause. The Learned Judge has come to the conclusion that it did contain such clause. The entire agreement was before the Learned Judge and construed by her. It is not open to argue that any particular provision of the agreement, which was relevant for the interpretation of the agreement, was not considered by the Learned Judge. That in effect means that the Learned Judge was not right in coming to the conclusion that she did and that is not permissible for a co-ordinate court to hold.

66. However, even if one finds that there is an arbitration agreement and the disputes are covered by it, one still has to consider whether there is any judicially recognised exception, for which the Court ought to decline to refer the parties to

arbitration and continue adjudication of the proceedings.

67. In this context, the Plaintiff submits that in any event, the Defendant has by its conduct and correspondence, prior to the institution of the above Suit, waived the right to refer the dispute to arbitration u/s 8 of the Act. The Plaintiff contends that with the intention of pursuing appropriate settlement of the disputed claims towards certain legal liabilities in accordance with the Bye-laws of the Defendant Exchange, the Plaintiff had by its letter dated 19th August, 2013, invoked the arbitration and conciliation clause contained in Clause 3.1.2 of the Bye-laws in the following terms:

".....The Bye Laws and Rules of the Exchange are binding on the Exchange and its members. Therefore, in view of the commercial dispute described above, we hereby invoke the conciliation proceedings as per Clause 3.1.2 of the Bye Laws of the Exchange. We request you to consider this letter as an invitation to conciliation as per Section 62 of the Arbitration and Conciliation Act, 1996.

We further refer to clause 15.52, 15.53 and 15.54 of the Bye Laws of the Exchange and request you to provide us with the panel of conciliators of the Exchange to enable us to appoint a conciliator in respect of the proceedings. "

However, the Defendant vide letter dated 23rd August, 2013, inter alia rejected the same stating that:

"....the provisions for Arbitration and reconciliation proceedings as contained in the Bye laws of the Exchange pertain to dispute between (a) member and a client; (b) member with another member. It does not pertain to dispute between Exchange and its members. In fact, as a member of the Exchange, you have submitted an Undertaking that you will abide by the decisions of the Exchange and so you cannot resort to arbitration proceedings by raising dispute against Exchange dues".

Thereafter, the Plaintiff vide letter dated 27th August, 2013, informed the Defendant that the Plaintiff intended to meet its payment obligation subject to the appropriate settlement of the disputes in relation to the claim by way of arbitration/conciliation in the following terms:

"6. Our client submits that it will be unable to make payment, if at all any amount is owed, as per the settlement cycles issued by NSEL until the disputes in relation to the claim are settled by way of arbitration/conciliation. We request you to forthwith notify us the conciliation/arbitration panel so that our client may initiate proceedings at the earliest to resolve the disputes."

The Defendant has not responded to this letter by complying with the requisition.

68. The Plaintiff has submitted that the letter dated 23rd August, 2013, clearly constitutes an unconditional and irrevocable waiver by the Defendant of its right to have disputes with the Plaintiff referred to arbitration. The Plaintiff in support

of this contention has relied on the decision of the learned Single Judge of the Karnataka High Court in the case of Ramakrishna Theatre Limited Vs. General Investments and Commercial Corporation Limited,

69. The Defendant has advanced a number of submissions in response. The Defendant has first argued that if at all there is waiver as alleged the same is only with reference to the arbitration provision contained in the Bye-Laws, and not with reference to the arbitration clause in the UIBT which is a separate and distinct contract and which is valid and binding, independently of the Bye-Laws. The Defendant also argues that the aforesaid letter dated 23rd August, 2013, addressed by the Defendant's then Managing Director and Chairman - Mr. Sinha, is an erroneous view expressed by him, and he has now been suspended by the Defendant Exchange. The Defendant has further argued that u/s 11 of the Act, a specific remedy was available to a party where one party does not respond to the invocation of arbitration by another party and accordingly the Plaintiff could have approached the Court seeking appointment of an arbitrator so as to have a reference of the dispute to arbitration.

70. The Defendant has finally argued that despite Mr. Sinha's letter dated 23rd August, 2013, the Plaintiff once again sought to invoke arbitration by its letter of 27th August 2013, thereby indicating that it did not accept Mr. Sinha's contention that there was no arbitration agreement between the Plaintiff and the Defendant and thus in such circumstances it cannot be said that the Defendant has waived its right to invoke arbitration/is estopped from doing so. Thereafter this Court delivered its judgment in N.K. Protein's case (supra) which settled the controversy as regards the existence of an arbitration agreement between a trading member and the exchange. The Defendant has since accepted this interpretation of the agreement and accordingly taken its current stand regarding the existence of an arbitration agreement.

71. The sequence of events noted above makes it clear that there is no clear waiver on the part of the Defendant of the arbitration agreement. Though at one stage the Defendant did take the stand that there existed no arbitration agreement between a trading member and the exchange, that stand was given up after this Court interpreted the contract document between the trading member and the exchange in N.K. Protein's case (supra) and that interpretation was accepted by the Defendant. No waiver, in clear and unequivocal terms, can be spelt out from this conduct of the Defendant.

72. I am also in agreement with the Defendant's argument that there is in any event no waiver at all with reference to the arbitration clause in the UIBT. I have in the latter part of this judgment found the UIBT to contain an arbitration agreement. Each arbitration agreement is a separate and distinct contract and so the waiver must be specific to the right of a party to invoke arbitration proceedings under that particular agreement. It is clear from Section 8 of the Act that the object and purpose of that provision is that judicial intervention is to be minimised. The judicial authority is mandated by that provision to refer the

parties to arbitration in the clearest terms. Thus, the Court must be circumspect in using its discretion to apply an exception such as waiver or estoppel, to refuse to refer the parties to arbitration.

73. Thus, I hold that the Defendant has not waived its right to the arbitration.

(c) The UIBT -

74. The Plaintiff has countered the submission of the Defendant that the duly executed UIBT of which Clause 11.11 more specifically contemplates an arbitration agreement between the parties for disputes in relation to the said UIBT. It is the Plaintiff's argument that the UIBT, executed by the Plaintiff, was not signed by both the parties, and is therefore merely a unilateral undertaking and not a valid arbitration agreement between the parties as defined u/s 7 of the Act. The Defendant argues that the UIBT constitutes an agreement between the parties, but it is one that is required to be signed and executed only by one of the parties; therefore a reference to "parties" in Section 7(4)(a) of the Act must be read to mean "party" and not "parties". The Plaintiff submits that this contention of the Defendant has not been supported by any authority and that such an interpretation runs counter to the principles of the ordinary law of contract. Referring to commentary in Pollock and Mulla on the Indian Contract Act, the Plaintiff contends that a contract implies two parties and that a contract can only be bilateral.

75. The Plaintiff has further emphasized that the Defendant's argument runs counter to Section 2(1)(b) and (h) read with Sections 7(1) and 7(4)(a) of the Act. Section 2(1)(b) defines "Arbitration Agreement" to mean an agreement referred to in Section 7. Section 2(1)(h) defines "party" to mean a party to an Arbitration Agreement. Section 7(1) clearly indicates that to constitute an Arbitration Agreement, there has to be an agreement i.e. a valid contract. The parties have to be ad-idem on referring disputes to arbitration under a written, signed agreement. Section 7(4)(a) of the Act provides that an Arbitration Agreement is in writing if it is contained, inter alia, in a document signed by the parties. Ex-facie the UIBT is not an agreement, but a merely unilateral undertaking of the Plaintiff which is not signed by the Defendant and thus it is not signed by the "parties" as mandated by Section 7(4)(a) of the Act. In support of these contentions, the Plaintiff has placed reliance on the decision of this Court in the case of Nasir Husain Films (P) Ltd. Vs. Saregama India Ltd. and Another,

76. The Defendant submits that the UIBT is admittedly a document in writing executed between both the Plaintiff and the Defendant Exchange and contains therein an Arbitration Agreement in Clause 11.11. The Defendant further submits that both the parties have acted on the basis of this document and all trades conducted by the Plaintiff are carried out on the Exchange platform on the basis of this agreement i.e. vide the internet. The Defendant argues that the UIBT is in the nature of an undertaking given by the Plaintiff to the Defendant Exchange and therefore does not contemplate the signature of the Defendant Exchange.

The document by its very nature requires the signature of only one party i.e. the Plaintiff. The signature of the Defendant is not required for its validity/implementation and the Plaintiff ought not to adopt a hyper-technical interpretation of Section 7(4)(a) of the Act, to argue that signatures of both the parties are contemplated.

77. The Defendant further submits that a holistic reading of the UIBT itself demonstrates that it contemplates an agreement between two parties i.e. the Defendant Exchange and the Plaintiff. For instance, Clause 10 of the UIBT uses the expression "either party" indicating thereby the fact that the UIBT is a document intended for both the Plaintiff and the Defendant to be parties thereto, even though the agreement contemplated only the Plaintiff's signature. Clause 10 of the UIBT is reproduced hereunder:

"10. Notice: Either party hereto shall give notice in writing to the other and shall be deemed to have been duly given or served, either by personally delivered to or sent by prepaid Registered Post with Acknowledgement due at respective addresses herein or at the last known address."

78. The Defendant stresses that all transactions executed by the Plaintiff on the Exchange platform, whether forming a part of the subject matter of the present dispute or not, have all been executed in consonance with and under the terms of the UIBT. The Defendant's contention hence centres on the point that both parties having acted upon the terms of the UIBT, have by their conduct accepted the UIBT and the terms contained therein, inter alia, the arbitration agreement contained in Clause 11.11 thereof. In support of this contention, reliance has been placed by the Defendant on the decision of the Hon'ble Supreme Court in the case of Unissi (India) Pvt. Ltd. Vs. Post Graduate Institute of Medical Education and Research, wherein a situation similar to the Nasir Husain Films case (supra) arose, but in which case, the parties by their conduct accepted and acted upon the terms of the agreement in contention in the said case. The Defendant has also relied on the decision of this Court in Viraj Holdings Vs. Motilal Oswal Securities Pvt. Ltd. and Others, wherein it was held that where a document contemplates only one party's signature, the arbitration agreement contained therein is valid and binding. The Defendant has also placed reliance on the decision of this Court in the case of Padmabai Dattatraya Bhojne Vs. State of Maharashtra,

79. Clause 11.11 of the UIBT is reproduced hereunder:

"11.11 Governing Laws & Dispute Resolution: This Terms shall, in all respects, be governed by and construed in accordance with the laws of India, without regard to the principles of conflict of laws. All disputes and differences arising out of or in connection with the Terms, which cannot be settled amicably between the parties hereto through dialogue or discussion, shall be finally settled exclusively by Arbitration. The dispute shall be referred to the sole arbitration of a person to be appointed by the Exchange and arbitration shall be held under the provisions

of the Arbitration and Conciliation Act, 1996 or any re-enactment, modification or amendment thereto. The arbitration proceedings shall be conducted at Mumbai only. Any award by the single arbitrator shall be final and binding upon both parties hereto. All arbitration proceedings and all documents submitted to any arbitration tribunal shall be in the English language. In relation to any legal action or proceedings for any urgent, interlocutory or final orders, the parties irrevocably submit to the exclusive jurisdiction of the courts in Mumbai, and waive any objection to such proceedings on grounds of venue or on the grounds that the proceedings have been brought in an inconvenient forum or that the Services were used/accessed/availed in a different domestic/international territory."

80. Section 7 of the Act is relevant to decide this issue. The relevant parts of the said Section are reproduced hereunder:

"7. Arbitration agreement. -- (1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

[...]

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in-

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other. [...]"

81. On a plain reading of Section 7 itself, it becomes clear that the Plaintiff's contention cannot be accepted. The Plaintiff has resorted to a strict interpretation of Section 7(4)(a) of the Act, to support its contention that the signature of both parties is required on the arbitration agreement. But as Section 7(4)(b) and (c) show, what is required by Section 7 is evidence of consensus/agreement between the parties. A signature is only one of the means of showing such consensus/agreement. But as the Defendant rightly points out, the UIBT is a document which contemplates the signature of only one party i.e. the Plaintiff.

82. The reliance placed by the Plaintiff on the judgment in *Nasir Husain Films (P) Ltd. vs. Saregama India Ltd. and Anr.* (supra) is erroneous. On reading paragraph 18 of the said judgment, it is clear that the same is based on a factual matrix which is completely different from the facts of the present case. In that case there was a clear dispute between the parties as to whether the agreement (which was signed by only one party) on which reliance was being placed had ever in fact come into existence at all; and further in the absence of such an

agreement whether the correspondence between the parties was sufficient to make out an arbitration agreement. Moreover, the document was such as to require the signature of both parties unlike the UIBT.

83. The facts of this case are similar to those in *Viraj Holdings v. Motilal Oswal Securities* (supra) which has been cited by the Defendant. That case considered the effect of a contract note signed only by the registered broker. Such contract notes were executed as per Regulation 3.5 of National Stock Exchange, framed under the Securities Contracts (Regulation) Act, 1956, and this regulation required signature of only the registered broker. Nevertheless, the arbitration agreement contained therein was found to be valid by the Court in that case.

84. A perusal of the provisions of the UIBT also indicate that it is a document wherein both the Plaintiff and the Defendant are intended to be parties, even though it only contemplates the Plaintiff's signature. Hence, the contention of the Plaintiff that the UIBT does not contain a valid arbitration agreement cannot be accepted.

85. Having established that there is a valid arbitration agreement in existence between the parties, I must now examine whether the present dispute falls within the scope of such agreement.

(B) SCOPE OF THE ARBITRATION AGREEMENT IN THE UIBT -

86. It is the Plaintiff's contention that Clause 11.11 of the UIBT, even if held to be an arbitration agreement u/s 7 of the Act, does not cover the disputes raised in the present Suit as that Clause is restricted to the disputes/differences that may arise between the parties pertaining to the "Terms" of the UIBT and nothing else. It is the Plaintiff's contention that the UIBT is merely an undertaking that sets out the terms and conditions governing internet based trading in commodities. Simply stated, it will allocate an online account which may be operated by the Plaintiff or its authorized representative to deal on the Exchange as defined and permitted by the Bye-Laws, Rules and Regulations of the Exchange. The Plaintiff submits that the over-arching framework under which Members are permitted to trade in contracts being offered by the Defendant Exchange are the Bye-Laws. The UIBT contains the terms and conditions governing the member's right to transact on the Defendant's platform using the services of the Defendant Exchange. Hence, disputes relating to only to such right and/or arising out of the services provided by the Defendant under the UIBT are governed by the dispute resolution provisions contained in Clause 11.11.

87. The Plaintiff has further elaborated that while the services of matching prices are being provided by the Defendant Exchange, the underlying transactions are solely between a buyer member and a seller member. Therefore, once the prices are matched on the Defendant Exchange, the resulting transaction or trades in relation to any commodity are said to be concluded between the two members and the agreement governing the rights and obligations of the two members in this respect are provided in the Business Rules.

88. On the other hand, the Defendant has firstly contended that the scope of enquiry by the courts at a pre-arbitration stage has been very limited as held by the Supreme Court in the case of National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd., The Defendant argues that this decision, though in the context of a Section 11 application, also applies to cases u/s 8 of the Act and thus a question as to whether a particular dispute falls within the scope and ambit of a particular arbitration agreement is a matter that must be left to the determination of the arbitral tribunal alone and should not be investigated by the Court.

89. The Defendant, in the alternative, contends that the scope of the Arbitration Agreement contained in Clause 11.11 of the UIBT clearly covers the disputes as contained in the present Suit, as it is stated in very wide terms. The relevant part of Clause 11.11 is stated once again for the sake of convenience:

"11.11 Governing Laws & Dispute Resolution: This Terms shall, in all respects, be governed by and construed in accordance with the laws of India, without regard to the principles of conflict of laws. All disputes and differences arising out of or in connection with the Terms, which cannot be settled amicably between the parties hereto through dialogue or discussion, shall be finally settled exclusively by Arbitration.

[...]"

90. The Defendant states that the expression "the Terms" contained in Clause 11.11 is defined at the very outset of the UIBT in the following manner:

"This document contains the terms and conditions (The "Terms" applicable for the internet based trading used by members, their authorized users and clients for trading on National Spot Exchange Ltd. (the "Exchange" or "NSEL") a Company that has been recognized to provide trading and clearing facility, commodities and related business for its Members including facilitating transactions by its Members to commodities (hereinafter called "the commodities business")."

91. The Defendant submits that the "Terms" of the UIBT, referred to in Clause 11.11, are thus the terms and conditions contained in the UIBT itself. Therefore, it is necessary to peruse the various terms and conditions contained in the UIBT itself to determine the scope of the expression "the Terms" and whether the disputes raised by the Plaintiff in the above Suit fall within the ambit of the arbitration agreement contained in Clause 11.11 of the UIBT. According to the Defendant, the following clauses of the UIBT have been relevant for this purpose.

"1. Purpose

(i.) The Member or his authorized user identified herein is desirous of trading in those Commodities admitted for dealing on the Exchange as defined and permitted by the Rules, Bye-Laws and Regulations of the Exchange;

(ii.) The Exchange offers and/or proposes to offer the Exchange's Services to the Member and the Member desires to avail of the Exchange's Services for purchasing, selling or otherwise dealing in Commodities;

(iii.) The Member has satisfied itself of the capability of the Exchange to execute transactions in Commodities and wishes to execute its orders through the Exchange, and the Member shall continue to satisfy itself of such capability of the Exchange to deal in Commodities before executing orders through it;

(iv.) The Exchange has, on the basis of information furnished by the Member and other information (if any), considered relevant by the Exchange, satisfied itself, and shall continuously be entitled to satisfy itself, about the genuineness and financial soundness of the Member and investment objectives relevant to the Services to be provided;

(v.) The Exchange has taken steps and shall take steps to make the Member aware of the precise nature of the Exchange's liability for business to be conducted, including any limitation on that liability and the capacity in which it acts;

(vi.) The Member desires to be bound by these terms relating to the Exchange's Service to be availed of by the Members and/or his authorized user.

These Terms shall form part of the undertaking for Internet based trading by members entered into between the Exchange and the Member. The Member's access to and use of the account or authorized user id/s with the Exchange is subject to his/her/its compliance with all the terms and conditions set forth herein."

"3.4 Subject matter of Terms:

It is clarified that the subject matter of the Undertaking is trading, that is purchase and sale of Commodities and other instruments traded on the Exchange."

"5. Transactions and Settlements:

.....

5.2 The Exchange shall not be responsible for any order that is made by the Member by mistake and every order that is entered by the Member through the use of the allotted user identification (ID) and password shall be deemed to be a valid order for which the Member shall be fully responsible."

"2. Definitions

2.1

.....

(c) "Exchange" means National Spot Exchange Limited having its registered

office at 102 A, Landmark, B Wing, 3rd Floor, Suren Road, Chakala, Andheri (East), Mumbai 400 093, its subsidiaries, affiliates, successors and assigns, and all other entities involved in the provision of the Commodities Exchange Services to its Registered Members with respect to specified Commodities;

(d) "Exchange provisions" means the Rules, Bye-laws, Regulations, Business Requirement Specifications, handbooks, notices, circulars and resolutions relating to the Exchange for the time being in force and as amended from time to time;

(i) "Member" means the person, firm, company or entity indicated in these Terms and registered with the Exchange as a user of the Services and (in case of an individual) his/her heirs, executors, administrators, legal representatives and permitted assigns, (in case of a partnership firm), the partners for the time being of the said firm, their survivors or survivor and their respective heirs, executors, administrators, legal representatives and permitted assigns, (in case the Member is a company or other body corporate) its successors and permitted assigns;

(l) "Services" means trading and matching Services relating to the Specified Commodities traded on the Exchange;

(n) "Transactions" refers to the orders placed by the Member on the Exchange for the purchase or sale of Commodities or other dealings in Commodities;"

"3. General Terms and Conditions governing the service

3.1 Use of the Services: Subject to the approval and acceptance of the Membership application and the terms and conditions herein, the Member is granted a revocable, non-exclusive and non-transferable entitlement to avail the Services for its personal use only. The Member will not and nor will be deemed to have any right or power to transfer or assign the permission or entitlement to use the Services or any part thereof hereby granted. The Member's access to and/or use of the Services shall be deemed unconditional acceptance of the Services and of these terms."

"7. Communication

.....

7.7 Conclusiveness of Records: The Exchange's own records of the trades/ transactions maintained through computer systems or otherwise shall be deemed conclusive and binding on the Member for all purposes."

"9. Term and Termination: These terms shall continue to be in force during the validity of Member's registration. Either party hereto may terminate the use of/ withdraw the Services by giving to the other thirty days advance written notice. The Exchange may suspend or discontinue/terminate the use of the Services by the Member forthwith and without prior notice if the Member has committed any breach or non-observance of any of the Terms herein or in case of the Member's death, bankruptcy or legal incapacity. The Member will remain responsible for any transactions made in its account through the Trading System of the

Exchange prior to such termination. Closing of the account will not affect the rights and obligations of either party incurred prior to the date of Termination. Termination of these Terms due to any material breach by the Member shall be without prejudice to any other remedy, which the Exchange may have against the Member. Upon termination of the Services, all Service Charges and other sums incurred up to such date shall become immediately due and payable by the Member to the Exchange. The Member's obligation to pay the Service Charges accrued to the Exchange shall survive any termination."

"11.7 Compliance with laws. All transactions that are carried out by and on behalf of the Member shall be subject to Government notifications, the rules, regulations and guidelines issued by the statutory and regulatory authorities and the bye-laws, constitution, rules, regulations, customs and usage of the Exchanges and its clearing house, if any, on which such transactions are executed and/or cleared by the Exchange."

"The conditions referred above are in addition to those applicable to members, authorized users and clients as per the bye-laws, rules and business rules of the Exchange.

Despite the risks indicated in this undertaking and those which inherently exist or creep in, the Member indemnifies the Exchange and accepts these conditions for his business and the business of his clients, and authorized users. I/We further undertake that we shall bring the contents of this undertaking to the notice of all our authorized user/s and also take an undertaking from the authorized user/s as per annexure of this undertaking duly signed by them and furnish the same to NSEL."

92. The Defendant's submission is that the above clauses of the UIBT demonstrate the nature of the agreement as well as indicate that the arbitration agreement would cover the disputes raised in the present Suit.

93. I first proceed to consider the Defendant's argument as to whether the scope of the arbitration agreement is an issue to be left to the arbitral tribunal. The decision of the Hon'ble Apex Court in the Boghara Polyfab case (supra), on which the Defendant relies in support of its argument, is of no assistance to the Defendant. Paragraph 20 of the said judgment of the Hon'ble Court is relevant and is reproduced hereunder:

"Section 16 is said to be the recognition of the principle of Kompetenz-Kompetenz. The fact that the arbitral tribunal has the competence to rule on its own jurisdiction and to define the contours of its jurisdiction, only means that when such issues arise before it, the Tribunal can and possibly, ought to decide them. This can happen when the parties have gone to the arbitral tribunal without recourse to Section 8 or 11 of the Act. But where the jurisdictional issues are decided under these Sections, before a reference is made, Section 16 cannot be held to empower the arbitral tribunal to ignore the decision given by the judicial authority or the Chief Justice before the reference to it was made."

94. In the Hon'ble Apex Court's judgment in *P. Anand Gajapathi Raju v. P.V.G. Raju*(supra), one of the conditions to be fulfilled for an application u/s 8 to be granted is that the subject matter of the action brought before the judicial authority must be the same as the subject matter of the arbitration agreement. Thus, whether a claim made falls within the arbitration agreement or not is very much necessary to be determined by the Court at this stage.

95. The scope of an arbitration agreement depends on the wording of the agreement. Whilst interpreting an arbitration agreement and determining its scope, there has been a movement from a restrictive to a more liberal approach. The liberal approach is underpinned by a sensible commercial presumption that the parties did not intend the inconvenience of having possible disputes from their transaction being heard before two different fora. [*Fiona Trust v. Privalov*] [2007] UKHL 40]. Consequently, the presumption is in favour of parties wanting only one tribunal to decide all disputes arising out of their relationship.

96. The language used in the arbitration agreement in Clause 11.11 is of a wide import i.e. "All disputes and differences arising out of or in connection with the Terms..."The UIBT, as its name indicates is an Undertaking for Internet Based Trading. Clause 3 of the UIBT specifies the General Terms and Conditions governing "the service", which is the Internet based trading service provided by the Defendant Exchange. However, Clause 3.4 clarifies that the "subject matter of the Undertaking is trading, that is purchase and sale of Commodities and other instruments traded on the Exchange." Clause 4 deals with Order Execution and Clause 4.4 discusses the non-guarantee of execution of an order placed. Clause 4.13 invokes the Bye-laws and Business Rules to such orders/trading. Clause 5 relates to Transactions and Settlements and Clause 5.1 specifically sets out the price the Member can expect to receive. What emerges from these provisions is that the UIBT, although in the nature of an undertaking by the trading Member, does set out details regarding the manner in which the service will be provided by the Defendant Exchange. The action in the present suit has been brought by the Plaintiff to (i) secure specific performance by the Defendant of "its obligation of delivering the said goods/commodities described..." in the Complaint, or payment of compensation in lieu of specific performance and (ii) remove its name from the list of defaulters appearing in the circular dated 22nd August, 2013 on the website of the Defendant. To my mind, the non-delivery of goods/commodities described has emanated from certain internet based trading and ostensible problems with the service provided by the Defendant Exchange. Consequently, it can be said that this is a dispute "in connection with" the Terms in the UIBT.

(C) Other Issues -

97. I now turn to the Plaintiff's objection in relation to the arbitrability of the dispute. This objection is canvassed on two grounds. First, the Plaintiff submits Clause 15.22 of the Bye-Laws contains an absolute bar on legal representation. Therefore, even if it were to be presumed that a valid arbitration agreement does

exist, this Court could hardly countenance a situation where the parties would have to fend for themselves and argue the matter on both fact and law, unrepresented and unaided by Counsel, Attorney or Advocate in a matter requiring compliance of procedure as set out in the Bye-Laws of the Defendant Exchange, as also involving voluminous documentary evidence and intricate issues of fraud and misrepresentation.

98. The Defendant, on its part, has stated that Clause 15.22 is a procedural clause and the invalidity of this clause cannot vitiate the arbitration agreement itself. In support of this submission, the Defendant has placed reliance on the decision of this Court in *Faze Three Exports Ltd. Vs. Pankaj Trading Co. and Others*, The Defendant submits that the Court in the said case categorically recognized the validity of an arbitration reference whilst striking down the bar to legal representation during the arbitration proceedings. In the said case, the arbitration took place as per the procedure prescribed by the Hindustan Chamber of Commerce. An Application was made by one of the parties to the Arbitral Tribunal seeking permission for representation by a lawyer, which Application was denied by the Arbitral Tribunal. This Court set aside the said award with the following observations:

"8. Parties have a right to be heard by the arbitral tribunal. The right of being heard is specifically conferred on the parties u/s 24 of the Act. It is true that the right of hearing per se may not include and does not necessarily include the right of hearing through a legal practitioner. In administrative matters, the right of hearing may be restricted to personal hearing by self or through an authorized representative in case of person with disability, like illiteracy. It is however, settled position that the arbitral proceedings are not administrative in nature. They are judicial at least quasi-judicial. Normally in judicial proceedings, the right of hearing includes the right to be represented by a legal practitioner, though in some case each right is partly restricted. However, the right to be so represented is required to be specifically excluded by the statute. Even where the statute excludes or limits the right of hearing through the legal practitioner, Courts have often permitted representation through a legal practitioner...

..... Thus, even where the statute contained provision of an express bar for representation through legal practitioner without permission of the Court, this Court has held that such permission should not be normally be denied. Arbitration and Conciliation Act, 1996 contains no provision which bars the representation of the parties by a, legal practitioner....

9. The arbitral tribunal appears to have declined the request of the petitioner to be represented by a legal practitioner on the principal ground that allowing of advocate's presence would result in delay and protraction of the proceedings. The advocates and lawyers delay the proceedings is myth. Sooner the myth is exploded the better it is. May be on stray occasions, a litigant and sometimes even a Judge may feel that a particular proceeding could be disposed of quickly without the assistance of legal practitioners of either side on account of triviality

of the dispute or otherwise. But, that is an exception. By and large, advocates and lawyers assist the Courts and Tribunals in limiting the scope of enquiry to the relevant overlooking the irrelevant, separating grain from the chaff and focusing on the real relevant issues. Generalisation that advocates and lawyers delay the proceedings is incorrect. Every Court and Tribunal which is endowed with the duty to act judicially or to determine any issues affecting the rights of the parties in a judicial or quasi-judicial enquiry must, in the absence of a statutory provision to the contrary, allow the party before it, if it so wishes to be represented by his authorised representative-including a legal practitioner. Enforcement of Section 30 (which incidentally has not yet been brought into force) of the Advocates Act is not necessary for this purpose. Section 30 of the Advocates Act speaks of the right of Advocates to practise. But, what about the rights of a litigant, who wants to be represented by a person having knowledge of law. Duty to act fairly is inherent in every Court, Tribunal and Authority which has a right and duty to decide upon the rights for the citizens. Giving of a fair opportunity to defend (or to put up his case) to every party is a part of duty to act fairly. Grant of a permission to a party to be represented by a person of his choice, including a legal practitioner, except where statute prohibits it or the Tribunal feels it to be against the public policy (like in some sensitive matter involving security of the State) is a part of the duty of the Tribunal to act fairly.

10. In the present case, the petitioner had specifically made a request to be represented by a legal practitioner. A partner of M/s. Mahimkar and Mahimkar, Solicitors was present at the venue of arbitration but, was not allowed to appear for the petitioner. This is recorded in the letter of the petitioner's Solicitors dated 16th August, 2002. It is thus, clear that fair opportunity of hearing was not given to the petitioner and to present his case which he wanted to do through his legal practitioner. This was done without any authority of law or without any authority in the arbitrators to prevent the representation of the petitioners through a legal practitioner. I am of the considered opinion that even in arbitration proceedings, parties are entitled to be represented by a legal practitioner if they so desire unless they have agreed in writing that none of the parties shall be represented by a lawyer."

99. The Defendant has submitted that in the said case, this Court expressly removed the bar against legal representation and remitted the matter back to the arbitral tribunal. The Defendant accordingly submits that Clause 15.22 is unenforceable, but the provision for arbitration is valid and binding, and that accordingly the parties will be entitled to be represented in the arbitral proceedings.

100. I cannot agree with the Defendant that the Faze Three Exports Ltd. case (supra) implies that the Court can strike down the said clause while referring the matter to arbitration. In that case, this Court set aside the award on the ground that the arbitrators had prevented legal representation without any authority of law or without any authority in the arbitrators to prevent the same. There was no

question of striking down such a clause; rather, it was the award that was set aside. In the present case, without any challenge to the said clause, the question of the Court striking it down suo motu does not arise. The decision in Faze Three Exports Ltd. (supra) does not assist the Defendant in relation to the principle it seeks to submit.

101. I am conscious however of the fact that the arbitration in the present case will, as per the order of this Court, proceed under the arbitration agreement contained in the UIBT. This particular provision i.e. Clause 15.22 is contained in the Bye-laws. It will be for the arbitral tribunal to consider the effect of the provision on the arbitration proceeding. Rules of procedure in the light of the arbitration agreement and the subject matter of disputes, is something within the realm of the Arbitrator's jurisdiction and need not detain us at the stage of reference of the parties u/s 8 of the Act. We may simply note Sections 18 and 34(2)(iii) of the Act in this behalf. Section 18 states as follows:

"18. Equal treatment of parties -- The parties shall be treated with equality and each party shall be given a full opportunity to present his case."

Section 34(2)(iii) of the Act, in the context of the grounds for setting aside the award, states as follows:

"34. Application for setting aside arbitral award. --

[...]

(2) An arbitral award may be set aside by the Court only if--

[...]

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

[...]"

102. Consequently, it would not be possible to deny a party the right to legal representation. As rightly observed by this Court in Faze Three Exports Ltd. (supra), arbitration is a quasi-judicial proceeding and in such proceeding the right of hearing includes the right to be represented by a legal practitioner, though in some case each right is partly restricted. However, the right to be so represented is required to be specifically excluded by the statute...", or presumably, by an agreement of the two parties. As noted above, this question will any way have to be determined by the arbitral tribunal.

103. The second ground of objection as regards arbitrability of the dispute raised by the Plaintiff is that there are intricate questions of fact and law involving voluminous documentary evidence/record and serious issues of fraud, which cannot be arbitrated and should be decided by the Court. The Plaintiff submits that the Report of the Court Receiver reveals that adequate stocks were not

found lying at the warehouses visited by the Court Receiver, although the Defendant in its Stock Report dated 6th August, 2013, published on the website giving details of stock as on 6th August, 2013, showed against the name of the Plaintiff that there were stocks of 44,586 MT of refined Palmolein oil at the warehouse of Sarda Agro Oils Ltd., Tank R4. The Plaintiff adds that the fact that a fraud has indeed been played by the Defendant is compounded by the very fact that it is regarding these very stocks that the Plaintiff has been illegally and wrongfully declared as a defaulter on 22nd August, 2013. Given that there are serious allegations of fraud in relation to the stocks traded on the Exchange operated by the Defendant and that the same are under investigation, the Plaintiff submits the matter has to be tried in Court and that such matters cannot be referred to arbitration. In support of this contention the Plaintiff has relied on the judgments in (i) N. Radhakrishnan Vs. Maestro Engineers and Others, (ii) India Household and Healthcare Ltd. Vs. LG Household and Healthcare Ltd., (iii) MSM Satellite (Singapore) Pte Ltd. Vs. World Sport Group (Mauritius) Limited, and (iv) Ivory Properties and Hotels Pvt. Ltd. Vs. Nusli Neville Wadia,

104. The Defendant, with respect to these submissions, has put forward various arguments. First, that there are no specific pleadings on fraud in the Complaint and that only the pleadings in the Complaint can be looked at. As per Order VI Rule 4 of the Code of Civil Procedure, the fraud is to be pleaded with full particulars. Second, that in any event no question of fraud arises in the present case as it is a simple case of a contract for the sale of goods. Third, that the Court is not concerned with other matters that may be pending adjudication before it, in which fraud may have been specifically pleaded by the parties. The Defendant has also submitted that the Court cannot take into account matters in the public domain and matters of common knowledge pertaining to the alleged fraud. The Defendant has also stated that a reading of the judgment of the Hon'ble Supreme Court in the case of N. Radhakrishna (supra), the decision of this Court in Bishundeo Narain and Another Vs. Seogeni Rai and Jagernath, and the unreported judgment of the Calcutta High Court in Ram Kishan Mimani vs. Govardhandas Mimani which was followed and applied in the case of HSBC PI Holdings (Mauritius) Limited vs. Avitel Post Studios Limited and Ors. [Arbitration Petition No. 1062 of 2012] indicates that the present case does not come within the principles enunciated in those judgments as to when a party would not be referred to arbitration because of allegations of fraud. Finally, The Defendant contends that the Plaintiff's case does not really depend on establishment of any fraud on the part of the Defendant and the reliefs claimed by the Plaintiff can be granted whether or not there is any fraud.

105. It has been submitted on behalf of the Defendant that there are no specific pleadings on fraud in the Complaint and that as per Order VI Rule 4 of the Code of Civil Procedure, the fraud is to be pleaded with full particulars. In relation to this argument, the Plaintiff has submitted that the Court cannot restrict its scrutiny to the Complaint and close its eyes to the record before it in this very matter. The Plaintiff submits that there were various reports circulating in the media that a

fraud may have been played by the Defendant which made the Plaintiff more cautious in withholding payment without delivery of the goods and until appropriate settlement of claims, and that there are serious allegations of fraud in relation to the stocks traded on the Exchange operated by the Defendant and that the same are under investigation. The Defendant, on its part, argues that the Court cannot consider matters which are in public domain and matters of common knowledge pertaining to the alleged fraud involved in the Exchange.

106. The Plaint in the above Suit, on perusal, indicates that a fraud may have been perpetrated by the Defendant Exchange. The Court cannot ignore the facts on record which have been produced before this Court. The facts revealed in the Reports of the Court Receiver dated 21st October, 2013 and 22nd October, 2013, which have been filed in the present case pursuant to this Court's ad-interim order dated 3rd October, 2013, ex facie reveal the conduct of the Defendant Exchange proclaiming in its website details of stock held as on 6th August, 2013, when there were no stocks.

107. As far as the arbitrability of fraud is concerned, the Hon''ble Supreme Court in N. Radhakrishnan (supra), held that a stay will not be granted u/s 8 of the 1996 Act in favour of a domestic arbitration, "when serious allegations of fraud are made which it is desirable should be tried in open court." In the case of in World Sport Group (Mauritius) v. MSM Satellite (Singapore) (supra), the Hon''ble Supreme Court held that the decision in N. Radhakrishnan (supra) did not apply to a stay in favour of foreign-seated arbitrations. This was a case u/s 45 of the Act. That provision states that an Indian court must stay its own proceedings in favour of foreign-seated arbitrations, unless the said agreement is null and void, inoperative or incapable of being performed.

108. This arbitrability question was considered by this Court in HSBC v. Avitel (supra), in the context of an application u/s 9 in relation to arbitration proceedings in Singapore. The respondents in that case opposed the application on the basis that, since fraud is not arbitrable under Indian law, the ultimate arbitration award would not be enforceable in India u/s 48; and since section 9 allows interim relief to be granted only in aid of final relief, it cannot be granted in a case where the final award would be unenforceable in India. On the facts of the case, the arbitral tribunal had held, and the Court affirmed, that the law governing the arbitration was not Indian law, and therefore the question of the arbitrability of fraud under Indian law did not strictly fall to be decided. However, given the detailed arguments on the point by both sides, the Court did consider the Supreme Court's decision in N Radhakrishnan (supra).It concluded that fraud is indeed arbitrable under Indian law observing:

"[T]he N. Radhakrishnan judgment cannot be read to imply that every allegation of fraud for malpractice being made, there can no longer be adjudication of such matters in an arbitration reference. N. Radhakrishnan has to be read to imply that an exception may be made to the general rule when it appears to court that a matter involving serious charges with heavy documentary and oral evidence

may not be referred to arbitration notwithstanding the dispute being covered thereby."

109. In this context, it seems to me that the rationale underlying decisions like *N. Radhakrishnan* is that Indian courts may refuse to refer a matter to arbitration u/s 8 of the Act, if satisfied that there is a sufficient reason why the matter should not be referred to arbitration. In my view, there would be sufficient reason, in a dispute involving allegations of fraud, only where a detailed investigation of the fraud as a whole is required to decide the dispute between the parties. The reason is that such an investigation may involve the interests and concerns of third parties to the dispute, or of the general public, which cannot be represented in the private process of arbitration. Again, if an investigating authority is in the midst of an investigation at the time of a dispute, and it is expected that certain directions may have to be issued to such authority as regards the investigation, in order to resolve the dispute between the parties and/or decide the question of fraud, it would be sufficient reason for the Court to refuse to refer the matter to arbitration, bearing in mind that the arbitral tribunal would not have the power to issue such directions to an investigating authority. It is pertinent to mention in this context that in a recent decision of the Hon'ble Supreme Court in *Swiss Timing Ltd. v. Organising Committee, Commonwealth Games 2010, Delhi*² the Hon'ble Court observed that there is no inherent risk to the parties in permitting arbitration to proceed, even with criminal proceedings running simultaneously.

110. In the present case, no such investigation of fraud as a whole is required to decide the dispute between the Plaintiff and the Defendant. A tangential reference to the wider fraud in the pleadings may be made, but it appears to me that it is possible for an arbitral tribunal to adjudicate the dispute, including the question of fraud, without having to unravel the entire fraud alleged to be perpetrated by the Defendant Exchange. The primary relief sought by the Plaintiff is specific performance, or compensation in lieu thereof, and an arbitral tribunal does have the power to order specific performance of a contract, as held by the Hon'ble Supreme Court in *Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan and Others*, Accordingly, I hold that the issue of fraud is arbitrable and there is insufficient reason to nevertheless refuse to refer the matter to arbitration.

111. For the sake of convenience, I summarize my conclusions as follows:

- i. The document annexed at Exhibit O to the Plaint is not a "Membership Agreement", as sought to be argued by the Plaintiff.
- ii. The Exchange has not been kept out of the purview of arbitration proceedings under the Bye-laws and Clause 15.4 of the Bye-Laws is a valid arbitration agreement by which the Exchange may be made party to an arbitration.
- iii. Clause 11.11 of the UIBT is a valid and binding arbitration agreement between the parties and the Defendant can invoke that agreement in order to request the

Court to refer the present dispute to arbitration.

iv. The Defendant has not waived its right to arbitrate.

v. The dispute is arbitrable, even though it involves allegations of fraud.

112. The parties are referred to arbitration and are directed to take necessary steps to commence the arbitration.

113. The above Notice of Motion is accordingly disposed of.

1 Order dated 23rd September, 2013 (Coram: Mrs. Roshan Dalvi, J.) in Arbitration Petition (L) No. 1524 of 2013

2 Arbitration Petition No. 34 of 2013 dated 28th May, 2014