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(2004) 10 MAD CK 0097

In the Madras High Court

Case No : C.M.A.N.P.D. (B) No. 2101 of 2004

PPN Power Generating Company Limited — APPELLANT

Vs

PPN (Mauritius) Company and Others — RESPONDENT

Date of Decision : 08-10-2004

Acts Referred:
Companies Act, 1956 — Section 235, 402, 403

Citation : (2005) 59 SCL 27

Hon'ble Judges : N. Kannadasan, J;K. Govindarajan, J

Bench : Division Bench

Advocate : Udaya Holla, Aravind Dattar, for Chitra Narayanan and Rishi Kumar Dagar, for the Appellant; A.M. Singhvi, For respondents 1 and 2, Man Mohan, assisted by Ritu Bhalla, Balaji Sathish Parasaran and Rahul Balaji for R3 to R11, for the Respondent

Final Decision : Dismissed

Judgement

K. Govindarajan, J.—The appellant having aggrieved by the order dated 5.7.2004, passed by the Company Law Board, (hereinafter called "CLB"), rejecting their application filed in C.A.No.62/2004 in C.P.No.8/2004, preferred the above appeal.

2. The appellant-company established a gas and naphtha fired combined cycle power generation plant at Pillaiperumalnallur in Government of Tamil Nadu. Respondents 1 and 2 are having 46% paid up capital of the Company (26% and 20% respectively). The 3rd respondent-company and the 4th respondent are holding 28% and 26% paid up capital respectively. The 5th respondent is the Managing Director of the appellant Company. Respondents 6 to 8 are Directors of the appellant-company nominated by the 3rd respondent herein. Respondents 9 and 10 are the Directors nominated by the 4th respondent herein. The financing companies, namely, I.D.B.I., and L.I.C., have nominated one Director each. They are not parties to the proceedings. Since the dispute is only between the appellant-company and respondents 1 and 2, the appellant-company has given

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up respondents 3 to 11, though they have been added in the appeal as respondents.

3. The appellant-company entered into a Power Purchase Agreement, (hereinafter called "PPA"), with the Tamil Nadu Electricity Board, (hereinafter called "TNEB") on 3rd January 1997, as the appellant-company has to sell to the TNEB, capacity and net electrical output of the power generating facility pursuant to the terms and conditions set forth in the said agreement.

4. The PPA among other clauses provides payment security mechanism as follows:-

"(a) direct payments;

(b) letter of credit;

(c) An Escrow account and hypothecation of TNEB''s receivables deposited in such account;

(d) guarantee by the State of Tamil Nadu through a sovereign guarantee ("the GOTN" Guarantee") in favour of the appellant- company guaranteeing the TNEB''s payment obligations".

According to respondents 1 and 2, TNEB, has not only failed to discharge their obligation under the agreement regarding payment security mechanism but also failed to pay a sum of Rs.468.88 crores (approximately) as on 31st January 2004 towards supply of power by the appellant-company. Since November 2001, the appellant-company had written to TNEB, regarding letter of credit and escrow accounts but no response had been received. In spite of that, the management of the appellant-company did not take any legal action against the TNEB. Since the Company''s right to recover the money would become time-barred at the end of 3 years from 26th March 2001, an issue was raised by the nominee director of the 2nd respondent at the 50th Board meeting held on 30th December 2003.

5. Stating that there are some acts of omission and commission and mismanagement of the Company, Company Petition in C.P.No.8/2004 was filed claiming several reliefs as sought for in the petition. Suffice to mention the following relief alone for the purpose of the present case:-

"a(ii) initiating and continuing proceedings qua TNEB and Government of Tamil Nadu for and on behalf of the company with respect to the Company''s right under the PPA and GOTN guarantee".

The interim relief also is sought for which is as follows:-

"a(i) Invoke the alternate dispute resolution remedy clause, PPA dated 3.1.1997 for and on behalf of the company and forthwith initiate the proceedings as contemplated therein".

Such a prayer is sought for to enforce clause 16.1 and 16.2 of the PPA. The CLB in the order dated 9.3.2004 declined to grant the interim relief and accepting the

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contentions of the appellant-company that any extreme measures against TNEB would have disastrous effects on the very business prospects of the company and also on the basis of sequence of events which show the cautious approach of the Board of Directors of the company.

6. On the ground that the Company''s right would become time-barred at the end of 3 years from 26th March 2001, the nominee directors of respondents 1 and 2 proposed two resolutions in their letter dated 12th March 2004 for the 51st Board of Directors meeting scheduled for 20th March 2004 wherein they proposed as follows:-

"Resolved that the Company do hereby invoke the Alternate Dispute Resolution provisions under the PPA dated 3.1.1997 for and on behalf of the Company and issue the invocation letter on or before March 26, 2004 with respect to the issuance of the Letter of Credit, the implementation of the Escrow Account and all unpaid amounts owing by TNEB under the PPA;

Resolved further that the Managing Director be and are hereby authorized and directed to forthwith initiate the proceedings as contemplated thereunder."

Though the said resolutions were taken up for discussion and at the Board meeting the said nominee directors placed on record for the consideration of the Board the legal opinions obtained by them regarding limitations, the majority of the Directors of the Board refused to invoke the legal remedies available to the Company and the resolution proposed were defeated by a vote of 8:5.

7. So, again respondents 1 and 2 herein moved interim application No.38/2004 before the CLB in C.P.No.8/2004 seeking the following prayer:-

"a. Authorise Mr.Jenson and Mr.Sirse, directors of the company sufficiently within the period of limitation expiring on 26.3.04 as stated hereinabove to represent the Company and forthwith initiate, institute and prosecute the dispute resolution mechanism under the PPA on behalf of the Company against TNEB seeking redressal and remedies for all breaches of the PPA by TNEB;

b. Direct the Company to render all assistance as required and asked for by the aforenamed Directors to give effect to prayer (a) above;

c. Direct the Company to bear the costs and expenses incurred by Mr.Jensen and Mr.Sirse in respect of prayer (a) above;

d. Grant ad interim relief in terms of prayers (a) to (c) above, and confirm the same on return of notice;

e. Award costs of this Application to the petitioners; and

f. Pass such further orders as this Hon''ble Tribunal may deem fit."

The CLB in the order dated 25th March 2004, refused to grant interim relief as sought for. Such a refusal was on the basis that the CLB cannot interfere with the business, judgment and decision of the Directors, unless there is evidence that

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they acted in bad faith or no sensible Board of Directors would reasonably have come to the decision which the Company Directors reached. The decision of the majority of Directors not to bring proceedings to enforce obligation of TNEB in favour of the Company is not attributed to the Directors'' inaction on account of mala fide reasons and it is not for the CLB to interpret the validity period of the PPA with reference to law of limitation, as TNEB is not bound for any such interpretation. It is represented that aggrieved by that order, an appeal was filed, but it has to see the light of the day.

8. On the same day, namely, 25.3.2004, respondents 1 and 2 initiated proceedings invoking arbitration clause in the PPA by filing the request for arbitration in accordance with Art. 3 of ICC Rules of Arbitration. It is relevant to mention here that such a proceeding was taken by respondents 1 and 2 in the name of the appellant-company. Pursuant to the same, a letter was sent to TNEB on 31.3.2004 to provide their comments on or before 30th April 2004. Knowing the same, the appellant-company sent a communication on 14.4.2004 stating that respondents 1 and 2 have made the request which is unauthorised and invalid and the appellant-company has not made any request for any arbitration and so the arbitration proceedings need not be proceeded with. Thereafter, the appellant-company filed Company Application in C.A.No.62/2004 in C.P.No.8/2004 seeking prayer as follows:-

"(a) to grant interim injunction restraining the Respondents/Petitioners from further proceeding with ICC Case No.13218/MS now pending on the file of the ICC International Court of Arbitration, Paris."

Though the CLB granted interim order initially not to proceed with the arbitration proceedings pending Application, in the order dated 5.7.2004, dismissed the petition holding that the nature of proceedings and the relief claimed at the CLB are distinct from those made before ICC Arbitral Tribunal and the appellant-company did not prove the prima facie case or the balance of convenience and established any irreversible prejudice that may be suffered by the appellant-company in the event of not granting any such injunction. Aggrieved against the same, the appellant-company has preferred the above Appeal.

9. Mr.Udaya Holla, Learned Senior Counsel appearing for the appellant submitted that the Company could not take derivative action against the TNEB to recover the amount payable by them and also to insist to provide payment security mechanism in a stringent manner as claimed by the minority shareholders taking into consideration the fact that they have to solely rely on the TNEB to sell the power and the TNEB is the sole purchaser of the power generated by the Company. Though the I.D.B.I., and the L.I.C., have extended the loan facility exceeding 1,000 crores and nominees of those lenders in the Board also supported the decision of other directors except the nominee directors of respondents 1 and 2, considering the consequences of any action against the TNEB which would ruin the Company and affect the working relationship of the appellant-company with the TNEB. Learned Senior Counsel further submitted

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that if the TNEB discontinued the purchase of power from the appellant-company, it would neither be possible to get third party purchaser for 300 Mega Watts of power generated by the Company. According to the learned Senior Counsel, such a decision by the Board taken not to proceed against the TNEB, was a commercial decision considering the divergent opinions available before them. Though there is a delay in settlement of the outstanding by the TNEB, according to the learned Senior Counsel, there is no allegation of misappropriation of the Company''s fund. It is his further submission that the Courts cannot interfere with the business, judgment and decisions of the Directors unless it is established that the Board of Directors acted in bad faith or such a decision was not taken reasonably. It cannot be said that the Directors of the Company have committed breach of their duties in taking such decision. Respondents 1 and 2 have also not questioned the bona fides of the Directors in deciding so. Referring to the 50th and 51st Board meeting, learned Senior Counsel further submitted that the Board of Directors approached the issue cautiously after weighing the pros and cons of any far reaching recovery measure against the TNEB and took a decision that such a derivative action against TNEB, cannot be taken and rejected the request of the nominee Directors of respondents 1 and 2. On earlier occasion the CLB on the basis of the said decision, refused to interfere with the said decision of the Board of Directors.

10. Pointing out the prayer in the Company Petition No.8/2004 and Interim relief sought for seeking permission to invoke GOTN guarantee for and on behalf of the Company and to forthwith initiate any proceedings and the order dated 9.3.2004, the CLB refusing to grant interim order and the order in Application No.38/2004 dated 25.3.2004 in which the CLB rejected finally the interim relief as sought for by the Applicant, the learned Senior Counsel appearing for the appellant submitted that having suffered such an order, respondents 1 and 2 should not have initiated arbitration proceedings before the International Court of Arbitral Tribunal, (hereinafter called "ICC") on the same day contrary to the decision of the CLB and so such a proceeding is oppressive in nature and cannot be allowed to proceed further. Referring to the order of the CLB, on merits, learned Senior Counsel submitted that though prima facie case and balance of convenience are also established, the CLB erroneously rejected the application seeking an order of anti suit injunction. Learned Senior Counsel also referred to clause 14.3 of the shareholders agreement dated 24.11.1995 in support of his submission that the shareholders are prohibited from taking any action in the name of or on behalf of any party to the agreement, as the parties to the agreement on independent entities engaged in the conduct of other one''s business. On that basis, learned Senior Counsel submitted that respondents 1 and 2 cannot initiate arbitration proceedings in the name of the appellant-company without even getting authorisation for the same. According to the learned Senior Counsel, the findings of the CLB that the relief sought for in the Company Petition filed under Sec. 398 read with Sections 402, 403 and 235 of the Companies Act and the dispute raised before the ICC Arbitral Tribunal are distinct cannot be sustained in law.

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According to him, such finding is given without properly understanding the relief sought for in the main Company Petition. If ultimately, the Tribunal comes to the conclusion that no such proceeding need be taken against the TNEB, then the proceedings taken before the ICC Arbitral Tribunal cannot have any legal sanction. Learned Senior Counsel further submitted that the Tribunal is not correct in holding that there is no prima facie case or the balance of convenience in favour of the appellant and they had not established any irreversible prejudice that may be suffered by the applicant in the event of not granting any such injunction. With respect to the jurisdiction of the CLB, learned Senior Counsel referred to Regulation 44 of the CLB Regulation 1991 and powers vested under Sec. 403 of the Companies Act to grant an order of anti-suit injunction. He further submitted that anti-suit injunction is only against the party and it cannot be construed as injunction granted against the ICC Arbitral Tribunal. Learned Senior Counsel has cited a number of decisions which would be dealt with hereunder in support of his submission regarding the scope of anti-suit injunction and the powers of the CLB to grant such relief.

11 The learned Senior Counsel further submitted that the respondents have invoked the arbitration proceedings on the same basis on which the Company Petition was filed and arbitration proceedings have not been taken in the name of minority shareholders to invoke the exception to the principles laid down in Foss v. Harbottle, (1843) 2 Hare 461 : 67 ER 189, but only on behalf of the Company as if the Company has invoked arbitration proceedings. While dealing with the power of the appellate court, he submitted that the appellate court cannot close its eyes even if the order of the CLB cannot be sustained in law. He further submitted that arbitration proceedings which is taken without the consent of the appellant-company is detrimental to the interest of the Company. When the respondents 1 and 2 are ignoring the earlier orders of the CLB, the appellant-company is entitled to get an order of injunction against the respondents 1 and 2 from proceeding further with respect to the arbitration proceedings. Even if such injunction is granted, no prejudice would be caused to the respondents 1 and 2 as they have already initiated the proceedings within time to avoid expiry of period of limitation even according to their calculation. Further, due to subsequent developments, namely, a communiction dated 30.8.2004, the period of limittion is extended.

12. Dr.Singhvi, learned Senior Counsel appearing for the respondents 1 and 2 submitted that the actions, namely, the earlier actions by the respondents 1 and 2 approaching the Board of Directors and the CLB are different and distinct actions and cannot be relied upon to contend that respondents 1 and 2 are estopped from invoking the arbitration clause under Clause No.16.2 of the PPA, before the ICC Arbitral Tribunal. According to him, before the Board, the respondents requested to take action against the TNEB to recover the amount and to insist the compliances of the Clauses in the agreement regarding payment security mechanism. Even before the CLB, the respondents have approached them, only as Directors of the Company, but the said action cannot take away

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the substantial right under the Common Law remedy to recover the amount from the TNEB by way of derivative action by minority shareholders. According to the learned Senior Counsel, unless such action is not taken, the claim would become time-barred, and merely because the CLB passed the order on 25.3.2004, it cannot be said that the respondents proceeded with the arbitration proceedings on the same day as if the respondents waited for that order. According to the learned Senior counsel, if such action is not taken immediately, the proceedings would become time barred. Learned Senior Counsel also submitted that in view of the exception to the principles laid down in Foss vs. Harbottle (supra), the minority shareholders are entitled to sue the arbitration proceedings in the name of the Company as the majority shareholders are not willing to take such proceedings. It is also submitted that such proceedings were taken only in the interest of the Company to recover the arrears of Rs.468.88 crores especially when the TNEB has not complied with the payment security mechanism contemplated under the PPA. He further submitted that in spite of the order passed by the CLB, respondents 1 and 2 can go for arbitration, as such proceedings have been taken only in the capacity as minority shareholders and also on the basis of the exception to the principles laid down in Foss vs. Harbottle case (supra). He also pointed out that parties in the arbitration proceedings are different from the parties before the CLB and the CLB cannot adjudicate such a claim which was made before the ICC Arbitral Tribunal. He also pointed out that the TNEB has not raised any objection regarding the sustainability of the arbitration proceedings except the objections regarding the maintainability of the arbitration proceedings by minority shareholders and the ICC Arbitral Tribunal has also framed an issue regarding the same which has to be decided only by the ICC Arbitral Tribunal. In view of Clause 16 of the PPA, the ICC alone is having sole and exclusive natural jurisdiction to decide the issue raised before the ICC Arbitral Tribunal. So, the CLB which is not having jurisdiction to decide such issue is an unnatural forum and hence it cannot grant anti suit injunction against exclusive and natural forum as held in Modi Entertainment Network and Another Vs. W.S.G. Cricket PTE. Ltd., . Learned Senior Counsel further submitted that the argument made on behalf of the appellant to the effect that if the Company proceeds against the TNEB, TNEB will stop purchase of power and thereby they have to close the industry, is not based on any pleading or material. Learned Senior Counsel further submitted that even otherwise, the TNEB can stop purchase of power if they are able to get power for lesser price from others and only to avoid the same, respondents 1 and 2 have insisted the Company to change over to the method of production of power and since the same has not been considered, the respondents have filed the Company Petition under Sec. 398 of the Companies Act. While replying to the submission of the learned Senior counsel appearing for the appellant that other Companies supplying power to the TNEB are not insisting the dues and also to implement the payment security mechanism, learned Senior Counsel submitted that the appellant-company has the highest outstanding with the TNEB, namely 76% of the outstanding and merely because others are not taking steps to secure the outstanding, it cannot

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be said that the appellant-company has to keep quiet.

13. With respect to the inherent power of the CLB, Learned Senior Counsel appearing for respondents 1 and 2 submitted that such a power cannot be used against the natural forum and also the proceedings taken by the respondents 1 and 2 was only in the interest of the Company and not to make gain by the respondents 1 and 2 themselves. It is also submitted that the inherent power can be used only with respect to unoccupied field. But, in the present case, the right to proceed with the arbitration proceedings is on the basis of Clause 16.2 of the PPA and so it is occupied by contract and thereby the CLB cannot exercise its discretion. Even if direction as sought for by respondents 1 and 2 to take arbitration proceedings by the CLB was given, such proceedings would be only regular action in appointing arbitrator under the agreement by the appellant-company and it cannot be construed as a derivative action by minority shareholders. Since the present action taken by respondents 1 and 2 is nothing but derivative action on the basis of the exception to the principles of the case in Foss vs. Harbottle (supra), for which the permission of the CLB need not be obtained. He further submitted that in the Company Petition filed by the respondents 1and 2, the appellant cannot sustain their Application to get orders against the respondents 1 and 2. If the prayer is granted by the CLB as sought for by the appellant, it is of permanent nature and thereby the remedy for the minority shareholders are prevented in perpetuity to pursue their remedy to safeguard their interest. He also pointed out that the prayer ''b'' in the Application is not the subject matter in the Company Petition. It is his further case that the appellants have not made out any pleading which is required to grant anti-suit injunction as mentioned in the decision in MODI''s case (supra). He also pointed out the portions in the petition filed by the appellants in support of his submission that the appellants have admitted that the action now taken by the respondents is derivative action. According to the learned Senior Counsel, such derivative action by the minority shareholders can be taken only if the CLB refuses to grant permission to proceed with the arbitration proceedings. Since the Company itself has taken arbitration proceedings, though at the instance of minority shareholders, if injunction is granted as sought for, even the Company itself cannot invoke Clause 16.2 of the PPA.

14. With reference to the scope of appeal, learned Senior Counsel appearing for respondents 1 and 2 submitted that if the CLB has given reasonings based on materials, this Court cannot substitute another reason to reverse the orders of the CLB though such exercise is possible. Learned Senior Counsel further submitted that even under the provisions of the Arbitration and Conciliation Act, 1996, stay cannot be granted to stall the arbitration proceedings. Referring to clause 14.3 of the PPA, learned Senior Counsel submitted that the same is not applicable to the present proceedings and such a clause is available only in the different agreement entered into between the shareholders, whereas the right to take arbitration proceedings is available in the PPA. According to the learned Senior Counsel, even if such a clause is available, the respondents 1 and 2 can

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invoke their common law right to take arbitration proceedings. The appellate court can interfere with the order of the CLB only if the findings given by the CLB are reversible or perverse. Referring to the letter dated 30.8.2004 produced by the Learned Senior Counsel appearing for the appellant, Dr.Singhvi, learned Senior Counsel appearing for respondents 1 and 2 submitted that it is only a self-serving document and the same has been produced in the midst of arguments and the said document cannot make the present application infructuous.

15. The question of law raised in this case can be captioned as follows:-

(1) Whether the CLB is having any inherent powers to grant anti-suit injunction and if it is so whether such power was not properly exercised in the present case on the basis of established principles?

(2) Whether the respondents 1 and 2 are prohibited under Clause 14.3 of the shareholders agreement dated 24.11.1998 or barred by the principles of Res judicata to invoke the arbitration proceedings before the ICC Arbitral Tribunal under clause 16.2 of the PPA?

(3) Whether the petition in C.A.No.62/2004 filed by the appellant is sustainable in law?

(4) Whether the order of the CLB rejecting the request for anti-suit injunction is sustainable in law?

16. Before dealing with the above questions, we are inclined to extract the findings given by the CLB. Additional Principal Bench, Chennai, to reject C.A.No.62/2004 in the order impugned dated 5.7.2004, for anti-suit injunction as sought for by the appellant on the following grounds:-

i) The orders dated 9.3.2004 and 25.4.2004 passed by the CLB in interim application and in Company Application No.38/2004 are not a bar to initiate a derivative action by the minority shareholders in the name of the Company before the ICC Arbitral Tribunal against the TNEB invoking arbitration clause No.16.2 in the PPA, as such a right was not at all invoked before the CLB, nor argued nor considered nor prohibited by the CLB, while declining the interim reliefs, on 9.3.2004 and 25.3.2004;

ii) As laid down in Modi''s case, the CLB is not having natural jurisdiction to deal with the matter pending before ICC Arbitral Tribunal and so it cannot grant injunction against the party who took the proceedings before the forum having natural and exclusive jurisdiction and in the foreign court of choice of parties;

iii)The CLB has no interest nor connection with the dispute in relation to the PPA to justify the interference with the ICC arbitral Tribunal.

iv) There is neither comity nor commonality of parties in the proceedings before the CLB and the ICC arbitral Tribunal;

v) The parties in dispute have exclusively entrusted the jurisdiction in relation to

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any dispute arising out of the PPA in favour of the ICC Arbitral Tribunal explicitly excluding the jurisdiction of the Indian courts as well as the Indian Arbitration Law and any dispute in relation to the PPA has been kept outside the purview of the CLB.

vi) While the exclusive jurisdiction of the ICC Arbitral Tribunal to adjudicate any dispute in relation to the PPA, including the issue as to whether the respondents 1 and 2 as minority shareholders, are entitled to invoke any derivative action in the name of the Company against the TNEB, is far from the doubt, the CLB can have no domain or concurrent jurisdiction over the resolution of any dispute arising out the PPA.

Vii) While considering the scope of clause 14.03 of the shareholders agreement, it is found that the prohibition sought to be enforced among the shareholders is only in relation to the conduct of their own business and it cannot override the established common law right available to minority actions as derivative action under the rule of exception to the principles in Foss v. Harbottle.

Viii) The CLB which is not being vested with natural jurisdiction can neither exercise the inherent powers under Regulation 44 of the CLB Regulations, 1991 nor powers vested under Sec. 403 of the

Companies Act to grant any anti-suit injunction, especially when the discretion has to be exercised according to the Rules of reason, justice and law, without any violation of the principles of the Companies Act.

ix) While the reliefs under Sec. 397 and 398 of the Act as sought for in the Company Petition are statutory reliefs, the reliefs which may be granted by the ICC Arbitral Tribunal are pursuant to the contractual obligations between the parties.

x) The nature of the proceedings and the reliefs claimed at the CLB are separate and distinct from those proceedings made before the ICC Arbitral Tribunal

xi) The appellant-company herein have not established that there is any prima facie case or the balance of convenience in favour of the applicant before the CLB nor established any irreparable prejudice that may be suffered by the appellant-company in the event of non-grant of anti-suit injunction.

17. Again, before dealing with the issues raised in the present case, the scope, the power and jurisdiction of this Court to deal with the appeal has to be gone into.

18. The above appeal is preferred under Sec. 10-F of the Companies Act, 1956. Under the said provision, any person aggrieved by the decision or order of the CLB is given liberty to prefer an appeal to the High Court on any question of law arising out of that order. So, now we have to decide on the basis of the above said provision, regarding the scope of our jurisdiction while dealing with the order of the CLB, dated 5.7.2004. Even according to the learned Senior Counsel

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appearing for the appellant, the CLB is only exercising its inherent and discretionary power either to grant or reject the prayer for injunction. Only if it is established that the CLB exercised such power arbitrarily or capriciously or perversely or contrary to the settled principles of law regulating grant or refusal of interlocutory injunction, this Court can interfere with the said order. But if such power was exercised reasonably and in a judicial manner by the CLB, the appellate court is not justified in interfering with the said order by taking a different view.

19. This view of ours is supported by the decision of the Apex Court in the decision in Laxmikant V. Patel Vs. Chetanbhat Shah and Another, , in which it is held as follows:-

"17. We are conscious of the law that this Court would not ordinarily interfere with the exercise of discretion in the matter of grant of temporary injunction by the High Court and the trial Court and substitute its own discretion therefore except where the discretion has been shown to have been exercised arbitrarily or capriciously or perversely or where the order of the Court under scrutiny ignores the settled principles of law regulating grant or refusal of interlocutory injunction. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the Court below solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial Court reasonably and in a judicial manner the fact that the appellate Court would have taken a different view may not justify interference with the trial Court''s exercise of discretion. However, the present one is a case falling within the well accepted exceptions. Neither the trial Court nor the High Court have kept in view and applied their mind to the relevant settled principles of law governing the grant or refusal of the interlocutory injunction in trade mark and trade name disputes. A refusal to grant an injunction in spite of the availability of facts, which are prima facie established by overwhelming evidence and material available on record justifying the grant thereof, occasion a failure of justice and such injury to the plaintiff as would not be capable of being undone at a later stage. The discretion exercised by the trial Court and the High Court against the plaintiff is neither reasonable nor judicious. The grant of interlocutory injunction to the plaintiff could not have been refused, therefore, it becomes obligatory on the part of this Court to interfere."

20. In the above said decision, the earlier decision of the Apex Court in Wander Ltd. v. Antox India, P. Ltd., 1990 (Supp) SCC 727, has been referred to. While dealing with the scope and nature of appeals and the powers of the appellate court in the said decision, it is held as follows:-

"13. On a consideration of the matter, we are afraid, the appellate bench fell into error on two important propositions. The first is a misdirection in regard to the very scope and nature of the appeals before it and the limitations on the powers

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of the appellate court to substitute its own discretion in an appeal preferred against a discretionary order. The second pertains to the infirmities in the ratiocination as to the quality of Antox''s alleged user of the trademark on which the passing-off action is founded. We shall deal with these two separately.

14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court''s exercise of discretion. After referring to these principles Gajendragadkar, J., in The Printers (Mysore) Private Ltd. Vs. Pothan Joseph,

" ... These principles are well established, but as has been observed by Viscount Simon in Charles Osenton & Co. v. Jhanaton, 1942 AC 130 , '' .... the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case''."

The appellate judgment does not seem to defer to this principle."

21. The Apex Court in the decision in Santosh Hazari v. Purushottam Tiwari, AIR 2001 SCW 723, had an occasion to deal with the power of the appellate court while considering the scope of Sec. 100, Civil Procedure Code. Though the said decision is not with reference to discretionary orders passed in interlocutory application, it has given a formula as to how the appellate court deal with the appeal while reversing the decision of the lower court. In that aspect, we are inclined to extract the relevant portion of the said decision, which is as follows:-

13. In Deputy Commr., Hardoi, in charge Court of Wards, Bharawan Estate Vs. Rama Krishna Narain and Others, , also it was held that a question of law of importance to the parties was a substantial question of law entitling the appellant to certificate under (the then) Section 110 of the Code.

14. A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be ''substantial'' a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if

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answered either way, in so far as the rights of the parties before it are concerned. To be a question of law ''involving in the case'' there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by Court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question of law involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstances of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation necessity of avoiding prolongation in the life of any lis.

15. A perusal of the judgment of the trial Court shows that it has extensively dealt with the oral and documentary evidence adduced by the parties for deciding the issues on which the parties went to trial. It also found that in support of his plea of adverse possession on the disputed land, the defendant did not produce any documentary evidence while the oral evidence adduced by the defendant was conflicting in nature and hence unworthy of reliance. The first appellate Court has, in a very cryptic manner, reversed the finding on question of possession and dispossession as alleged by the plaintiff as also on the question of adverse possession as pleaded by the defendant. The appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on question of fact and law. The judgment of the appellate Court must, therefore, reflect its conscious application of mind, and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate Court. The task of an appellate Court affirming the findings of the trial Court is an easier one. The appellate Court agreeing with the view of the trial Court need not restate the effect of the evidence or reiterate the reasons given by the trial Court, expression of general agreement with reasons given by the Court, decision of which is under appeal, would ordinarily suffice (See Girja Nandini Devi and Others Vs. Bijendra Narain Choudhury, . We would, however, like to sound a note of caution. Expression of general agreement with the findings recorded in the judgment under appeal should not be a device or camouflage adopted by the appellate Court for shirking the duty cast on it. While writing a judgment of reversal the appellate Court must remain conscious of two principles. Firstly, the findings of fact based on conflicting evidence arrived at by the trial Court must weigh with the appellate Court, more so when the findings are based on oral evidence recorded by the same presiding Judge who authors the judgment. This certainly does not mean that when an appeal lies on facts, the appellate Court is not competent to reverse a finding of fact arrived at by the trial Judge. As a matter of law if the appraisal of the evidence by the trial Court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and

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surmises, the appellate Court is entitled to interfere with the finding of fact (See Madhusudan Das Vs. Smt. Narayanibai (Deceased) by Lrs. and Others, . The rule is - and it is nothing more than a rule of practice - that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge''s notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate Court should not interfere with the finding of the trial Judge ona question of fact (See Sarju Pershad Vs. Raja Jwaleshwari Pratap Narain Singh and Others, . Secondly, while reversing a finding of fact the appellate Court must come into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding. This would satisfy the Court hearing a further appeal that the first appellate Court had discharged the duty expected of it. We need only remind the first appellate Courts of the additional obligation cast on them by the scheme of the present Section 100 substituted in the Code. The first appellate Court continues, as before, to be a final Court of facts; pure findings of fact remain immune from challenge before the High Court in second appeal. Now the first appellate Court is also a final Court of law in the sense that its decision on a question of law even if erroneous may not be vulnerable before the High court in second appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate Court even on questions of law unless such question of law be a substantial one."

22. From the above said decisions, it is clear that this Court can interfere with the order of the CLB only if discretionary/inherent powers of the CLB, is exercised arbitrarily or capriciously or perversely or ignored the settled principles of law in granting interlocutory injunction. We can also interfere with the order if we are able to conclude that the CLB has not exercised its power in granting injunction in spite of the availability of facts which are prima facie established by overwhelming evidence and material available on record justifying the grant thereof and occasioned failure of justice and thereby the appellant sustained irreparable injury, but at the same time the appellate Court cannot reassess the material and reach a conclusion different from one reached by the CLB solely on the ground that if it had considered in a particular manner, it would have come to contrary conclusion. While reversing the order of the CLB, this Court must come into close quarters with the reasonings assigned by the CLB and then this Court has to assign its own reasonings in arriving at a different conclusion.

23. Dr.Singhvi, learned Senior Counsel appearing for respondents 1 and 2, in his own style, while explaining the power of the Appellate court to interfere with the discretionary order of the CLB, relied on the "Carpet Theory", as he mentioned. According to him, if the lower forums have walked through carpet without stepping down from the same, the appellate Court cannot interfere with the order of the said forum. It is not the matter, such a walking is straight or zig-zag. It is only for the appellate Court to see whether the said forum had walked on

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the carpet or stepped down from the carpet. He refers the carpet to its power or jurisdiction of the forum for disposing of the application for injunction. We have to find out hereinafter whether the CLB had walked through the carpet or stepped out.

24. Now on the basis of the above settled principles of law regarding the power of this Court to deal with the appeal, we are inclined to deal with the case on the basis of the pleadings and argument advanced by the respective learned Senior Counsel.

25. Before dealing with Point No.1, it is beneficial to deal with the scope of "anti-suit injunction" in general which are culled out from various decisions. The same is not defined or dealt with in the Code of Civil Procedure.

(i) When a court restrains a party to a suit/proceedings before it from instituting or prosecuting a case in another court, including a foreign court, it is called "anti-suit injunction".

(ii) Anti-suit injunction can be issued on the ground of "equity and good conscience".

(iii) Anti-suit injunction can be granted "to avoid injustice".

(iv) If foreign proceedings are "oppressive or vexatious". such anti-suit injunction can be granted.

(v) To prevent the administration of justice being prevented for unjust ends of justice, anti-suit injunction can be granted with respect to foreign proceedings.

(vi) There must be an equity which entitles one party as against the other, to an injunction to restrain the other from proceeding in the foreign court.

(vii) To protect the courts'' own proceedings and process, anti-suit injunction can be granted.

(viii) If the bringing of the legal proceedings involved unconscionable conduct or unconscientious exercise of legal right, such anti-suit injunction may be granted.

(ix) Though the international anti-suit injunction operates only against the parties, it effectively restricts the jurisdiction of a foreign sovereign''s courts.

(x) International anti-suit injunction can be granted whenever there is a duplication of parties and issues and the court determines with the prosecution of simultaneous proceedings would frustrate the speedy and effective determination of the case.

(xi) There is no precious Rules governing the anti-suit injunction.

(xii) Only in the most compelling circumstances, a court should exercise its discretion to issue an anti-suit injunction.

(xiii) Such injunction is required to prevent irreparable and miscarriage of justice

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and to prevent the litigants'' evasion of the important public policies of the forum.

(xiv) The Court should exercise such a power granting anti-suit injunction to enjoin foreign suits sparingly and only in very special circumstances.

26. Point No.1 and 4:- The appellant-company filed Application in C.A.No.62/2004 invoking powers under Regulation 44 of the Company Law Board Regulations, 1991, which reads as follows:-

"44. Saving of inherent power of the Bench:- Nothing in these rules shall be deemed to limit or otherwise affect the inherent power of the Bench to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Bench."

The CLB is vested with inherent power to exercise even under Sec. 402(g) of the Companies Act, which reads as follows:-

402. Without prejudice to the generality of the powers of the (Tribunal) u/s 397 or 398, any order under either section may provide for -

(a) .. ..

(b) .. ..

(c) .. ..

(d) .. ..

(e) .. ..

(f) .. ..

(g) any other matter for which in the opinion of the (Tribunal) it is just and equitable that provision should be made."

27. Regulation No.44 is in para materia to Sec. 151 of the Code of Civil Procedure. Sec. 151 of the Code reads as follows:-

"151. Saving of inherent powers of Court:- Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

From the above said Regulation No.44 and the Section 402(g) of the Companies Act, it is clear that the inherent power can be exercised by the CLB to meet the ends of justice and to prevent abuse of the process of the CLB.

28. Courts have held that such inherent power can be exercised in the absence of any express prohibition. In the decision in Rampakavi Rayappa Belagali Vs. B.D. Jatti and Others, the Apex Court has held as follows:-

"5. .... In exercising inherent power, the courts cannot override the express provisions of law. Where however, as in the present case, there is no express or

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implied prohibition in recalling an earlier order made because of the absence of the - party and to directing the disposal of the reference on merits, the courts, in our opinion, should not be loath to exercise such power provided the party concerned approaches the court with due diligence and shows sufficient cause for its non-appearance on the date of hearing."

29. Even in the decision in The Newabganj Sugar Mills Co. Ltd. and Others Vs. The Union of India (UOI) and Others, , the Apex Court while dealing with the limitation on the powers of the court in exercising inherent powers, has held as follows:-

"6. Rejecting, therefore, the recommendations for solution of the problem arising here, as put forward by counsel for the appellants, we have to devise other measures. We are aware of our limitations:

"The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to ''the primordial necessity of order in social life.'' Wide enough in all conscience is the field of discretion that remains."

The difficulty we face here cannot force us to abandon the inherent powers of the Court to do. "The inherent power has its roots in necessity and its - breadth is coextensive with the necessity". Certainly, we cannot go against any statutory prescription. ....."

30. Even in the decision in Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal, , it is held that the inherent power has not been conferred upon the Court; it is a power inherent in the Court by virtue of its duty to do justice between the parties before the Court. It is also held that when the Code itself recognises the existence of the inherent power of the Court, there is no question of implying any powers outside the limits of the Code.

31. In the decision in Dalpat Kumar and Another Vs. Prahlad Singh and Others, , it is held that grant of injunction is a discretionary one . While holding so, the Apex Court has given guidelines as to the circumstances under which such discretionary relief of injunction should be granted, which is as follows:-

"4. ..(1) there is a serious disputed question to be tried in the suit and that an act, on the facts before the court, there is probability of his being entitled to the relief asked for by the plaintiff/defendant;

(2) the court''s interference is necessary to protect the party from the species of injury.

In other words, irreparable injury or damage would ensue before the legal right

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would be established in trial; and

(3) that the comparative hardship or mischief or inconvenience which is likely to occur from withholding the injunction will be greater than that would be likely to arise from granting it."

It is also held that the burden is on the plaintiff to prove that there is "prima facie" case in his favour and also has to satisfy that not granting such an order of injunction by the court would result in "irreparable injury".

32. The learned Senior Counsel appearing for the appellant relied on the decision of the Calcutta High Court (Division Bench) in Debi Jhora Tea Co. v. Barendra Krishna Bhowmick, 1980 (50) Comp.Cases 771, in support of his submission that there can be no limitation on the court''s power while acting under Sections 397, 398 and 402 of the Companies Act, 1956, with respect to the power of the CLB to grant injunction. Even in the said decision, it is only held that the intention of the legislature is to confer wide and ample powers upon courts for the regulation of the conduct of the Company''s affairs and to provide for any other matter which the court thinks just and equitable to provide for, in the interests of the corporate body and general public.

33. Even in the decision in Grindlays Bank Ltd., v. Industrial Tribunal,1980 (Supp) SCC 420, regarding the availability of the power of the Tribunal in the absence of any express provision, it is held as follows:-

"6. We are of the opinion that the Tribunal had the power to pass the impugned order if it thought fit in the interest of justice. It is true that there is no express provision in the Act or the rules framed thereunder giving the Tribunal jurisdiction to do so. But it is a well known rule of statutory construction that a Tribunal or body should be considered to be endowed with such ancillary or incidental powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties. In a case of this nature, we are of the view that the Tribunal should be considered as invested with such incidental or ancillary powers unless there is any indication in the statute to the contrary. We do not find any such statutory prohibition.

On the other hand, there are indications to the contrary."

34. Similar view has been taken by the Apex Court in the decision in Union of India and another Vs. Paras Laminates (P) Ltd., , holding as follows:-

"8. There is no doubt that the Tribunal functions as a court within the limits of its jurisdiction. It has all the powers conferred expressly by the statute. Furthermore, being a judicial body, it has all those incidental and ancillary powers which are necessary to make fully effective the express grant of statutory powers. Certain powers are recognised as incidental and ancillary, not because they are inherent in the Tribunal, nor because its jurisdiction is plenary, but because it is the legislative intent that the power which is expressly granted in the assigned field of jurisdiction is efficaciously and meaningfully exercised. The

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powers of the Tribunal are no doubt limited. Its area of jurisdiction is clearly defined, but within the bounds of its jurisdiction, it has all the powers expressly and impliedly granted. The implied grant is, of course, limited by the

express grant and, therefore, it can only be such powers as are truly incidental and ancillary for doing all such acts or employing all such means as are reasonably necessary to make the grant effective. As stated in Maxwell on Interpretation of Statutes (11th Edn.) "where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution."

35. In the decision of the Apex Court in M/s. J.K. Synthetics Ltd. Vs. Collector of Central Excise, also, similar view is taken, which is extracted hereunder:-

"3. Our attention was invited to the judgment of this Court in Income Tax Officer Vs. M.K. Mohammed Kunhi, , whee the question related to the powers of the Income Tax appellate Tribunal u/s 254 of the Income Tax Act, 1961. Reliance was placed upon Sutherland''s Statutory Construction, Third Edn., Domats Civil Law, Vol.I,and Maxwell on Interpretation of Statutes, 11th Edn., to hold that it was a firmly established rule that an express grant of statutory power carried with it, by necessary implication, the authority to use all reasonable means to make such grant effective. The powers which had been conferred upon the Tax Appellate Tribunal were of the widest possible amplitude and carried with them, by necessary implication all powers and duties incidental and necessary to make, the exercise of those powers fully effective. Having regard to its powers u/s 254, it was held that the Tax Appellate Tribunal had impliedly been granted the power of doing all such acts and employing such means as were essential and necessary to its ends. The statutory power carried with it the duty in proper cases to make such order for staying proceedings as would prevent the appeal, if successful, from being rendered nugatory."

From the above said decisions, though it is held that even in the absence of any specific provision, the Courts are having inherent power to grant injunction and such inherent power has been conferred upon the court by virtue of its duty to do justice. We need not go into the said aspect in this case, as Regulation No.44 and Section 402 of the Companies Act contemplate such power on the CLB. So there cannot be any difficulty in accepting the proposition that the CLB is having such inherent power to grant injunction in a given case if it has jurisdiction to deal with the same.

36. But we have to deal with the question whether the CLB is having power to grant injunction as sought for by the appellant-company to stall the arbitration proceedings initiated by respondents 1 and 2 as minority shareholders by way of derivative action initiated before the ICC Arbitral Tribunal, which alone is having jurisdiction to deal with the arbitration proceedings in view of clause 16.2 of the PPA.

37. Learned Senior Counsel appearing for the appellant submitted that it cannot

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be said that the CLB is not having jurisdiction to grant injunction with respect to arbitration proceedings in question. According to him, it also cannot be said that Courts cannot grant injunction at the instance of Indian Firm restraining the arbitration proceedings initiated in foreign country.

38. In support of his submission, learned Senior Counsel appearing for the appellant relied on the decision in V.O. Tractoroexport, Moscow Vs. Tarapore and Company and Another, . In the said case, the appellant before the Supreme Court initiated arbitration proceedings before Foreign Trade Arbitration Commission of the U.S.S.R. Chamber of Commerce, Moscow. Before initiation of such proceeding, the respondents before the Apex Court filed a suit on the Original Side of the Madras High Court. After initiating the arbitration proceedings, the appellant entered appearance and contested the suit and filed an application for stay of the suit. Respondents also filed another application for injunction restraining the appellant from taking any part in the arbitration proceedings in Moscow. Learned Single Judge dismissed the application for stay of the suit and granted injunction restraining the appellant from taking part in the proceedings in Moscow. The Division Bench also confirmed the decision of the learned Single Judge. On appeal, the Apex Court found that no case for injunction has been made out and set aside the orders of the High Court and allowed the appeal filed before them. While dealing with the question whether the High Court was justified in granting interim injunction restraining the Russian Firm from proceeding with the arbitration in Moscow, the Apex Court has held as follows:-

"23. The next question is whether the High Court was justified in granting an interim injunction restraining the Russian Firm from proceeding with arbitration at Moscow. The position of the Russian Firm is that neither it nor the Foreign Trade Arbitration Commission of the U.S.S.R. Chamber of Commerce which is seized of the arbitration proceedings is amenable to the jurisdiction of the courts in India. The presence in India of the party sought to be injuncted is a condition pre-requisite for the grant of an injunction. Alternatively, the Indian Firm has been guilty of breach of the agreement to refer the matter to arbitration at Moscow and therefore it has disentitled itself to the exercise of the Court''s discretion in its favour in the matter of granting an injunction.

24. Now, it is common ground that the point about the Russian Firm having no representative in India was not agitated before the High Court. The position taken up in the plaint was that the Russian Firm was carrying on business in the U.S.S.R., and at Madras. The controversy before the High Court appears to have been confirmed only to what is stated in Para 5 of the counter-affidavit of the Russian Firm, namely, that in the presence of the Arbitration agreement in the contract entered into between the parties, the only proper remedy for the Indian Firm was to submit the disputes to the arbitration tribunal at Moscow.

25. The rule as stated in Halsbury''s Laws of England, Vol.21, at page 407, is that with regard to foreign proceedings, the court will restrain a person within its

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jurisdiction from instituting or prosecuting suits in a foreign court whenever the circumstances of the case make such an interposition necessary or proper. This jurisdiction will be exercised whenever there is vexation or oppression. In England, courts, have been very cautious and have largely refrained from granting stay of proceedings in foreign courts (Cheshire''s Private Industrial Law, 7th Ed., pages 108-110). The injunction is, however, issued against a party and not a foreign court.

26. Although it is a moot point whether Section 35 of the Arbitration Act, 1940, will be applicable to the present case in Shiva Jute Baling Limited Vs. Hindley and Company Limited, , it was assumed that Section 35 applied to protocol arbitration and the principle embodied in that section cannot be completely ignored while considering the question of injunction. According to that section no reference nor award can be rendered invalid by reason only of the commencement of legal proceedings upon the subject of the reference, but when legal proceedings upon the whole of the subject-matter of the reference have been commenced between all the parties to the reference and a notice thereof has been given to the arbitrators or umpire, all further proceedings in a pending reference shall, unless a stay of proceedings is granted u/s 34, be invalid.

27. If the venue of the arbitration proceedings had been in India and if the provisions of the Arbitration Act of 1940, had been applicable, the suit and the arbitration proceedings could not have been allowed to go on simultaneously and either the suit would have been stayed u/s 34 or if it was not stayed, and the arbitration were notified about the pendency of the suit, they would have had to stay the arbitration proceedings because u/s 35 such proceedings would become invalid if there was identity between the subject-matter of the reference and the suit. In the present case, when the suit is not being stayed u/s 3 of the Act it would be contrary to the principle underlying Section 35 not to grant an injunction restraining the Russian Firm from proceeding with the arbitration at Moscow. The principle essentially is that the arbitrators should not proceed with the arbitration side by side in rivalry or in competition as if it were a Civil Court."

39. As per the above decision, there cannot be any doubt that order of injunction can be granted even with respect to arbitration proceedings. But, even from the above said decision, it is clear that the petition for injunction was entertained in a suit and such an order of injunction was granted only because the action of the respondents therein was vexation or oppression and it is held that while granting such order, courts should be very cautious and have largely refrained from granting stay of proceedings of foreign courts. The Apex Court also found that such an order is necessary on the basis of the principle that the arbitrators should not proceed with the arbitration, side by side in rivalry or on competition as if it were a Civil Court. In the present case, such a situation is not available. The proceedings taken by the respondents 1 and 2 cannot be said as vexation or oppression. It is relevant to mention here that the amount which is due from the TNEB, is not in dispute and availability of clause 16.2 in the PPA to invoke the

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arbitration proceedings is also not in dispute. The respondents, as minority shareholders, took derivative action initiating arbitration proceedings in accordance with clause 16.2 of the PPA, that too, only after the Company failed to invoke such arbitration proceedings, though such right is given under clause 16.2 of the PPA especially when the TNEB failed to pay the amount and also not complied with payment security mechanism as contemplated under the PPA to recover the money to the appellant-company which is due from the TNEB. There is no parallel proceeding with respect to the same, is pending in India so as to prevent the respondents for initiating arbitration proceedings. So, the decision reported in the decision in V.O. Tractoroexport, Moscow Vs. Tarapore and Company and Another, cannot be relied on to say that in the present case CLB should have granted injunction.

40. In the decision in Modi Entertainment Network and Another Vs. W.S.G. Cricket PTE. Ltd., , the Apex Court had dealt with similar issue regarding the power of issuing anti suit injunction to restrict the proceedings in foreign court. In para 24 of the decision, the Apex Court has laid down the principles in exercising the discretion to grant injunction which read as follows:-

"24. From the above discussion the following principles emerge:

(1) In exercising discretion to grant an anti-suit injunction the court must be satisfied of the following aspects:

(a) the defendant, against whom, injunction is sought, is amendable to the personal jurisdiction of the court;

(b) If the injunction is declined, the ends of justice will be defeated and injustice will be perpetuated; and

(c) the principle of comity - respect for the court in which the commencement or continuance of action/proceeding is sought to be restrained - must be borne in mind.

(2) In a case where more forums than one are available, the court in exercise of its discretion to grant anti-suit injunction will examine as to which is the appropriate forum (forum conveniens) having regard to the convenience of the parties and may grant anti-suit injunction in regard to proceedings which are oppressive or vexatious or in a forum non-conveniens.

(3) Where jurisdiction of a court is invoked on the basis of jurisdiction clause in a contract, the recitals therein in regard to exclusive or non-exclusive jurisdiction of the court of choice of the parties are not determinative but are relevant factors and when a question arises as to the nature of jurisdiction agreed to between the parties the court has to decide the same on a true interpretation of the contract on the facts and in the circumstances of each case.

(4) A court of natural jurisdiction will not normally grant anti-suit injunction against a defendant before it where parties have agreed to submit to the

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exclusive jurisdiction of a court including a foreign court, a forum of their choice in regard to the commencement or continuance of proceedings in the court of choice, save in an exceptional case for good and sufficient reasons, with a view to prevent injustice in circumstances such as which permit a contracting party to be relieved of the burden of the contract; or since the date of the contract the circumstances or subsequent events have made it impossible for the party seeking injunction to prosecute the case in the court of choice because the essence of the jurisdiction of the court does not exist or because of a vis major or force majeure and the like.

(5) Where parties have agreed, under a non-exclusive jurisdiction clause, to approach a neutral foreign forum and be governed by the law applicable to it for the resolution of their disputes arising under the contract, ordinarily no anti-suit injunction will be granted in regard to proceedings in such a forum conveniens and favoured forum as it shall be presumed that the parties have thought over their convenience and all other relevant factors before submitting to the non-exclusive jurisdiction of the court of their choice which cannot be treated just as an alternative forum.

(6) A party to the contract containing jurisdiction clause cannot normally be prevented from approaching the court of choice of the parties as it would amount to aiding breach of the contract; yet when one of the parties to the jurisdiction clause approaches the court of choice in which exclusive or non-exclusive jurisdiction is created, the proceedings in that court cannot per se be treated as vexatious or oppressive nor can the court be said to be forum non-conveniens.

(7) The burden of establishing that the forum of choice is a forum non-conveniens or the proceedings therein are oppression or vexatious would be on the party so contending to aver and prove the same."

41. The learned Senior Counsel appearing for the appellant-company submitted that the Apex Court in the above case has come to the conclusion that there is no valid reason to grant anti-suit injunction and such conclusion is on the basis of the facts of that case, and also no valid reason was given or merits were not made out to grant such injunction. But the principles laid down in Modi Entertainment Network and Another Vs. W.S.G. Cricket PTE. Ltd., , have to be relied on, regarding the issuance of anti-suit injunction and the same have to be applied to test the correctness of exercise of discretion by the CLB.

42. Learned Senior Counsel appearing for the appellant relied on the decision in Oil and Natural Gas Commission Vs. Western Company of North America, , in which the Apex Court, relying on the decision in V.O. Tractoroexport, Moscow Vs. Tarapore and Company and Another, and other decisions found, on the basis of the facts of that case, that the said case was one of those rare cases where the Court would be failing in its duty if it hesitates in granting the order. On that basis, learned Senior Counsel appearing for the appellant submitted that applying the said principle, the Company Law Board should have granted

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injunction as sought for. In the said case before the Apex Court, the respondent was restrained from proceeding further with an action instituted by it before the U.S. Court against the appellant-O.N.G.C. The appellant and the respondent entered into a drilling contract. The said contract provided for arbitration for any difference arising out of the agreement being referred to arbitrators, which is governed by the Indian Arbitration Act, 1940. In view of certain disputes, two Arbitrators and an Umpire were appointed. The Arbitrators informed the Umpire that they were unable to agree on the matters raised and consequently the Umpire entered into the arbitration and proceeded to declare his non-speaking award and passed the interim award. The respondent requested the Umpire to authorise one D.C.Singhania to file the award in the appropriate court in India. Such authorisation was granted and the award rendered by the Umpire was lodged in the Bombay High Court. Subsequently, the Umpire rendered a supplementary award as the final award. The same also was lodged in the High Court of Bombay by the Umpire at the instance of the respondent. The respondent lodged a plaint in the US District Court seeking an order of confirmation of the awards and a judgment for payment of interest until the date of the judgment and costs by ONGC. The appellant-ONGC filed a petition under Sections 30 and 33 of the Indian Arbitration Act, 1940 for setting aside the awards rendered by the Umpire and prayed for an interim injunction restraining the respondent from proceeding further with the action instituted in the US court. The Bombay High Court originally granted an ex parte interim injunction but subsequently vacated the same after hearing the parties. Aggrieved against the same, the ONGC approached the Apex Court and the Apex Court while dealing with the said case, has held as follows:-

"18. In the result we are of the opinion that the facts of this case are eminently suitable for granting a restraint order as prayed for by ONGC. It is no doubt true that this Court sparingly exercises the jurisdiction to restrain a party from proceeding further with an action in a foreign court. We have the utmost respect for the American court. The question however is whether on the facts and circumstances of this case it would not be unjust and unreasonable not to restrain the Western Company from proceeding further with the action in the American court in the facts and circumstances outlined earlier. We would be extremely slow to grant such a restraint order but in the facts and circumstances of this matter we are convinced that this is one of those rare cases where we would be failing in our duty if we hesitate in granting the restraint order, for, to oblige the ONGC to face the aforesaid proceedings in the American court would be oppressive in the facts and circumstances discussed earlier. But before we pass an appropriate order in this behalf, we must deal with the plea that the High Court does not have the jurisdiction to grant such a restraint order even if the proceeding in the foreign court is considered to be oppressive. Counsel for the respondent has placed reliance on Cotton Corporation of India Limited Vs. United Industrial Bank Limited and Others, , in support of this plea. In Cotton Corporation case, the question before the court was whether in the context of

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Section 41(b) of the Specific Relief Act, the court was justified in granting the injunction. The said provision runs thus:

41. An injunction cannot be granted -

(b) to restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought;

This provision, in our opinion, will be attracted only in a fact-situation where an injunction is sought to restrain a party from instituting or prosecuting any action in a court in India which is either of co-ordinance jurisdiction or is higher to the court from which the injunction is sought in the hierarchy of courts in India. There is nothing in Cotton Corporation case which supports the proposition that the High Court has no jurisdiction to grant an injunction or a restraint order in exercise of its inherent powers in a situation like the one in the present case. In fact this Court had granted such a restraint order in V.O. Tractoroexport, Moscow Vs. Tarapore and Company and Another, , and had restrained a party from proceeding with an arbitration proceedings in a foreign country (in Moscow). As we have pointed out earlier, it would be unfair to refuse the restraint order in a case like the present one for the action in the foreign court would be oppressive in the facts and circumstances of the case. And in such a situation the courts have undoubted jurisdiction to grant such a restraint order whenever the circumstances of the case make it necessary or expedient to do so or the ends of justice so require. The following passage extracted from paragraph 1039 of Halsbury''s Laws of England, Vol.24 at page 579 supports this point of view:

With regard to foreign proceedings, the court will restrain a person within its jurisdiction from instituting or prosecuting proceedings in a foreign court whenever the circumstances of the case make such an interposition necessary or expedient. In a proper case the court in this country may restrain a person who has actually recovered judgment in a foreign court from proceeding to enforce that judgment. The jurisdiction is discretionary and the court will give credit to foreign courts for doing justice in their own jurisdiction.

It was because this position was fully realized that it was argued on behalf of the respondent that the action in the US court could not be considered as being oppressive to the ONGC. We have already dealt with this aspect and reached a conclusion adverse to Western Company. There is no merit in the submission that the High Court of Bombay has no jurisdiction in this behalf."

In the above said decision, the Apex Court has come to the conclusion that the order of injunction should be granted restraining the respondent from proceeding with in US court, on the ground that the Indian court had exclusive jurisdiction to grant such injunction and action taken by the respondent in the foreign court would be oppressive in the facts and circumstances of that case. The American court had no jurisdiction in the facts and circumstances of the case. Moreover, the action by the respondent before American court is in violation of the arbitration clause. Even in Modi''s case (supra), the Apex Court had referred to

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ONGC''s case and accepted the principles laid down in ONGC''s case and discussed the reason for the conclusion of the Apex Court in favour of granting injunction. So, the principles laid down even in ONGC''s case cannot lend any help to the appellant-company to substantiate their stand for getting injunction in the present case.

43. Even in SNI A''erospatiale v. Lee Kui Jak and another, 1987 All ER 3, similar view has been taken and the said decision has also been referred to and discussed in Modi''s case. The Privy Council in the said case had also laid down the principles to be applied by the court while granting injunction restraining foreign proceedings. In the said case, there was no jurisdiction agreement for resolution of disputes. In para 17 of the judgment in Modi''s case the Apex Court has dealt with the said judgment and so the facts of that case and the principles laid down therein supports the reasoning given by the CLB to reject the injunction as sought for by the appellant.

44. In the decision in CSR LTD. v. Cigna Insurance Australia Ltd., (1997) 146 ALR 402, it is held that the inherent power to grant anti-suit injunction is to be exercised when the administration of justice so demands or, in the context of anti-suit injunctions, when necessary for protection of courts'' own proceedings or processes and with respect to the same subject matter filed in this country and apart from that, a court may, in exercise of the power deriving from the Chancery Court, make orders in restraint of unconscionable conduct or the unconscientious exercise of legal rights. If the bringing of legal proceedings involves unconscionable conduct or the unconscientious exercise of a legal right, an injunction may be granted by a court in the exercise of its equitable jurisdiction in restraint of those proceedings. The said decision also has been referred to and dealt with by the Apex Court in Modi''s case. If the facts of the present case are applied to the principles laid down in that case, the CLB is correct in holding that there is no necessity for protection of its own proceeding or process as it has no jurisdiction to deal with the issue raised before the ICC Arbitral Tribunal. Learned Senior Counsel appearing for the appellant relying on the relevant prayers regarding arbitration proceedings in the Company Petition submitted that when the CLB was asked to decide about the necessity to invoke the arbitration clause, namely, 16.2 of the PPA,

the present action by the respondents is nothing but oppressive and the same issue is pending before the CLB. But the prayer sought for before the CLB is only to direct the Administrator to invoke clause 16.2 of PPA which means the Company has to initiate arbitration proceedings. But the proceeding taken by respondents 1 and 2 before the ICC Arbitral Tribunal is as a derivative action as minority shareholders. So, even if any order is passed, as suggested by the learned Senior Counsel appearing for the appellant, in the Company Petition, it does not affect the present proceedings taken by the respondents.

45. In the decision in Laker Airways Limited v. Sabena, Belgian World Airlines, 1984 U.S. App. LEXIS 24811, the United States Court of Appeals for the District

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of Columbia Circuit, while dealing with the limits of Federal Court''s power to conserve its adjudicatory authority over a case filed with the court, instead of actively raising all defensive claims in the Federal court, the named defendants initiated suits in foreign tribunals for the sole purpose of terminating the federal court''s adjudication of the litigation. It is also found that the issue raised in two different courts represents a head-on collision between the diametrically opposed antitrust policies of the United States and United Kingdom. While analysing the said situation, it is held as follows:-

"It is well settled that English and American courts have power to control the conduct of persons subject to their jurisdiction to the extent of forbidding them from suing in foreign jurisdictions. However, the fundamental corollary to concurrent jurisdiction must ordinarily be respected: Parallel proceedings on the same in personam claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as res judicata in the other. The mere filing of a suit in one forum does not cut off the preexisting right of an independent forum to regulate matters subject to its prescriptive jurisdiction. For this reason, injunctions restraining litigants from proceeding in courts of independent countries are rarely issued.

.. .. ..

A second reason cautioning against exercise of the power is avoiding the impedance of the foreign jurisdiction. Injunctions operate only on the parties within the personal jurisdiction of the courts.

However, they effectively restrict the foreign courts ability to exercise its jurisdiction. If the foreign court reacts with a similar injunction, no party may be able to obtain any remedy. Thus, only in the most compelling circumstances does a court have discretion to issue an anti-suit injunction.

There are no precise rules governing the appropriateness of anti-suit injunctions. The equitable circumstances surrounding each request for an injunction must be carefully examined to determine whether, in light of the principles outlined above, the injunction is required to prevent an irreparable miscarriage of justice. Injunctions are most often necessary to protect the jurisdiction of the enjoining court, or to prevent the litigant''s evasion of the important public policies of the forum."

The above said decision was referred to by the United States Court of Appeal for the First Circuit in Hans A. Quaak Et AL, v. Klynveld Peat Marwick Goerdeler Bedri Jfsrevisoren, 2004 US App.LEXIS 4352. In the said decision, two basic views, namely, liberal approach and the conservative approach in granting anti-suit injunction with reference to International proceedings have been discussed. While doing so, it is observed as follows:-

"We reject the liberal approach. We deem international comity an important integer in the decisional calculus - and the liberal approach assigns too low a

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priority to that interest. In the bargain, it undermines the age-old presumption in favor of concurrent parallel proceedings - a value judgment that leaves us uneasy - and presumes that pubic policy always favors allowing a suit pending in an American court to go forward without any substantial impediment. To cinch matters, this approach gives far too easy passage to international antisuit injunctions. We understand that the judicial process is a cornerstone of the American way of life - but in an area that raises significant separation of powers concerns and implicates international relations. We believe that the law calls for a more cautious and measured approach.

The conservative approach has more to commend it. First, it recognizes the rebuttable presumption against issuing international antisuit injunctions (and, thus, honors the presumption favoring the maintenance of parallel proceedings). Second, it is more respectful of principles of international comity. Third, it compels an inquiring court to balance competing policy considerations. Last - but far from least - it fits snugly with the logic of Canadian Filters, in which we said that issuing an international antisuit injunction is a step that should "be taken only with care and great restraint" and with the recognition that international comity is a fundamental principle deserving of substantial defence.

.. .. .. In order to provide guidance for the district courts, we spell out the manner in which our preferred approach operates. The gatekeeping inquiry is, of course, whether parallel suits involve the same parties and issues. Unless that condition is met, a court ordinarily should go no further and refuse the issuance of an international antisuit injunction. See e.g., China Trade, 837 F.2d at 36, Laker Airways, 731 F.2d at 928; see also George A. Bermann. The Use of Anti-Suit Injunctions in International Litigation, 28 Colum, J. Transnat''l L. 589, 626 (1990) (stating that courts generally "will not consider issuing anti-suit injunctions" unless there are "parallel local and foreign actions between the same parties over the same claim"). If - and only if - this threshold condition is satisfied should the court proceed to consider all the facts and circumstances in order to decide whether an injunction is proper. In this analysis, considerations of international comity must be given substantial weight - and those considerations ordinarily establish a rebuttable presumption against the issuance of an order that has the effect of halting foreign judicial proceedings."

46. Learned Senior Counsel appearing for the appellant submitted that the appellant-company can sustain their petition for injunction even without filing a counter claim. In support of his submission, learned Senior Counsel relied on the decision of the learned single Judge of the Karnataka High Court reported in Suganda Bai v. Sulu Bai, AIR 1975 Knt. 137, in which it is held as follows:-

"3. Now the principles, under which a defendant may seek and obtain an order of temporary injunction against the plaintiff, are stated in Collison v. Warren, (1901) 1Ch 812 where Buckley, J., after referring to a number of earlier decisions of the English Courts, quoted Lopes, LJ, in (1824) 2 Ch 541 545:-

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"The question is this - whether the defendant can move for an injunction against the plaintiff without filing a counter-claim or issuing a writ in a cross-action. In my opinion, he can in some cases, but only in cases where the defendant''s claim to relief arises out of the plaintiff''s cause of action, or is incidental to it."

also referred to the decision of Davey, L.J., in the same case wherein it is stated thus:-

"In my opinion, it must be relating to or arising out of the relief sought in the action which is before the Court, and that any other injunction cannot properly be granted in the action."

The principles stated in the above decision have been followed by this Court and it is only in cases where the defendants'' claim to relief arises out of the plaintiff''s cause of action or is incidental to it that he can ask for a temporary injunction against the plaintiff.

4. In the instant case, the cause of action for the plaintiff''s suit, as stated earlier arose in the year 1970, whereas the cause of action for the defendants arose in the year 1973. The two causes of action are different. Therefore, the courts below were wholly in error in granting temporary injunction prayed for by defendant 1."

47. Learned Senior Counsel appearing for the appellant also relied on the decision in Ramaiah & others v. Godappa & others, 1989 (1) Kar.L.J. 210, to substantiate the same contention as stated above. The decision in AIR 1975 Knt. 137 in the earlier paragraph has been referred to and the Division Bench in the decision in 1989 (1) Kar. L.J. 210 has agreed with the view of the learned single Judge rendered in AIR 1975 Knt. 137.

48. In the present case, the appellant''s claim before the CLB is not on the basis of cause of action arose in the Company Petition or incidental to it. As discussed above, the prayer in the Company Petition is on the basis of mismanagement. Incidentally respondents 1 and 2 have sought for direction to the administrator to invoke the arbitration clause available in the PPA. But the appellant now seeks an order of injunction to stall the proceedings taken on different capacity which is nothing to do with the prayer sought for in the main Company Petition and so the said decisions cannot be relied on to support the appellant''s case in this appeal.

49. Now we have to consider the issue raised here on the basis of the principles laid down in various decisions as to whether the CLB erred in not granting anti-suit injunction as prayed for by the appellant-company, restraining the respondents 1 and 2 from proceeding with the arbitration proceedings initiated by them before the ICC Arbitral Tribunal.

50. Though the relief of injunction as sought for against respondents 1 and 2 is amenable to personal jurisdiction of the CLB, on that basis only it cannot be said that the CLB is not correct in rejecting the petition seeking for anti-suit injunction. Since respondents 1 and 2 initiated arbitration proceedings only in the

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interest of the Company to recover the dues from the TNEB and also as contemplated in the PPA entered into between the appellant-company and the TNEB and not for personal interest or gain of respondents 1 and 2, it cannot be said that ends of justice would be defeated by not granting injunction as sought for. But, if injunction is granted, injustice would be perpetuated as the appellant-company has sought for injunction against respondents 1 and 2 from proceeding with arbitration proceedings even by taking derivative action as minority shareholders permanently, it amounts preventing respondents 1 and 2 from exercising their common law right which is available to them. Moreover, the appropriate forum to invoke arbitration proceedings under clause 16.2 of the PPA is the ICC Arbitral Tribunal in view of the specific contract between the appellant-company and TNEB and no such proceeding can be taken in India as it has been specifically excluded. To appreciate the above reasons, it is relevant to extract clause 16.2 of the PPA which reads as follows:-

"16.2 Arbitration of Disputes: In the event the Parties are unable to resolve any dispute pursuant to Section 16.1, then;

(a) Except as otherwise provided in this Agreement, any dispute, controversy, or claim arising out of or relating to this Agreement, or breach, termination or validity thereof, shall be finally settled by arbitration in accordance with this Section 16.2

(b) Notwithstanding Section 17.8 the arbitration shall be conducted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce (the "ICC") in effect on the date of this Agreement (the "Rules")

(c) There shall be three arbitrators of whom each Party shall select one. The two arbitrators thus appointed shall select the third arbitrator to act as chairman of the tribunal within thirty (30) days of selection of the second arbitrator. If the two Party-appointed arbitrators fails to agree on a third arbitrator, the ICC Court of Arbitration shall make such appointment.

(d) At any oral hearing of evidence in connection with the arbitration, each Party thereto or its legal counsel shall have the right to examine its witnesses and to cross-examine the witness of an opposing Party. No evidence of any witness shall be presented in written form unless the opposing Party or Parties shall have the opportunity to cross-examine such witness, except as the Parties to the dispute otherwise agree in writing or except under extraordinary circumstances where the interest of justice require a different procedure.

(e) The arbitration shall be held in London, England. Notwithstanding Section 17.8 the laws of England shall govern the validity, interpretation, construction, performance and enforcement of the provisions contained in this Section 16.2. The arbitration proceedings shall be conducted, and the award shall be rendered, in the English language.

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(f) This Agreement and the rights and obligation of the Parties shall remain in full force and effect pending the award in any arbitration proceedings hereunder.

(g) The costs of arbitration shall be determined by the arbitral tribunal in accordance with the Rules.

(h) The Indian Arbitration Act (Act No.X (10) of 1940: The Arbitration and Conciliation Act, 1996, shall not be applicable to this arbitration provision, to any arbitration proceeding or award rendered hereunder, or to any dispute or difference arising out of or in relation to this Agreement. Any award rendered hereunder shall be a "foreign award" within the meaning of the Indian Foreign Awards Act, 1961.

(i) The Parties hereby waive any rights of application or appeal to the courts of India to the fullest extent permitted by law in connection with any question of law arising in the course of arbitration or with respect to any award made."

Since respondents 1 and 2 had approached only the ICC Arbitral Tribunal which is the forum of parties choice in which the exclusive jurisdiction is created, the proceedings before the ICC Arbitral Tribunal cannot per se be treated as vexatious or oppressive, nor the ICC Arbitral Tribunal be said to be the forum non-conveniens and in view of the above said clause 16.2 of the PPA, CLB cannot decide the said issue which has been raised before the ICC Arbitral Tribunal and so the CLB is not having jurisdiction to decide the said issue. In view of the fact that the ICC Arbitral Tribunal is having natural and exclusive jurisdiction and a forum of choice of the parties, no anti-suit injunction can be granted in respect of proceedings taken before the natural and exclusive jurisdiction of the forum of choice of parties by the forum, namely, the CLB, which is not having jurisdiction to decide the issue raised before the ICC Arbitral Tribunal especially when the CLB is not even having concurrent jurisdiction to decide that issue in question. If injunction as sought for is granted, it amounts to aiding breach of contract, namely, clause 16.2 of the PPA, as the proceedings have been taken before the ICC Arbitral Tribunal which is having natural and exclusive jurisdiction for which the parties have specifically consented and the CLB which is not having natural jurisdiction with respect to the issue raised before the ICC Arbitral Tribunal. When the CLB is not having jurisdiction to decide the issue raised before the ICC Arbitral Tribunal, the question of protecting the CLB''s own proceeding and process does not arise. On the basis of the facts set out earlier, it is clear that there is no duplication of parties and issues both before the CLB and before the ICC Arbitral Tribunal. As rightly found by the CLB, TNEB is not a party before the CLB, but it is a party before the ICC arbitral tribunal. Moreover, TNEB cannot be a party before the CLB, as no relief can be granted by the CLB against the TNEB. Furthermore, the courts have taken the views that the arbitration proceedings should not be stopped from proceeding further, but, on the other hand, the said proceedings should be completed at an early date. So, seeking an anti-suit injunction by the appellant-company is contrary to the settled principles of law. In view of the reasons given, there cannot be any irreparable or miscarriage of

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justice if injunction is granted. As respondents 1 and 2 have proceeded with the arbitration proceedings only for the benefit of the Company and consequently of the shareholders, by taking steps to recover huge amount from the TNEB, they are not asking any personal benefit out of the same. Respondents 1 and 2 have taken steps, which would have been taken by the Company. In the present case, it cannot be said that there is a multiplicity of proceedings both efore the CLB and ICC Arbitral Tribunal as the scope of the proceedings before them are different and each proceeding was taken with the respective forum which is having exclusive jurisdiction on the subject raised before it. Moreover, the appellant-company has not come forward with necessary pleadings to grant anti-suit injunction by the CLB, which are required to establish the necessary facts to grant such order. In view of the above, it cannot be said that the CLB has committed error in not granting injunction as prayed for by the appellant-company. The CLB had rightly exercised its discretion in not exercising its inherent power in favour of the appellant-company and travelled on the carpet provided for it and so no interference is warranted by this Court.

51. Point No.2:- Though this issue is not very much relevant in view of the findings given earlier regarding jurisdiction of the CLB, we are inclined to deal with the same as the same has been argued elaborately. A shareholders agreement was entered into on 24th November 1998 among respondents 1 to 4, and the appellant-company. Clause 14.3 of the said agreement which is put against respondents 1 and 2 reads as follows:-

"14.3. It is understood that the Parties are independent entities engaged in the conduct of their own business. Except as expressly provided for herein, this Agreement shall not constitute any Party as the legal representative or agent of any other party for any purpose whatsoever, and no Party shall have the right or authority to assume, create, or incur any liability or obligation of any kind, express or implied, in the name of or on behalf of any other Party. If any party provides services or supplies products or technology to the Company or to the any Party, such Party does so as an independent contractor engaged in its own business."

The above said clause prohibits any party to act as a legal representative or agent or any other party for any purpose whatsoever and no party shall have the right to assume, create or incur any liability or obligation of any kind express or implied in the name of or on behalf of any other party. This clause is relied upon by the appellant-company to say that respondents 1 and 2 have no authority or they are prohibited to take arbitration proceedings in the name of the appellant-company. The CLB rightly rejected the case of the appellant-company on the ground that the said clause cannot override the established common law right of the minority shareholders to take derivative action. Moreover, the issue regarding maintainability of request for arbitration at the instance of respondents 1 and 2 is pending before the ICC Arbitral Tribunal and so we are not inclined to deal with the issue on the basis of clause 14.3 of the shareholders agreement in detail in

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this appeal, as the CLB is not going to decide the same in the Company Petition filed by respondents 1 and 2 and they have proceeded with the arbitration proceedings not on the basis of a right arises under an agreement.

52. Learned Senior Counsel appearing for the appellant submitted that having sought for similar relief in the Company Petition and having failed in their attempt in getting interim orders to permit them to proceed with the arbitration proceedings, the Tribunal should have granted anti suit injunction as prayed for by the appellant-company, as the respondents 1 and 2 have taken the arbitration proceedings in spite of the orders rejecting their request for the same. On the contrary, Dr.Singhvi, learned Senior Counsel appearing for the respondents 1 and 2 submitted that the relief sought for in the Company Petition and the relief sought for by way of interim relief and also in C.A.No.38/2004 are only to direct the Administrator/directors to initiate arbitration proceedings. The proceedings now taken by the ICC Arbitral Tribunal is only a derivative action by minority shareholders applying the exception to the principles laid down in Foss v. Harbottle (1843) 2 Hare 461 : 67 E R 189, and so it cannot be said that the orders of the CLB either stand in the way of the respondents 1 and 2 or prohibit to take such proceedings, especially when no positive direction is given not to proceed with the arbitration proceedings.

53. Respondents 1 and 2 are minority shareholders in the appellant-company having 46% of shares. The TNEB owes money to the appellant-company towards supply of power generated by the appellant-company. It is not in dispute that the TNEB has not provided the multi-layered payment security mechanism as mentioned in the PPA. Respondents 1 and 2 filed C.P.No.8/2004 before the CLB, Additional Principal Bench, Chennai, u/s 398 read with Sections 402, 403 and 235 of the Companies Act, 1956. It is no doubt true that in the said Company Petition, respondents 1 and 2 have come forward with the pleadings regarding non-compliance of the clauses mentioned in the PPA regarding the payment security mechanism by the TNEB and also the outstanding of a sum of Rs.468.88 crores (approximate) as on 31.1.2004. It is relevant to mention here that before filing the said Company Petition, the 1st respondent-company moved the Board for passing resolution to take action to recover money. Since they failed in their attempt, they approached the CLB. Apart from the above said fact, various averments regarding mismanagement have been averred in the Company Petition. On that basis, they have sought for appointment of an administrator for the appellant-company and also to vest with the powers to the said administrator to initiate and continue the proceedings against the TNEB for and on behalf of the Company with respect to the Company''s right under the PPA. Even while seeking for interim order, respondents 1 and 2 have prayed only to give direction to the administrator to invoke alternative dispute resolution mechanism. No doubt, in the order dated 9.3.2004, the CLB rejected such request for interim relief as sought for. Even in C.A.38/2004, respondents 1 and 2 prayed before the CLB to authorise the directors of the Company who are the nominee directors of respondents 1 and 2, to represent the company to initiate, institute and

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prosecute the alternate dispute resolution mechanism under the PPA on behalf of the Company against the TNEB. From the above said facts, it is clear that by taking the said proceedings, respondents 1 and 2 tried to get direction from the CLB to invoke alternative dispute resolution mechanism either by the administrator or by the directors of the Company though such directors are nominee directors of respondents 1 and 2. The administrator, if appointed, would amount to replacing the Board and so the above said prayers and orders passed by the CLB cannot be construed as if respondents 1 and 2 have come forward with the plea that they should be permitted to invoke alternative dispute resolution mechanism and so the action of respondents 1 and 2 in initiating such proceedings cannot be allowed to proceed further. The action that was sought to be taken against the TNEB is a right conferred under clause 16.2 of the PPA. Respondents 1 and 2 have approached the CLB for the above said reliefs and they have not sought for the relief to proceed with the alternate dispute resolution mechanism by themselves as minority share holders. The proceedings in question taken by respondents 1 and 2 invoking arbitration clause under the PPA before the ICC Arbitral Tribunal is on different capacity and on their own right. The proceedings pending before the CLB is not for recovering money from the TNEB itself. So merely because on the basis of the same facts respondents 1 and 2 have taken proceedings before the ICC Arbitral Tribunal, it cannot be said that the orders passed by the CLB would prevent respondents 1 and 2 from exercising their independent right as minority shareholders. We are not going into the question whether they can sustain the petition before the ICC Arbitral Tribunal as minority shareholders, as, such an issue has already been framed and it has to be gone into and decided by the ICC Arbitral Tribunal.

54. Respondents 1 and 2 are having two kinds of rights to get redress. With respect to breach of any clause in the PPA, as minority shareholders of the Company, they can approach the Company to proceed against the TNEB, for the breach. If it is not acceded to by the Company, then as minority shareholders, they can invoke their right in that capacity to get the relief for the benefit of the Company by way of derivative action. As rightly submitted by Dr.Singhvi, learned Senior Counsel appearing for respondents 1 and 2, only if the request made by respondents 1 and 2 to the Company to proceed against the TNEB is rejected, respondents 1 and 2 can invoke their right as minority shareholders.

55. So, the orders passed by the CLB rejecting the request of respondents 1 and 2 to direct the Company to initiate proceedings against the TNEB either through administrator or through directors cannot stand in the way of respondents 1 and 2 to take derivative action to safeguard their interest as minority shareholders. Even in the request for arbitration filed before the ICC arbitral tribunal, the copy of which is produced before us, it is stated that such a proceeding has been taken to protect the interest of the Company by the minority shareholders. Even in the petition filed in C.A.No.62/2004, in para 8, it is admitted that such action by the appellant-company was by way of derivative action. Learned Senior Counsel appearing for the appellant tried to impress upon this Court that a party

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who was not able to get permission from the CLB cannot be permitted to proceed with the same proceedings ignoring the orders passed by the CLB. If such a party, in this case, respondents 1 and 2, is given right to invoke such arbitration proceedings on different capacity and exercising different right, it cannot be said that the proceedings before the CLB seeking relief differently, cannot be put against respondents 1 and 2 as if they have ignored the orders of the CLB and proceeded with the proceedings before the ICC Arbitral Tribunal invoking arbitration clause under the PPA.

56. We are not now dealing with the maintainability of the request for arbitration in the name of the Company and not in the name of minority shareholders, as the said issue is pending before the ICC arbitral tribunal at the instance of the TNEB. It is also relevant to mention here that the TNEB has not raised any objection for arbitration. As a matter of fact, they have appointed their arbitrator and no proceedings before the CLB or Court are taken by the TNEB, questioning the invoking of arbitration proceedings by respondents 1 and 2.

57. In view of the above, we are of the considered view that there is no bar for respondents 1 and 2 to take proceedings to invoke the arbitration clause as minority shareholders by way of derivative action.

58. Against the order passed by the CLB, it is informed that respondents 1 and 2 have preferred appeal before this Court, but it was not prosecuted. Even then, in view of the above said discussion, the said fact cannot have so much importance.

59. The Rule in Foss v. Harbottle 1943 (2) Har 461 is to the effect that the Court will not interfere with the ordinary management of a Company acting within its powers and has no jurisdiction to do so at the instance of the shareholders. A shareholder is entitled to institute a suit to enforce his individual rights against the Company such as his right to vote, or his right to stand as a director of a Company at an election. If the shareholder however intends to obtain redress in respect of a wrong done to the Company or to recover monies as damages alleged to be due to the Company, the action should ordinarily be brought by the Company itself. So to enable a shareholder to institute a suit in the name of the Company in such a case, there must be the sanction of the majority for corporate action. This principle implies supremacy of the will of the majority. If the majority acts in an oppressive manner, it is not as if the minority are without a remedy. In the above said Foss v. Harbottle''s case at p.482,, Sir James Wigram, Vice-chancellor who delivered the judgment, observed as follows:-

"If a case should arise of injury to a corpn., by some of its members, for which no adequate remedy remained, except that of a suit by individual corporators in their private characters, & asking in such character the protection of those rights to which in their corporate character they were entitled, I cannot but think that the principle so forcibly laid down by Lord Cottenham in ''Wallworth v. Holt'' (1841) 4 Myl & Cr.619: 41 E R 238 & other cases would apply, & the claims of justice would be found superior to any difficulties arising out of technical rules

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respecting the mode in which corpns., are required to sue."

Subsequently, various decisions have recognised exceptions to what is conveniently known as the rule of Foss v. Harbottle (supra). The Division Bench of this Court in the decision in K.A.S. Mohammed Ibrahim Vs. Jaithoon Bivi Ammal, represented by her next friend and guardian, Shaik Dawood Rowther, , held as follows:-

"(9) The later decisions however have recognised exceptions to what is conveniently known as the rule in ''Foss v. Harbottle'', (1843) 2 Hare 461 : 67 E R 189. James L.J., in ''Mac Dougall v. Gardiner'', (1875) 1 Ch.D.13 : 45 L J Ch 27 considered the rule & stated the exceptions in the following passages at p.21 which has since become classic:

"I think it is of the utmost importance in all these companies that the rule which is well known in this Ct., as the rules in ''Mozley v. Alston'', (1847) 1 Ph 790: 61 L J Ch 217 ; & ''Lord v. Copper Miners'' Co.'', (1898) 2 Ph 740 : 2 De G & S 308 & ''Foss v. Harbottle'', (1843) 2 Hare 461 : 67 E R 189 should be always adhered to; that is to say, that nothing connected with internal disputes between the share-holders is to be made the subject of a bill by some one share-holder on behalf of himself & others, unless there be something illegal, oppressive, or fraudulent - unless there is something ''ultra vires'' on the part of the Co., ''qua Co.'' or on the part of the majority of the Co., so that they are not fit persons to determine it; but that every litigation must be in the name of the Co., if the Co., really desire it."

From this it follows that a share-holder or share-holders are entitled to bring an action (1) in respect of matters which are ''ultra vires'' the Co., & which the majority of share-holders were incapable of sanctioning; (see ''Burland v. Earle'', 1902 A C 83 : 71 L J P C 1; (2) where the act complained of constitutes a fraud on the minority, & (3) where the action of the majority is illegal. The decisions in ''Baillie v. Oriental Telephone & Electric Co. Ltd.'', 1915 1 Ch 503 : 84 L J Ch 409 & ''Cotter v. National Union of Seamen'', 1929 2 Ch 58 : 98 L J Ch 323 recognised a fourth exception where a special resolution was required by the Articles of the Co. & Co., obtained the assent of the majority to such special resolution by a trick, or even where a Co., authorised to do a particular thing only by a special resolution, does it without a special resolution duly passed as in such a case to deny a right of suit to the share-holders without using the name of the Co., would in effect result, the Co., doing the thing by an ordinary resolution. ...."

Though the learned Senior Counsel appearing for the appellant submitted that the request for arbitration was not filed on behalf of the minority shareholders and it is only by the appellant-company and so respondents 1 and 2 cannot maintain such a petition, as stated already, the maintainability of such petition at the instance of respondents 1 and 2 need not be gone into, as the very question is raised before the ICC Arbitral Tribunal and pending. But the fact remains, the

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proceedings were taken by way of derivative action by minority shareholders, namely, respondents 1 and 2, which is permissible in law, though we are not going into the correctness of the form in which such a request for arbitration was made.

59. The Learned Senior Counsel appearing for the appellant-company relied on the principle of Res judicata in support of his submission that the proceedings taken by respondents 1 and 2 before the ICC Arbitral Tribunal cannot be allowed to proceed with. The principles of resjudi cata is based on the need of giving a finality to the judicial decisions. What it says that once a resjudi cata is judicata, it shall not be adjudged again. This principle of resjudi cata is embodied in relation to suits under Sec. 11 of the Code. But, even where Sec. 11 of the Code does not apply, the principles of resjudi cata has been applied by Courts for the purpose of achieving finality in litigation.

60. To rely upon the principles of resjudi cata, the following conditions should exist:-

(a) The matter directly and substantially in issue in the subsequent proceedings must be directly and substantially in issue in the former proceedings;

(b) The former proceeding must be between the same parties or between the parties under whom they or any of them claim;

(c) Such a party must be litigating under the same title in the former proceeding;

(d) If the Court which dealt with the earlier proceeding is not competent to decide the subsequent proceedings for want of pecuniary jurisdiction till it cannot be a ground for holding that the decision of the former Court is not res judicata;

(e) Such a matter in issue in the subsequent proceeding must have been heard and finally decided in the earlier proceeding.

Unless the above conditions are satisfied, it cannot be said that the subsequent proceedings taken by the respondents 1 and 2 do constitute res judicata. In the present case, as rightly submitted by the learned Senior Counsel appearing for the respondents 1 and 2, there is no specific plea regarding res judicata and the CLB cannot deal with the issue raised before the ICC Arbitral Tribunal, and the TNEB is also not a party before it. Moreover, even according to clause 16.2 of the PPA, only the ICC Arbitral Tribunal alone can deal with the arbitration and Indian Courts have been specifically excluded the jurisdiction. Such a clause of exclusive jurisdiction with the ICC Arbitral Tribunal with reference to arbitration was agreed upon between the appellant and the TNEB.

61. The maxim "no man should be vexed twice over the same cause" (memo debt Bis Vexari Prouna Et Eadem Causa) is recognised to be a principle of law which has to be given effect to and followed without being undully restricted by the terms of the statute as enacted in Sec. 11 of the CPC. The plea of of res judicata will apply only to the orders of the court or forum having concurrent

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jurisdiction to stay the subsequent proceedings, if the order or judgment of the court of exclusive jurisdiction was directly on the point, and the same matter between the parties. It is conclusive upon the same or between the same parties if the issue goes before another court even for a different purpose.

62. In the decision in Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another, , the Apex Court has dealt with the principle of Res judicata, as follows:-

"(7) The principle of res judicata is base on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and furture litigation. When a matter - whether on a question of fact or a question of law - has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in S. 11 of the Code of Civil Procedure; but even where S. 11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.

(8) The principle of res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings. Does this however mean that because at an earlier stage of the litigation a court has decided an interlocutory matter in one way and no appeal has been taken therefrom or no appeal did lie, a higher court cannot at a later stage of the same litigation consider the matter again?"

63. Even in the decision in Dhanwanti Joshi Vs. Madhav Unde, , the Apex Court had applied the principles of Res judicata to the interlocutory orders and held as follows:-

"21. It is no doubt true that orders relating to custody of children are by their very nature not final, but are interlocutory in nature and subject to modification at any future time upon proof of change of circumstances requiring change of custody but such change in custody must be proved to be in the paramount interests of the child (Rosy Jacob Vs. Jacob A. Chakramakkal, . However, we may state that in respect of orders as to custody already passed in favour of the appellant the doctrine of res judicata applies and the Family Court in the present proceedings cannot re-examine the facts which were formerly adjudicated between the parties on the issue of custody or are deemed to have been adjudicated. There must be proof of substantial change in the circumstances presenting a new case before the court. It must be established that the previous arrangement was not conducive to the child''s welfare or that it has produced

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unsatisfactory results. Ormerod, L.J., pointed out in S v.W, (1981) 11 F L 81 that

"the status quo argument depends for its strength wholly and entirely on whether the status quo is satisfactory or not. The more satisfactory the status quo, the stronger the argument for not interfering. The less satisfactory the status quo, the less one requires before deciding to change."."

64. The respondents 1 and 2 have not sought for any relief similar to the relief sought for before the ICC Arbitral Tribunal. To take derivative action by minority shareholders, no permission from CLB is necessary as the said action is distinct and separate from the proceeding pending before the CLB. The respondents 1 and 2 have come forward with the prayer seeking a direction to appoint administrator for the purpose of invoking clause 16.2 of the PPA or to permit the directors mentioned in the petition to invoke clause 16.2 of the PPA. They have not sought for, before the CLB, to appoint arbitrator, which can be done only as per clause 16.2 of the PPA. All these steps are being taken by respondents 1 and 2 only to safeguard the interest of the appellant-company and according to respondents 1 and 2, if the proceedings are not initiated in time, it would become time-barred. Though there is a dispute regarding the period of limitation, we need not decide the said issue in this appeal. From the above, it is clear that the appellants have not satisfied any one of the conditions mentioned above to sustain their claim that the respondents are estopped from taking proceedings before the ICC Arbitral Tribunal in view of the order passed by the CLB.

65. The learned Senior Counsel appearing for the appellant referred to an example more than once in support of his submission that the respondents 1 and 2 shall not be permitted to proceed with the proceedings pending before the ICC Arbitral Tribunal. According to him, if a petition is filed by a person seeking permission to go to Bombay and if it is refused, he cannot go to Bombay at all. But, we have to see on what capacity he sought for permission. If he sought for permission to go to Bombay in his individual capacity and even if it is refused, it cannot be said that there is a prohibition against him to go to Bombay, if he goes to Bombay on different capacity. So, the said example is not applicable to the facts of the present case.

66. In the present case, two remedies are available to the respondents. (1) Seeking a direction to take arbitration proceedings by the Company (either through administrator or directors) itself as a regular and normal action under the PPA and (2) as minority shareholders. by way of derivative action invoking arbitration clause. In this case, the respondents 1 and 2 have invoked their first right before the CLB and the second right before the ICC Arbitral Tribunal.

67. Moreover, the appellant-company did not file Application in C.A.No.62/2004 on the ground that respondents 1 and 2 have violated the orders of the tribunal and so the injunction should be granted. The appellant-company mentioned the said facts regarding the orders passed by the CLB only as a passing reference.

68. In view of the above, the submission made by the learned Senior Counsel

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appearing for the appellant on the ground of res judi- cata, we are not inclined to interfere with the order passed by the CLB on that ground.

69. Point No.3:- It is relevant to mention here that the respondents 1 and 2 filed a Company Petition in C.P.No.8/2004 u/s 398 read with Section 402, 403 and 235 of the Companies Act seeking various reliefs as mentioned in the petition. The appellant-company filed C.A.No.62/2004 seeking an order of injunction restraining the respondents 1 and 2 from proceeding with the ICC Case No.13218/MS, pending before the ICC Arbitral Tribunal, Paris and restraining the respondents 1and 2 from initiating any derivative action on behalf of the appellant-company. The said petition, namely, C.A.No.62 of 2004 is filed in C.P.No.8/2004, filed by the respondents 1 and 2. The main reason set out in the application is, even before the main Company Petition in C.P.No.8/2004 is not disposed of, respondents 1and 2 have initiated derivative action against the TNEB, that too in the name of the appellant-company without any appropriate authorisation as per the statutory requirement and so the civil courts can restrain a party from instituting proceedings in foreign jurisdiction when a particular issue is already pending before the Courts of India and the CLB would have the same power as the civil court to grant anti suit injunction where proceedings initiated in a foreign jurisdiction are wholly illegal and cause serious prejudice to the interest of the company. From the above pleadings in C.A.No.62/2004, we can set out the basis on which the said application is filed:-

(1) The minority shareholders/respondents 1 and 2 initiated derivative action against the TNEB, in the name of the appellant-company without any appropriate authorisation as per the statutory requirement;

(2) Civil courts are having jurisdiction to restrain such a party to institute proceedings in foreign jurisdiction;

(3) Such a derivative action cannot be taken when the decision of the Board of Directors was not to initiate proceedings against the TNEB.

(4) Since the proceeding initiated in the foreign jurisdiction are wholly illegal and cause serious prejudice to the interest of the Company, the injunction should be granted;

The above said basis on which the application is filed is only relying on the facts which has been done subsequent to the filing of the Company Petition. The cause of action to file the above C.A.No.62/2004 arises after the filing of C.P.No.8/2004 and orders passed in the Company Petition and Company Application. Even on this ground, the appellant-company cannot sustain their petition.

70. In C.P.No.8/2004, by way of passing reference, the orders dated 9.3.2004 and 25.3.2004 have been mentioned and the appellant-company has not relied on the said orders heavily to insist before the CLB to grant anti suit injunction. But the appellant-company has put forth the case mainly on the ground that the Board of Directors have decided to keep cordial relationship with the TNEB,

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without taking any action regarding arbitration and not to insist the payment security mechanism and so the proceedings initiated by the respondents 1 and 2 are illegal and cause serious prejudice to the interest of the Company. Mainly on that basis, the injunction was sought for. The subject matter in the said application is nothing to do with the main Company Petition. Therefore the appellant-company should have taken separate proceedings if they are entitled in law and they should not have approached the CLB by way of interlocutory application that too in the Company Petition filed by the respondents. Though the learned Senior Counsel appearing for the appellant during the course of arguments has mainly submitted that respondents 1 and 2 have ignored the orders of the CLB, they have approached the CLB for injunction,not on the basis of any such pleading in the Company Application, except to the extent as stated above.

71. Moreover, the nature of prayer sought for in the application in C.A.No.62/2004 is not temporary in nature but it is of permanent nature. Even with respect to clause (b) of the prayers, the same cannot be entertained and if such prayers are granted, it would amount to taking away the valuable right of respondents 1 and 2 as minority shareholders. If such reliefs sought for are given, respondents 1 and 2 would become remediless. So such prayers cannot be construed as interim prayers and such petition in C.P.No.8/2004 before the CLB cannot be sustained.

72. Even with respect to the prejudice of the company if the arbitration is allowed to be proceeded with, Mr.Udaya Holla, the learned Senior Counsel appearing for the appellant submitted that respondents 1 and 2 should not be allowed to proceed with the arbitration proceedings which are detrimental to the interest of the Company. According to him, when the Company is not willing to take arbitration proceedings on the basis of commercial decisions, minority shareholders cannot be allowed to take arbitration proceedings. According to him, even other creditors of the Company are supporting the decision of the Company in this regard. He also submitted that since the TNEB is the sole purchaser of power supply generated by the appellant, if the appellant-company antagonise the TNEB, there is a possibility of refusing to purchase the power from the TNEB and thereby the appellant-company has to close down the industry. Learned Senior Counsel cited some of the example regarding such action taken by the TNEB in various states. But, as rightly submitted by Dr.Singhvi, learned Senior Counsel appearing for the respondents 1 and 2, in the Application filed in C.A.No.62/2004, it is only stated as follows:-

"The Hon''ble Board would have the same power as civil courts to grant anti-suit injunction where the proceedings in a foreign jurisdiction are wholly illegal and "cause serious prejudice to the interest of the Company" .

Except the said averment, no other pleading is available in the Application as suggested by the learned Senior Counsel appearing for the appellant-company. Even in the grounds filed before this Court, such a plea has not been made. So,

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such a factual submission made by the learned Senior Counsel appearing for the appellant-company cannot be taken into consideration to decide the issue in question for want of pleadings.

73. We, therefore, find ourselves in agreement with the view taken by the CLB as the appellant-company has not made out a case for anti-suit injunction and so the order of the CLB rejecting the prayer for anti-suit injunction need not be interfered with.

74. For all the reasons stated above, this Appeal is dismissed. But, there shall be no order as to costs. C.M.P.Nos.12274 to 12276 of 2004 are also dismissed.

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