

(2019) 01 DEL CK 0436

In the Delhi High Court

Case No : Arbitration Appeal (COMM.) 11, 12, 13, 14 Of 2018, Miscellaneous Application No. 3587, 3590 Of 2018

Royale India Rail Tours Ltd

APPELLANT

Vs

Cox & Kings India Ltd. & Anr

RESPONDENT

Date of Decision : 30-01-2019

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 8, 11, 16, 23(3)
Companies Act, 1956 — Section 36

Citation : (2019) 2 R.A.J. 747 : (2019) 257 DLT 132 : (2019) 4 AD(Delhi) 184

Hon'ble Judges : Navin Chawla, J

Bench : Single Bench

Advocate : Abhinav Vasisht, Abhimanyu Mahajan, Anubha Goel, Rishi Agrawala, Rajiv Nayar, Karan Luthra, Niyati Kohli, Saurabh Seth, K.V.Singh, Joy Basu, Saurav Agrawal, Madhav Misra, Arjun Masters, Ayush Gupta, Kanak Bose, Sudipto Sarkar, Saurav Agarwal, Madhav Misra

Final Decision : Dismissed

Judgement

1. The appellants, Cox and Kings India Ltd. (hereinafter referred to as the 'C&K') and Royale Indian Rail Tours Ltd. (hereinafter referred to as the 'RIRTL') have filed the present appeals, being Arb.A. (Comm.) No. 11/2018 and 14/2018 respectively challenging the order dated 10.12.2017 passed by the Arbitral Tribunal in AC-1840-A (Arbitration proceedings arising out of the Articles of Association of RIRTL) and Arb.A. (Comm.) No. 12/2018 and 13/2018 respectively challenging the order dated 10.12.2017 passed by the Arbitral Tribunal in AC-1811 (Arbitration proceedings arising out of the Joint Venture Agreement dated 10.12.2008), whereby the Arbitral Tribunal has allowed the applications filed by the respondent no.1 in all the appeals, Indian Railway Catering and Tourism Corporation (hereinafter referred to as 'IRCTC') under Section 16 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') deleting RIRTL from the array of parties in both the arbitration proceedings.

2. As the facts involved in both sets of appeals and even the question of law

raised by the parties are common to all the appeals, they are being disposed of by this common order.

3. On 10.07.2008, a Memorandum of Understanding (MoU) was executed between C&K and IRCTC for the purpose of pooling their respective experience, expertise and infrastructure and to form a Joint Venture Company to acquire, furnish, maintain, manage and operate luxury trains and with a view to market and sell holiday packages with such luxury trains as an integral part. Along with the said MoU were attached the 'Principles of the J.V. Agreement', Clause-S whereof contained an Arbitration Agreement in the following words:

"S. Arbitration

1. In the event that a matter remains unresolved at the level of the BoO, the same shall be referred for resolution to the JV/Shareholders Committee.

2. In the event of a dispute at the JV/Shareholders Committee or AGM levels the same shall be referred to arbitration by an independent Arbitrator jointly appointed by Second Party and IRCTC, under the Indian Arbitration and Conciliation Act, 1996, duly amended from time to time. The place of arbitration shall be New Delhi, India."

4. Thereafter RIRTL that is the JVC, was incorporated on 27.11.2008. Article 200 of the Articles of Association (AOA) contains the Arbitration Agreement and is reproduced hereinbelow:

"200. Reference to an Arbitrator

IRCTC and C&K will endeavour to resolve by mutual negotiation any dispute, differences, controversy or claims arising out of or in relation to, this Agreement, including the scope, validity; existence and the interpretation thereof, the activities performed hereunder, or for the breach thereof, arising between them in connection with this Agreement.

In the event that the dispute between the parties remains unresolved even after the reference to the Shareholders Committee, the same shall be referred to arbitration.

(a) Any and all disputes, differences, controversy or claims arising out of or in relation to, this Agreement including the scope, validity, existence and the interpretation thereof, the activities performed hereunder, or for the breach thereof, which cannot be satisfactorily resolved by mutual negotiation within ninety (90) days of issue of a notice by a party, shall be finally settled by arbitration, in accordance with the rules of Arbitration of Indian Council of Arbitration (ICA) under The Arbitration and Conciliation Act, 1996, including any statutory modifications, amendments, re-enactments thereof from-time to time, by reference to a single arbitrator where claim, if any, does not exceed Rs.1.00 crore. In other cases, if the parties so agree the dispute shall be referred to single arbitrator or in absence of such agreement to - three arbitrators, one to be

appointed by each party within in such period as prescribed under ICA Rules after the expiry of said ninety (90) days, and the presiding arbitrator shall be appointed in accordance with the provisions of ICA Rules.

(b) Any reference made to the arbitration tribunal under this Agreement shall not affect the performance of terms, other than the terms related to the matter under arbitration, by Parties under the Agreement.

(c) Such arbitration shall be conducted at New Delhi, India and the language of such arbitration proceedings shall be English. The arbitration agreement contained herein shall be governed by the laws in effect in India.

(d) The arbitration award shall be final. The Arbitrators shall have the power to order specific performance of this Agreement.

(e) This Agreement shall, subject to the dispute resolution procedure hereinabove set out, be subject to the exclusive jurisdiction of the Delhi Courts and shall be governed by and construed in accordance with the laws of India.

(f) The Parties shall bear their respective costs incurred in the arbitration, unless the arbitrators otherwise award or order, and shall share the costs of such arbitration proceedings equally unless otherwise awarded or fixed by Arbitrator Tribunal; and

(g) The Disputing Parties shall co-operate in good faith to expedite, to the maximum extent practicable, the conduct of any arbitral proceeding commenced pursuant to this Agreement. "

(Emphasis Supplied)

5. On 10.12.2008, IRCTC and C&K entered into a Joint Venture Agreement (JVA), Article 30 whereof again provided for an Arbitration Agreement between them and is reproduced hereinbelow:

"ARTICLE-30

DISPUTE RESOLUTION

30.1 Reference to an Arbitrator

IRCTC and C&K will endeavour to resolve by mutual negotiation any dispute, differences, controversy or claims arising out of or in relation to, this Agreement, including the scope, validity, existence and the interpretation thereof, the activities performed hereunder, or for the breach thereof, arising between them in connection with this agreement.

In the event that the dispute between the parties remains unresolved even after the reference to the shareholders committee, the same shall be referred to arbitration.

30.2 Any and all disputes, differences, controversy or claims arising out of or in

relation to, this Agreement, including the scope, validity, existence and the interpretation thereof, the activities performed hereunder, or for the breach thereof, which cannot be satisfactorily resolved by mutual negotiation within Ninety days of issue of a notice by a party, shall be finally settled by arbitration, in accordance with the rules of Arbitration of Indian Council of Arbitration (ICA) under The Arbitration and Conciliation Act, 1996, including any statutory modifications, amendments, re-enactments thereof from time to time, by reference to a single arbitrator where claim, if any, does not exceed Rs.1.00 crore. In other cases, if the parties so agree, the dispute shall be referred to single arbitrator or in absence of such agreement to three arbitrators, one to be appointed by each party within in such period as prescribed under ICA Rules after the expiry of said ninety days, and the presiding arbitrator shall be appointed in accordance with the provisions of ICA Rules.

30.3 Any reference made to the arbitration tribunal under this Agreement shall not affect the performance of terms, other than the terms related to the matter under arbitration, by parties under the Agreement.

30.4 Such arbitration shall be conducted at New Delhi, India, and the language of such arbitration proceedings shall be English. The arbitration agreement continued herein shall be governed by the laws in effect in India.

30.5 The arbitration award shall be final. The arbitrators shall have the power to order specific performance of this Agreement. 30.6 This Agreement shall, subject to the dispute resolution procedure hereinabove set out, be subject to the exclusive jurisdiction of the Delhi Courts and shall be governed by and construed in accordance with the laws of India.

30.7 The parties shall bear their respective costs incurred in the arbitration, unless the arbitrators otherwise award or order, and shall share the costs of such arbitration proceedings equally unless otherwise awarded or fixed by Arbitral Tribunal; and

30.8 The Disputing Parties shall cooperate in good faith to expedite, to the maximum extent practicable, the conduct of any arbitral proceedings commenced pursuant to this Agreement."

(Emphasis Supplied)

6. IRCTC vide its letter dated 12.08.2011 terminated the JVA alleging default on part of C&K. A copy of this notice was also marked to RIRTL.

7. On 07.09.2011, C&K sent a legal notice addressed to IRCTC as also RIRTL, invoking Arbitration Agreements contained in Clause-S of the MoU, Article 200 of the AOA and Article 30 of the JVA. In the said notice, it was inter alia stated as under:-

"Our clients under the former name Cox & Kings (I) Limited entered into a Memorandum of Understanding (MOU of 2008) with you IRCTC on the 10th July,

2008, pursuant to this MOU of 2008 our clients together with you IRCTC formed the Joint Venture Company incorporated under the name and style known as Royal India Rail Tours Limited (RIRTL). At the time of incorporation of the JVC RIRTL, our client and you IRCTC entered into a Memorandum & Articles of Association dated 24.11.2008 (AOA of 2008) and thereafter subsequent to the incorporation of the JVC RIRTL Joint Venture Agreement dated 10.12.2008 (JVA of 2008) was entered into by and between you IRCTC and our clients."

There have been disputes between you IRCTC and our clients and an attempt was being made to resolve the issues and disputes in terms of Article 30.1 of the said JVA of 2008.

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5. On 24.11.2008 the Joint Venture Company which has been envisaged under the MOU of 2008 was incorporated under the name and style better known as Royal India Rail Tours Ltd. (RIRTL). The Articles of Association and the Memorandum of the said Joint Venture Company was executed by C&K and IRCTC. Under Article 200 of the Articles of Association of RIRTL (AOA of 2008) if there were any dispute between the three parties, the same was required to be referred to arbitration. The Articles of Association of RIRTL also talk of a lease of the train by IRCTC.

6. On 10.12.2008, a JVA of 2008 was executed between C&K and IRCTC.

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The said JVA of 2008 contains mutual rights and obligations of IRCTC, C&K and RIRTL regarding the operations and management of the Super Luxury Train "Maharaja Express."

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Keeping with the disputes arising out of the above three agreements viz. MOU of 2008, AOA of 2008, JVA of 2008 and the records and documents thereto and the disputes raised by IRCTC and C&K and claims having been made by C&K for all the expenses incurred for the benefit and use of the Joint Venture Company RIRTL and the MAHARAJA EXPRESS (train) and its working capital, the above mentioned arbitration clauses of the agreements are hereby invoked. In any event as disputes have occurred between the parties and the said disputes being in excess of Rs.1 crore we propose to refer the disputes to Arbitration in terms of Clause 30.2. Amongst all other Claims and demands, our clients, inter alia, would be claiming specific performance of all the obligations of IRCTC in respect of the Maharaja Express in relation to the various agreements i.e. the MOU, JVA and the AOA, without limiting their right to make claims related thereto. Our clients would be praying for the setting aside of the two letters dated 12.8.2011 written by IRCTC. Our Clients shall be claiming all unpaid claims from the JVC-RIRTL and IRCTC. Our Clients would be claiming taxes and other pre-operative, operative and post-operative expenses. Our clients shall also be making other claims which

may be monetary in nature for your i.e. IRCTC's non-performances and breaches strictly in the alternative to the claim for specific performance.

Our clients state that Clause 30.2 contemplates parties attempting to agree to the appointment of Sole Arbitrator. We therefore nominate and appoint Hon^{ble} Mr. Justice Ajit P. Shah (Chief Justice of Delhi High Court "retired") as the Arbitrator for adjudicating all our client's disputes arising out of or in relation to the MOU, AOA and the JVA. Together with all other claims issues and disputes arising between both parties in case you so consent, Hon^{ble} Mr. Justice Ajit P. Shah (Chief Justice of Delhi High Court "retired") could be considered as the Sole Arbitrator, failing which you may nominate the second arbitrator in terms of Clause 30.2 and the Arbitration and Conciliation Act, 1996, who together may then appoint the third Arbitrator. The nomination would be governed by the provisions of Arbitration & Conciliation Act, 1996."

8. A reading of the above notice would clearly show that the arbitration proceedings were aimed at IRCTC alone with no claim made against RIRTL.

9. On 05.10.2011, IRCTC responded to the above notice inter alia claiming that RIRTL could not be made a party to such arbitration proceedings as even Article 200 of the AOA was an Arbitration Agreement only between IRCTC and C&K.

10. On 09.11.2011, C&K addressed a letter to the Indian Council of Arbitration (ICA), IRCTC and RIRTL seeking appointment of the Arbitral Tribunal and making a reference to Article 200 of the AOA and Article 30 of the JVA.

11. ICA in turn, vide letter dated 03.12.2011 informed IRCTC and RIRTL of the request, albeit making reference to only Article 30 of the JVA.

12. C&K thereafter filed a petition under Section 11 of the Act before this Court, being Arb.Pet. No.57/2012 again making reference to both, Article 30 of the JVA and Article 200 of the AOA. This petition was disposed of by this Court vide its order dated 20.07.2012, inter alia holding as under:-

"8. Inasmuch as the letter dated 9th November 2011, written by the Petitioner to the ICA, the IRCTC and RIRTL makes an express reference to the arbitration clause in the AOA, this Court is of the view that the said letter ought to be construed as an invocation by the Petitioner of the arbitration clause in the AOA as well. There is merit in the contention that the disputes between the Petitioner and IRCTC arise both under the JVA and the AOA, both of which contain a similar arbitration clause.

9. The Court enquired from the parties whether the claims of the Petitioner under the AOA can also be referred to a Tribunal comprised of the same members constituting the Tribunal constituted to consider the claims of the Petitioner arising out of the JVA. Counsel for the parties, on instructions, stated that they would have no objection if a Tribunal comprising of the same members is constituted to examine the claims of the Petitioner arising out of the AOA.

10. Accordingly this Court, in exercise of its powers under Section 11 of the Act, appoints the following arbitral Tribunal to consider the claims of the Petitioner arising under the AOA:

Mr. Justice D.P. Wadhwa Presiding Arbitrator Mr. Justice M.J. Rao Co-Arbitrator Mr. Justice A.P. Shah Co-Arbitrator

11. The Petitioner will file a separate statement of claim as regards the disputes arising out of the AOA before the above Tribunal within a period of two weeks from today. The pleadings will be completed and the further proceedings will take place under the ICA Rules.

12. It is made clear that this Court has not expressed any opinion on the contentions of the parties as regards the issue or whether RIRTL can be made a party to the arbitration proceedings or whether the claims under the JVA and AOA can be clubbed. These issues when raised before the Tribunal, will be considered by it in accordance with law."

13. In view of the above order, two arbitration proceedings were commenced with by the Arbitral Tribunal being AC-1840-A, in relation to Article 200 of AOA, and AC-1811, being in relation to Article 30 of the JVA.

14. While making a request to the ICA vide its letter dated 09.11.2011, C&K had also filed its Statement of Claim. In the Statement of Claim, it was inter alia stated as under by C&K:

"18. All the above ingredients for establishing a concluded lease agreement between the parties can be seen from the JVA of 2008 itself and therefore the Claimant submits that the JVA of 2008 itself constitutes a written agreement between the Parties /Partners of RIRTL.

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23. The JVA of 2008 contains a dispute resolution clause under Article 30 of the JVA of 2008. The Claimant submits that all efforts were taken to attempt to resolve the disputes under Article 30.1, but as will be set out in detail hereinafter, during the attempt to resolve the disputes with reference to the Shareholders Committee and through mutually agreed mediation proceedings carried out by three Independent Directors of the JVC RIRTL, the Claimant states that the concerned Director Tourism of IRCTC, who incidentally is one the nominee Director of IRCTC on the Board of Directors of RIRTL, by his email of 9th August 2011 addressed to all the Board of Directors of RIRTL clearly stated that RIRTL was a PPP and the business of RIRTL ought to be carried out jointly as PPP and having commenced the business of RIRTL at this stage the same could not be changed. The Claimant states and submits that despite this stand taken by the IRCTC by their email on the 9th of August, 2011 the IRCTC prematurely broke of the discussions / mediation proceedings and without arriving at any resolution IRCTC has unlawfully and wrongfully sought vide its letter dated 12th August 2011, to terminate the JVA of 2008, without there being a termination

clause. The Claimant submits that in the JVA of 2008 there is an intentional omission of a Termination Clause due to the equal financial participation of both partners i.e. the Claimant and IRCTC in RIRTL, with the Claimant in addition bringing in its experience and expertise in meeting up-to the needs and demands of the high networth international luxury tourist. Therefore specific performance of the JVA of 2008 ought to be granted by this Hon'ble Tribunal.

24. The JVC RIRTL comprising of both the Claimant on one hand and IRCTC on the other hand had executed the Memorandum of Association (hereinafter, 'MOA') and Articles of Association (hereinafter, 'AOA') and under the said AOA, there was an arbitration clause being Article 200. The Claimant submits that there were similar negotiations which will be referred to hereinafter to attempt a resolution of the disputes between the parties, but IRCTC prematurely walked out from the negotiations. Thereafter, IRCTC wrongfully terminated the JVA of 10/12/2008 by its letter of 12th August 2011. The Claimant submits furthermore that IRCTC by its letter dated 12 August 2011, addressed to JVC RIRTL with a copy to the Claimant sought to unlawfully and wrongfully withdraw the exclusive use of the Train from JVC RIRTL contrary to IRCTC's obligations under the JVA of 2008. The Claimant will subsequently address the reason why this letter was also wrongful and could not have been issued.

25. The Claimant submits that normally they would have commenced two separate arbitrations pertaining to the two separate arbitration clauses but in the light of what is stated herein below, submits that a composite single arbitration is now available to the Claimant. The Claimant submits that based on a recent judgment dated 14 October 2011 of the Hon'ble Supreme Court in P. Shah v BHH Securities, the Claimant submits that as the claim was in the nature a single claims and that there are in fact arbitration clauses in the JVA and the AOA, it is now permissible to combine both the arbitrations into a single clause. The Claimant in its request to the ICA, will also make this request. Furthermore, if this request is opposed by IRCTC, the Claimant will if necessary, make an application under Section 11 of the Arbitration and Conciliation Act, 1996 for a joinder of the claims."

15. In the Statement of Claim, however, there was no claim made by C&K against the RIRTL.

16. Pursuant to the order passed by this Court, C&K filed another Statement of Claim, now under the AOA. In the said Statement of Claim, again there was no hint of any dispute between C&K and RIRTL.

17. C&K thereafter filed an application seeking joinder of the claims under the JVA and the AOA. The said application, was however, dismissed by the Arbitral Tribunal by its order dated 22.04.2014.

18. IRCTC also filed applications under Section 16 of the Act claiming that there was no Arbitration Agreement in existence between IRCTC, C&K and RIRTL.

19. It is important to note here that RIRTL neither filed any reply to the Statement of Claim nor filed reply to these applications under Section 16 of the Act.

20. On the other hand, C&K filed its reply to the application of IRCTC under Section 16 of the Act *inter alia* stating as under:

"9. In response to para 5, the Claimant submits that these are all repeated allegations and the position is quite clear that the Claimant and Respondent No. 1 are parties to the JVA and that the Claimant, Respondent No. 1 and Respondent No. 2 are parties to the AOA. The Claimant has already made an application for joinder of the two claims failing which in any case the two separate claims will survive for consideration by the same Tribunal. The Claimant denies that the Tribunal has no jurisdiction to entertain the claim in its present form for the reasons set out above. The Claimant states that the present arbitration is a joinder of two separate arbitrations instituted by the Claimant under two arbitration agreements. The subject matter of the disputes that have arisen between the parties is such that it would be impossible to have separate adjudication of disputes that the Claimant has with the Respondent No. 1 and Respondent No.

2. The relief which is being sought against Respondent No. 1 will necessarily have a bearing on Respondent No. 2, which is nothing but a creation of the Claimant and Respondent No. 1 both being equal shareholders in the Respondent No. 2 company. The Claimant therefore requests this Hon'ble Tribunal to cut through the hyper-technical objections being raised by the respondent No. 1 simply to obstruct the course of justice. The Claimant further states that this Hon'ble Tribunal has jurisdiction over Respondent No. 2 as Article 200 of the Articles of Association bind the Respondent No. 2 company as much as it does the Claimant and Respondent No. 1. It is therefore of no consequence that the Respondent No. 2 is not signatory to the JVA. In light of the above, there is no merit in the Respondent No. 1's contention that the Respondent No. 2 must be deleted from the array of parties and the reliefs claimed with respect to Respondent No. 2 must also be denied."

21. On 25.03.2013, C&K filed an application seeking to amend its Statement of Claim(s) as also the replies to IRCTC's applications under Section 16 of the Act wishing to now claim that RIRTL had become a confirming party to the JVA and consequently was a party to the Arbitration Agreement contained in Article 30 thereof.

22. During the pendency of the above application, C&K filed another application claiming therein that RIRTL was a confirming party to the JVA and therefore, is also a party to Clause 30 of the same. This application, was however, withdrawn by C&K in the arbitration proceedings held on 20.04.2013.

23. By the order dated 30.04.2013, the Arbitral Tribunal dismissed the applications filed by C&K seeking amendment of its Statement of Claim and reply

to the applications under Section 16 of the Act holding as under:

"However, Respondent No.1 points out that prior to such proposed amendment, Claimant had taken a consistent stand that Respondent No.2 is not a party to the JVA or its arbitration clause. The Claimant's case was that Respondent No. 2 was a party to the AOA and therefore, it was a party to the Arbitration clause and the two arbitrations (being the JVA and AOA arbitrations) should be consolidated. This position of the Claimant remained unchanged for a period of over two years since disputes arose between the Parties and the same has been recorded in various correspondences. In this regard, Respondent No.1 has made reference to the Claimant's reply to the Respondent No.1's Section 16 application which contains a clear admission in paragraph 9, page 6, Volume 7 of the joint paper book that Respondent No.2 is not a party to the JVA.

In these circumstances, the Tribunal is of the view that the proposed amendment to paragraph No. 4 of the statement of claim is liable to be rejected.

As regard the Second Application, i.e. application filed by the Claimant under Section 23(3) of the A&C Act for amendment of the reply to application No.2 (JVA) under Section 16 filed by respondent No.1, the amendments proposed therein flow from the amendment proposed to paragraph No.4 in the first application. Accordingly, the proposed amendments by way of the second application are also rejected accordingly.

However, certain questions or interpretation of the agreement are also raised in the said proposed amendments in the second application. The same may be raised at the time of oral submissions on the issue of jurisdiction."

24. On 19.06.2013, the Arbitral Tribunal held that the plea of IRCTC, inter alia that RIRTL is not a party to the Arbitration Agreement contained in the AOA, shall be decided at the time of hearing and proceeded to fix the schedule for the parties to complete the pleadings and file their evidence.

25. C&K produced Mr.Arup Sen as its witness. Based on certain answers given by the witness in his cross examination, IRCTC filed an application seeking deletion of RIRTL from the array of parties. The Arbitral Tribunal vide its order dated 17.02.2016 held that even this application shall be heard after conclusion of the evidence.

26. The Impugned Orders have been passed on the above applications filed by IRCTC, ordering deletion of RIRTL from the array of parties.

27. The learned senior counsels for the appellants submit that the AOA and the JVA form part of one single transaction. The RIRTL, by its conduct, had affirmed to the JVA and therefore, was a necessary and proper party to the arbitration proceedings. It is further submitted that the primary relief sought was the specific performance of the JVA and therefore, any order passed by the Arbitral Tribunal would ultimately impact RIRTL as well and therefore, RIRTL was a necessary and proper party to the arbitration proceedings. As far as, the

arbitration proceedings under the AOA are concerned, the AOA being a contract between the company and its members, in terms of Section 36 of the Companies Act, 1956 (Section 10 of Companies Act, 2013), Article 200 of the AOA bound the parties, including RIRTL, to arbitration. It is further submitted that Article 200 of AOA, while using the words 'under this Agreement', made a reference to the JVA and therefore, disputes under the JVA are also arbitrable under Article 200 of the AOA.

28. On the other hand, the senior counsel for the IRCTC submits that it was the case of the appellants that RIRTL was not a party to the JVA. It is only after IRCTC filed an application under Section 16 of the Act, that C&K sought to withdraw its admission by seeking to amend its Statement of Claim and its reply to the said application. The said application seeking amendment was dismissed by the Arbitral Tribunal vide its order dated 30.04.2013 and therefore, any plea of the appellants that RIRTL is a party to the JVA as a confirming party or by conduct, cannot be accepted.

29. As far as Article 200 of AOA is concerned, the learned senior counsel for IRCTC submits that the said Article again is an Arbitration Agreement only between C&K and IRCTC, and RIRTL is not a party to the same. In any case, no dispute having been raised between C&K and RIRTL, RIRTL has been rightly ordered to be deleted from the array of parties by the Arbitral Tribunal.

30. I have considered the submissions made by the learned senior counsels for the parties.

31. Admittedly, RIRTL, though in existence on the date of execution of the JVA, was not a signatory to the same. The JVA has been executed only between C&K and IRCTC.

32. Clause 2.2 of the JVA provides that the Joint Venture Company shall, upon its incorporation, accede to this Agreement by executing this Agreement as a confirming party. Admittedly, though the company, that is RIRTL, was already in existence on the date of the signing of the JVA, it never signed the JVA on the said date or any time thereafter as a confirming party. Clause 2.2 of the JVA is reproduced hereinunder:

"2.2 Memorandum and Articles of Association

The company shall, inter-alia, have as its main object the business of acquiring, furnishing, maintaining, managing, and operating luxury trains with the view to market and sell holiday packages with such luxury trains being the principal mode of transportation.

The JVC can also use other modes of transportation like luxury buses, ships, aeroplanes for part of the journey to enhance the value of its luxury train based tour packages.

The parties agree that, in addition to the luxury train, the JVC may undertake

other tourism related activities and projects with mutual consent.

The parties shall ensure that Memorandum and Articles of Association of the company shall in all respects and at all times reflect and be consistent with the provisions of this Agreement should there nevertheless be any inconsistency between the provisions of this Agreement and the Memorandum and Articles of Association of the company, the parties shall initiate steps to amend provisions of the Memorandum and the Articles of Association of the Company so as to be consistent with the provisions of this Agreement.

The company shall, upon its incorporation, accede to this Agreement by executing this Agreement as a confirming party, thereby undertaking to be bound by the obligations and mutual covenants binding the parties pursuant to this Agreement.

The company shall, upon its incorporation, accede to this Agreement by executing this Agreement as a confirming party, thereby undertaking to be bound by the obligations and mutual covenants binding the parties pursuant to this Agreement."

33. The Arbitral Tribunal has also taken note of the above Clause and held as under in its Impugned order dated 10.12.2017 passed in Arb. Case No.AC-1811:

"67. It is an admitted position that the JVA is not signed by Respondent No.2. Therefore, it would be correct to say that there is no Arbitration Agreement, much less any Agreement between the Claimant, Respondent No. 1 and Respondent No.2. The Agreement is between the Claimant and the Respondent No. 1 only. The JVA bears the signatures, only of the Claimant and the Respondent No.

1. Importantly, Respondent No. 2 was already in existence when the JVA was signed.

68. Further, Clause 2.2 of the JVA contains that the only way an entity could become a confirming party was by executing the JVA. Admittedly, no such process under Clause 2.2 was followed by Respondent No.2."

34. Learned senior counsels for the appellants have placed reliance on the meeting of the Board of Directors of RIRTL held on 10.12.2008, 07.03.2009 and 22.09.2010 to submit that RIRTL had acted on the JVA.

They further placed reliance on letter dated 20.09.2010 addressed by IRCTC to RIRTL making a reference to the JVA while calling upon it to enter into the Lease Agreement and pay the lease rent. They also refer to letter dated 20.06.2011 where again IRCTC has referred to the JVA while calling upon RIRTL to execute the Lease Agreement as also pay the lease charges. They submit that IRCTC had also addressed the notice dated 12.08.2011 to RIRTL terminating the JVA. They submit that, therefore, by the conduct not only did the Joint Venture Company, RIRTL confirm to the JVA but also IRCTC acted on the basis that the Joint

Venture Company was bound by the JVA. In any case, the JVA and the incorporation of the Joint Venture Company form part of a single composite transaction and therefore, it cannot be held that the Joint Venture Company cannot be made party to the arbitration proceedings. They place reliance on the judgments of the Supreme Court in *Ameet Lalchand Shah & Ors. vs. Rishabh Enterprises & Anr.* 2018 SCC OnLine SC 487; *Cheran Properties Ltd. vs. Kasturi and Sons Limited*, 2018 SCC OnLine SC 431 and *Chloro Controls India Pvt. Ltd. vs. Severn Trent Water Purification INC & Ors.* (2013) 1 SCC 641.

35. On the other hand, the learned senior counsel for IRCTC, relying upon the judgment of the Supreme Court in *Indowind Energy Ltd. vs. Wescare (India) Ltd. & Anr.* (2010) 5 SCC 306, submits that as the company, that is RIRTL, never executed the JVA, it cannot be made a party to the Agreement by drawing reference to Board Meetings or the notices. He submits that even otherwise, the pleadings filed by C&K in the course of arbitration proceedings do not support the contention sought to be raised by the counsels for the appellants. He further submits that the Arbitral Tribunal has also taken note of these pleadings and even rejected the attempt of the appellants to make amendments to such pleadings with the intent to withdraw the admissions made by them.

36. I have considered the submissions made by the learned counsels for the parties. The Arbitral Tribunal in its Impugned Order has taken note of the admissions made by C&K in its pleadings filed before the Arbitral Tribunal and has held as under:

"20. Respondent No.1 has also placed reliance on the following admissions made by the Claimant in the pleadings, evidence and the Arbitral record that the Respondent No. 2 is not a party to the JV A:

(a) The Arbitration notice from the Claimant's lawyers to the Respondent No. 1 dated 7th September, 2011 states:

"At times of incorporation of the JVC RIRTL, our client and you entered into a Memorandum & Articles of Association dated 24 November 2008(AOA of 2008) and thereafter subsequent to the incorporation of the JVC RIRTL a Joint Venture Agreement dated 10.12.2008 (JVA of 2008) was entered into by and between you IRCTC and our clients.

(b) Paragraph 16 of the Statement of Claim dated 9 November 2011:

The Claimant submits that a detailed Joint Venture Agreement was executed on 10 December 2008 (JVA of 2008) between IRCTC and the Claimant... "

(c) Paragraph 9 of its reply dated 7 November 2012 to the Respondent No.1's Section 16 application:

" ... The Claimant submits that these are all repeated allegations and the position is quite clear that the Claimant and the Respondent No. 1 are parties to the JVA and that the Claimant, Respondent No. 1 and Respondent No. 2 are parties to

the AOA....

The Claimant further states that this Hon'ble Tribunal has jurisdiction over Respondent No 2 as Article 200 of the Articles of Association bind the Respondent No. 2 company as much as it does the Claimant and Respondent No. 1. It is therefore of no consequence that the Respondent No. 2 is not signatory to the JVA.

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"69. Respondent No. 1 has rightly pointed out various unequivocal admissions (already reproduced above) made by the Claimant in the pleadings, evidence and the Arbitral record that the Respondent No.2 is not a party to the JVA.

70. However, the Claimant sought to take a completely different argument by filing an Amendment Application to amend its Statement of Claim as well as its reply to the Respondent No. 1's Section 16 Application, in order to plead that the Respondent No. 2 has become a confirming party to the JV A. This was also sought to be supplemented by an additional Amendment Application. However, the Amendment Application was dismissed by the Tribunal and the additional Amendment Application was withdrawn as not pressed by the Claimant.

71. In fact, the Tribunal in its Order dated 20th April, 2013 has specifically taken note of the Claimant's admission that the Respondent No. 2 is not a party to the JVA or the arbitration clause contained therein. The relevant portion of the said Order is being reproduced hereinafter:

"However, Respondent No. 1 points out that prior to such proposed amendment, Claimant had taken a consistent stand that Respondent No. 2 is not a party to the JVA or its arbitration clause. The Claimant's case was that Respondent No.2 was a party to the AOA and therefore it was a party to the arbitration Clause and the two arbitrations (being the JVA and AOA arbitrations) should be consolidated. This position of the Claimant remained unchanged for a period of over two years since disputes arose between the Parties and the same has been recorded in various correspondences. In this regard, Respondent No. 1 has made a reference to the Claimant's reply to Section 16 application which contains a clear admission in paragraph 9, page 6, Volume 7 of the joint paperbook that Respondent No. 2 is not a party to the JVA.

xxxxx

76. Even the submission of the Claimant that Respondent No.2 became a party to the JVA by conduct, is not at all convincing. There are no pleadings, evidence or proof, with regard to any such conduct on the part of Respondent No. 2. The plea regarding Respondent No. 2 becoming the confirming party had earlier been rejected by the Tribunal.

77. It is also contended that Article 2.2 of the JV A provides that a Party can be made a confirming party only by way of executing the JVA and by no other way.

It is settled position of law that if an Agreement provides for a certain act to be done in a certain manner, then it has to be done in that manner only.

xxxx

80. However, the Tribunal finds that there is no pleading or evidence led by the Claimant in support of the aforesaid submissions. The Claimant has merely produced some charts of these purported actions and is asking the Tribunal to infer from these charts that Respondent No. 2 became a confirming Party. However, there is no sufficient evidence in support of such submissions of the Claimant."

37. I find no reason to interfere with the above findings of the Arbitral Tribunal.

38. In any case, a reading of Articles 30.1 and 30.2 clearly suggests that the Arbitration Agreement was only between IRCTC and C&K. Even though RIRTL may have acted in terms of the JVA, the Arbitration Agreement being a separate and distinct Agreement from the main contract, RIRTL would not, by conduct or otherwise, become a party to the Arbitration Agreement. (Refer: SMS Tea Estates Pvt. Ltd. vs. Chandmari Tea Company Pvt. Ltd. (2011) 14 SCC 66; MR Engineers and Contractors Pvt. Ltd. vs. Som Datt Builders Ltd. (2009) 7 SCC 696; Lesotho Highlands vs. Impreglio (2006) UKHL 43 and A. Ayyasamy vs. A. Paramasivam (2016) 10 SCC 386).

39. The Arbitral Tribunal has also considered the above issue and has held as under:

"60. In the opinion of the Tribunal upon a bare reading of the above Clauses, it can be clearly seen that Respondent No. 2 is not a Party to the Arbitration Agreement contained in Article 30. The Arbitration Agreement is evidently only between the Claimant and Respondent No.1.

61. Article 30.1 speaks of only IRCTC and C&K and it does not refer to any other party, including Respondent No.2. Article 30.1 envisages that IRCTC and C&K will endeavour to resolve their dispute by mutual negotiations and in the event the dispute between the said parties remains unresolved, then the same shall be referred to arbitrator. Article 30.2 clearly refers to those disputes which could not be satisfactorily resolved by mutual negotiations, which shall be finally settled by the arbitral tribunal constituted in accordance with the procedure laid down in the said Article. Thus, Articles 30.1 and 30.2 are inter linked and Article 30.2 can be invoked only when the dispute or difference cannot be resolved by "mutual negotiations".

62. The Tribunal thus, finds force in the contention of Respondent No.1 that only the Claimant and Respondent are the parties to the Arbitration Agreement in Article 30 of the JVA.

63. Once it can be seen from the Parties in Articles 30.1 and 30.2 are only Respondent No. 1 and the Claimant, then accepting the plea of the Claimant

would virtually amount to rewriting the contract and creating a new contract between the Parties. It is stated that as per settled position of law, a Tribunal cannot create a new contract for the Parties and must necessarily act within the four corners of the Contract."

40. Judgment of Ameet Lalchand Shah (supra) can have no application to the facts of the present case. In the said case, the Court was considering an application filed by the appellant therein u/s 8 of the Act seeking reference of the parties to arbitration. The Court, as a matter of fact found that the Equipment Lease Agreement dated 14.03.2012 was the Principal/main Agreement and the other Agreements were integrally connected therewith. In those peculiar facts, the Court referred the Agreements and the parties to arbitration. The court, took note of the amended provisions of Section 8 of the Act in passing the order.

41. In Cheran Properties Ltd. (supra), the Supreme Court held that the circumstances in which the Agreements have been entered into may reflect an intention to bind both signatory and non-signatory entities within the same group. Therefore, factors such as relationship of a non-signatory to a party which is a signatory to the Agreement, the commonality of subject matter and the composite nature of the transaction weigh in the balance. The effort is to find the true essence of the business arrangement and to unravel from a layered structure of commercial arrangements, an intent to bind someone who is not formally a signatory but has assumed the obligation to be bound by the actions of a signatory. In reaching the above conclusion, the Supreme Court placed reliance on Chloro Controls (supra), while distinguishing the earlier judgments in Indowind (supra).

42. There can be no quarrel with the above proposition of law, however, the facts of each case have to be considered in applying the above principles. In the present case, the IRCTC and C&K are equal Joint Venture Partners in RIRTL. The Arbitration Agreement clearly binds only C&K and IRCTC. The disputes are also only between IRCTC and C&K. C&K, being the claimant, is seeking no relief against RIRTL.

43. Section 8 of the Act, as amended by the Arbitration and Conciliation (Amendment Act), 2015 is reproduced hereinbelow:

"8. Power to refer parties to arbitration where there is an arbitration agreement
(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if an party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists."

44. A reading of the above provision would clearly show that it is 'a party to the Arbitration Agreement or any person claiming through or under him' who can

apply for reference of the parties to the arbitration.

45. In the present case, RIRTL is not the claimant before the Arbitral Tribunal and therefore, cannot be said to be making a claim 'through or under' C&K.

46. The Arbitral Tribunal has also rejected the contention of the appellants that the claim of C&K being a derivative action, RIRTL could be made a party to such arbitration proceedings. The Arbitral Tribunal holds as under:-

86. The Respondent No.1 is also right in contending that by making a derivative action the Respondent No.2 does not become a party to the Arbitration Agreement. Moreover, any such plea of derivative action would be outside the scope of reference. In fact, the Statement of Claim does not refer to any derivative cause of action and the entire case is predicated on the Claimant's personal cause of action which evident from a bear reading of the prayers made in the Statement of Claim. Further, it is now well established that a derivative action in an arbitration can only be maintainable if the Company and the shareholders both are parties to the arbitration clause. [See the decision of the Bombay High Court in *Onyx Musicabsloute v. Yashraj Films* (Supra)]."

47. As far as the submissions of the learned senior counsels for the appellants relying upon Article 200 of the AOA are concerned, the same are noted to be rejected. First of all, the finding of the Arbitral Tribunal that there are no disputes between the parties in relation to the AOA of RIRTL could not be disputed by the learned senior counsels for the appellants. The disputes between the parties are in relation to and connected with only the JVA.

48. Secondly, a reading of Article 200 of the AOA, again suggests that it is applicable only to IRCTC and C&K.

49. Learned senior counsel for C&K submitted that the words 'this agreement' used in Article 200(a) of the AOA refers to the JVA and therefore, any dispute in relation to the JVA can also be referred to arbitration relying upon Article 200(a) of the AOA. He further submitted that as AOA is an agreement between the company and its members, the company was rightly made a party to the arbitration proceedings.

50. I am unable to agree with the said submission of the learned senior counsel for the appellants. Though, AOA of a Company is an agreement between the company and its members, the words 'this agreement' used in Article 200(a) can only be construed to mean the Articles of Association of RIRTL alone and not the JVA. It is of significance to note that the JVA was not even in existence on the date of the formation of Articles of Association of RIRTL.

51. In view of the above, I find no merit in the present appeals and the same are dismissed with costs quantified at Rs.1 lac for each appeal to be paid by the appellants for their respective appeals.