

(2002) 05 CAL CK 0018
In the Calcutta High Court
Case No : Writ Petition No. 19388 (W) of 2001

S and D Securities Pvt. Ltd. and Another	APPELLANT
Vs	
Union of India (UOI) and Others	RESPONDENT

Date of Decision : 02-05-2002

Acts Referred:

Arbitration Act, 1940 — Section 31(2), 32, 33
Arbitration and Conciliation Act, 1996 — Section 16, 21, 4, 7, 8
Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 156(3)
Securities Contracts (Regulation) Act, 1956 — Section 9

Citation : (2003) 3 BC 99 : (2003) 1 CALLT 608

Hon'ble Judges : Asok Kumar Ganguly, J

Bench : Single Bench

Advocate : S.P. Sarkar, D.J. Dutta and Vijay Bhatia, for the Appellant; Soumen Sen and Susanta Dutta for Respondent No. 2, R.P. Singh and D.K. Chatterjee for Respondent Nos. 3 and 4 and U.N. Dwivedi, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Ganguly, J.—The writ petitioner No. 1 is a company registered under Companies Act, 1956 (hereinafter called the petitioner company) and the writ petitioner No. 2 is one of the directors of the petitioner company. The petitioner-company is a registered stock broker and is a trading member of National Stock Exchange of India Limited (hereinafter called NSE).

2. The respondent No. 5 is also a company registered under Companies Act and it has opened an account with the petitioner-company.

3. The petitioner's case is that in the year 1996 under instruction from respondent No. 3, the petitioner-company opened an account being No. K005 in the name of the respondent No. 3. Thereafter, in 1997 respondent No. 3 introduced his son, the respondent No. 4, and on their joint requests, the petitioner-company opened another account being No. S025 in the name of

respondent No. 4 with respondent No. 3. The further case of the petitioner-company is that on 17th April, 1999 in terms of instruction given by respondent Nos. 3 and 4, the petitioner-company purchased 4000 equity shares of GMDC Limited with its own fund and the said purchase was duly entered in the account No. S025 of the respondent No. 4 but the price including the commission of the petitioner-company remained due. The petitioners state that thereafter, the respondent No. 3 and 4 introduced the respondent No. 5 to the petitioner-company as their sister concern and on the request of respondent Nos. 3 and 4 the petitioner-company opened an account in the name of respondent No. 5 being account No. B037. On or about 23rd April, 1999 the respondent No. 2 and 3 made over a cheque to the petitioner-company for a sum of Rs. 1,95,047/- drawn by respondent No. 5 in favour of the petitioner-company with request to the petitioner to transfer the said 4000 equity shares, so purchased in the name of respondent No. 4, in favour of the respondent No. 5 and the petitioner-company did act accordingly. On or about 18th May, 1999 as instructed by respondent No. 3, the petitioner-company sold and transferred 1000 equity shares of GMDC Limited out of 4000 so purchased and the sale proceeds of Rs. 69,550/- was entered into the account of respondent No. 5. Thereafter, on 11th June, 1999, the respondent No. 5 requested the petitioner-company to transfer the remaining 3000 equity shares of GMDC Limited in favour of the respondent No. 5. To that the petitioner-company demanded the dues of respondent No. 5 as per its account duly maintained by the petitioner-company. The case of the petitioner-company is that respondent No. 5 failed to make the payment of the dues to the petitioner-company,

4. As the petitioner-company was refusing to transfer the shares, the respondent No. 5 by a letter dated 8th June 1999 informed the NSE of the said conduct of the petitioner-company and in the said letter a request was made to NSE to direct the petitioner-company to immediately deliver the 3000 equity shares to the respondent No. 5 and if the petitioner-company fails to do so, refer the case to arbitration. A copy of the said letter was also sent to the petitioner-company. In reply thereto, the petitioner-company wrote a letter to NSE refuting the claim of respondent No. 5 but in the said letter the petitioner-company did not raise any objection to the claim for arbitration raised in the letter dated 8th June 1999 written by respondent No. 5.

5. In view of the aforesaid facts, the NSE in its reply by a communication dated 20.11.2001 informed the petitioner to submit its defence to such arbitration proceedings and in the event of the petitioner's failure to do so, the petitioner was informed that Arbitrator may be appointed to proceed with the arbitral proceeding.

6. The petitioner challenged the said communication of NSE, inter alia, contending that in the absence of any arbitration agreement between the petitioner and the respondent No. 5, the said direction on the petitioner-company to submit to the arbitration proceeding is wholly without jurisdiction. Thereupon,

this Court issued notices and passed some interim direction and then on exchange of affidavits the matter was heard.

7. In the background of these facts, the main contention of the petitioner is that there is no arbitration agreement between, the petitioner-company and the respondent No. 5. The arbitration clause on which the respondent No. 5 and the NSE, the respondent No. 2 rely is contained in chapter XI of the bye-laws of NSE.

8. The learned counsel for the petitioner-company submitted that in the instant case, the arbitration clause will be applicable to all the members of NSE and others who as members are governed by such bye-laws and the regulation of NSE. According to the learned counsel the respondent No. 5, a customer or a constituent of the petitioner-company is a broker and is not governed by such bye-law just because the respondent No. 5 has entered into some transactions with the petitioner-company, a member of NSE. The learned counsel further submitted that regulations 4.3.1 of the Capital Market Regulations support the contentions of the petitioner-company. The learned counsel for the petitioner-company relied on 4.3.1 of the said Regulation. The said regulation provides as follows:

"4.3.1. Every Trading Member shall enter into an agreement with each of his constituents, i.e. clients, before accepting or placing orders on the constituent's behalf. Such agreement, shall include provisions specified by the Exchange in this behalf in annexure-3. The term constituent herein shall not include a Participant. The Exchange may categorise constituents into such types as may be necessary for the above purpose and specify the clauses to be included in agreements to be entered into by the Trading Member depending on the category of such constituent. However the Trading Member's responsibility shall not in any way be reduced due to non-execution of agreement with the constituent."

9. The learned counsel submitted that in the instant case, no agreement was entered into between the petitioner-company and the respondent No. 5. The learned counsel, therefore, urged that having regard to the terms of the said bye-laws and the regulations, in the absence of any agreement between the petitioner-company and the customer, the provisions of the bye-laws including the arbitration clause are not attracted in respect of the disputes between the trading member and its constituents. The learned counsel further submitted that the consequences, which may arise, as a result of default on the part of the petitioner-company to enter into such an agreement, is a different matter. But in the absence of agreement, it was submitted that this Court cannot hold that the arbitration clause contained in chapter XI of the bye-laws would be attracted. The learned counsel for the petitioner-company further submitted by way of alternative argument that assuming the arbitration agreement contained in the bye-laws is attracted, the matter cannot be referred to arbitration by reasons of the provisions of limitation contained in Clause 3 Chapter XI of the said bye-laws. The said Clause 3 of Chapter XI of the said bye-laws is set out below:

"All claims, differences or disputes referred to in Bye-laws (1), (1A) and (1B) above shall be submitted to arbitration within six months from the date on which the claim, difference or dispute arose or shall be deemed to have arisen. The time taken in conciliation proceedings, if any, initiated and conducted as per the provisions of the Act and the time taken by the Relevant Authority to administratively resolve the claim, differences or disputes shall be excluded for the purpose of determining the period of six months."

10. Referring to the said clause, the learned counsel submitted that it provides that the disputes shall be submitted to arbitration within six months from the date on which the differences arose between the parties. In the instant case, the alleged difference arose sometime in June 1999 but since no dispute was raised for referring the differences to arbitration within six months, in the instant case, the arbitration clause is not attracted.

11. The learned counsel submitted that u/s 21 of the Arbitration and Conciliation Act, 1996 (hereinafter called ACA 96) an arbitration commences on the date from which a request for adjudication of the dispute through arbitration is received by the other party. In this case, no request has been received by the petitioner within six months from the date of the alleged claim. The learned counsel relying on the affidavit of respondent No. 5, also submitted that from the contract notes it is clear that claims by either party can be made either in Civil Jurisdiction or before the Arbitrators. According to the learned counsel, the alleged arbitration agreement, assuming the same is attracted in the facts of the case, lacks the mandatory and exclusive nature of an arbitration agreement as contemplated u/s 7 of the Arbitration Act. The learned counsel further submitted that in the instant case, already a civil suit has been filed covering the dispute, which is sought to be referred to arbitration. In the said Civil suit no application has been made by the respondent No. 5 u/s 8 of the ACA 96 for referring the name to arbitration. Therefore, at this juncture, if the order permitting arbitration is allowed to operate the same might lead to parallel proceeding and there is a likelihood of conflicting decisions. The learned counsel also submitted that the respondent No. 5 has already filed a criminal proceeding u/s 156(3) of the Criminal Procedure Code against the petitioner-company on the alleged charges of criminal conspiracy, breach of trust, etc. and such complaint having been filed before the learned Magistrate, the learned Magistrate forwarded the same to Burabazar Police Station for investigation and report. As such when there is a charge of fraud against the petitioner and the petitioner is entitled to vindicate his position by insisting on a trial in open Court in preference to private tribunal like arbitration.

12. The learned counsel for the respondent No. 5 has controverted the aforesaid case as made out by the counsel for the petitioner-company. The learned counsel for the respondent No. 5 urged that in fact, it had entered into with the petitioner an agreement through its director in the prescribed format of the 2nd respondent, but no copy of the said agreement was handed over by the

petitioner to the respondent No. 5. The learned counsel also submitted that in para 8.1 of the affidavit-in-opposition used by the respondent No. 5 it has been stated that on the writ petitioner's insistence for execution of an agreement in the format prescribed by the respondent No. 2, the said respondent No. 5 through the deponent of the said affidavit, namely, Bharat Kumar Mahensaria executed an agreement. The said averment has been made in para 8.1 of the affidavit filed by respondent No. 5 and the same has been affirmed as to true to knowledge by the deponent of the said affidavit.

13. While dealing with the said averment made in the affidavit on behalf of the respondent No. 5, the petitioner-company filed an affidavit-in-reply affirmed on 5th February, 2002. The said averment has not been specifically denied. Reference in this connection be made in para 18 of the affidavit-in-reply affirmed by the petitioner on 5th February 2002. The said paragraph is set out below:

"With reference to paragraphs 8, 8.1, 8.2, 8.3, 8.5, 8.6, 8.7 and 8.8 of the said affidavit, I have been advised to deal with the said allegations in the proper forum and as such" I reserve my rights to make submissions with regard thereto in the appropriate forum and I refrain from dealing with the same herein."

14. The petitioner has filed another supplementary affidavit-in-reply on 11th February 2002 in answer to the affidavit-in-opposition of the respondent No. 5. In the said supplementary affidavit also para 8.1 of the affidavit-in-opposition of the respondent No. 5 has not been denied.

15. The learned counsel for the respondent No. 5 further submitted that the question whether there is an existence of arbitration agreement or not is a question which can be decided in the arbitration proceeding itself and the said question cannot be decided by the writ Court. The learned counsel for the respondent No. 5 referred to Section 16(1) of the ACA 96 and contended that under the said section the arbitral tribunal is now competent to rule on its own jurisdiction including on any objection about the existence or validity of the arbitration agreement. Therefore, the question of existence of an arbitration agreement can be decided by the arbitral tribunal. Apart from that, the learned counsel urged that the existence of an arbitration agreement can be decided only by evidence and this can be best done before the arbitral tribunal and the writ Court is not the proper forum for a decision on that question. Apart from that the learned counsel also submitted that the existence of an arbitration agreement between the two private parties in connection with commercial transaction has no public law element in it and as such is not a matter which falls within the domain of the writ Court. The learned counsel further submitted that the jurisdiction u/s 16 of ACA 96 is a new feature under this Act and the same was not available under Arbitration Act, 1940. Since this forum is available, the petitioner-company should utilise the said forum and should not approach the writ Court for deciding this question of fact.

16. The learned counsel also submitted that the bye-laws of NSE are applicable

on their own. It is binding on all whether the parties agree to abide by it or not. The learned counsel further submitted that the power to make such bye-laws has been conferred upon NSE u/s 9 of Securities Contracts Regulation Act, 1956 (hereinafter called SCRA 56) and the said bye-laws have the approval of Securities and Exchange Control Board of India (hereinafter referred to as SEBI). Those bye-laws have been framed for the regulation and control of contracts. Sub-section 2 of Section 9 of SCRA 56 enumerates the purpose for which such bye-laws can be made. One of those purposes is that the bye-laws can be made to provide for the purposes enumerated in Clause 9(2)(i) of SCRA 56. Clause (j) is as follows:

"(j) The terms, conditions and incidents of contracts, including the prescription of margin requirements, if any, and conditions relating thereto, and the forms of contracts in writing."

Sub-section 4 of Section 9 of ACA 96 provides for publication of such bye-laws in the gazette of India and also in the official gazette of the State. Relying on those provisions the learned counsel submits that since those bye-laws have been made in public interest and to achieve a public purpose and made under the provision of statute and with the approval of SEBI the said bye-laws have the force of law. They are applicable on their own and the application of such bye-laws does not depend upon any contract between the parties. The learned counsel further submits that the bye-laws which have been so framed have deeming clauses for their extended operation.

17. The deeming clauses on which reliance placed are set out below. The first deeming clause is Clause 4 of Chapter VII of the bye-laws at page 15 to the following effect:

"Clause 4, Chapter VII: (a) All dealings in securities on the Exchange shall be deemed made subject to the Bye-laws, Rules and Regulations of the Exchange and this shall be a part of the terms and conditions of all such deals and the deals shall be subject to the exercise by the relevant authority of the powers with respect thereto vested in it by the Bye-laws, Rules and Regulations of the Exchange."

18. The 2nd deeming clause occurs at Clause 1 of Chapter X at page 26 and the 3rd deeming clause pointed out is Clause 2 of Chapter XI at page 30 of the bye-laws.

19. Those deeming clauses are set out below:

"Clause 1, Chapter X: (b) All contracts relating to dealings permitted on the Exchange made by a trading member shall in all cases be deemed made subject to the Bye-laws, Rules and Regulations of the Exchange. This shall be a part of the terms and conditions of all such contracts and shall be subject to the exercise by the relevant authority of the powers with respect thereto vested in it by the Bye-laws, Rules and Regulations of the Exchange."

"Clause 2, Chapter XI: (c) In all dealings, contracts and transactions, which are made or deemed to be made subject to the Bye-laws, Rules and Regulations of the Exchange, the provisions relating to arbitration as provided in these Bye-laws and Regulations shall form and shall be deemed to form part of the dealings, contracts and transactions and the parties shall be deemed to have entered into an arbitration agreement in writing by which all claims, differences or disputes of the nature referred to in Bye-laws (1), (1A) and (1B) above shall be submitted to arbitration as per the provisions of these Bye-laws and Regulations."

20. The learned counsel submits that even if there is no agreement, but in view of the deeming clauses pointed out above, the arbitration clause in the bye-laws is automatically attracted in respect of transactions in disputes between the writ petitioner-company and respondent No. 5.

21. According to the learned counsel, the petitioner-company is under an obligation to enter into an agreement with each constituent before accepting or placing any order on behalf of the constituent. The learned counsel also submits that it is also the obligation of the writ petitioner to issue a contract note in terms of regulation 3.5 of the said Regulation and failure to issue a contract note to that effect is punishable u/s 15F of Securities and Exchange Board of India Act, 1992 (hereinafter referred to SEBI 92). The learned counsel submitted that by not issuing such contract notes, the writ petitioner-company is exposing itself to the penal provision u/s 15F and also acting contrary to the undertaking dated 1.09.1995 given by it which is a condition precedent for becoming a trading member of SEBI. The learned counsel further submitted that the petitioner who has committed such glaring statutory default or acted in such clear violation of statutory mandate is not entitled to obtain any order from the writ Court. The learned counsel further submitted that in the instant case, the argument of the petitioner-company that if an arbitration proceeding is initiated the same will be barred by limitation is wholly misconceived since there is no limitation. However, it is open to the petitioner-company to raise such question before the arbitral tribunal and the arbitral tribunal can decide the same. The learned counsel also submitted that there is no question of the arbitration proceeding being vitiated in view of the criminal proceeding inasmuch as the purpose of both these proceedings are totally different. The arbitration proceeding has been initiated for realisation of dues and claims of the parties whereas the criminal proceeding has been initiated for awarding punishment.

22. The learned counsel also submitted that in the instant case, fraud is not an issue in the dispute between the parties. Therefore, there is no reason why the arbitration proceeding cannot be commenced. The learned counsel also sought to distinguish the cases decided by the learned counsel of the petitioner-company.

23. The learned counsel for the respondent No. 2 also urged in favour of dismissing the writ petition and allowing the arbitration proceeding to commence. The learned counsel submitted that respondent No. 5 being a constituent of the petitioner-company, a member of NSE, both the petitioner-company and the

respondent No. 5 are governed by the bye-laws framed u/s 9 of SCRA 56. It has been urged that once a trading member namely the petitioner-company, enters into any transactions, with its constituents, the trading members, being bound by the bye-laws, rules and regulations, cannot in a dispute with its constituents avoid the mechanism of arbitration, even if it has not issued any contract note or agreement in terms of regulation 4.3.1 of the Capital Market Regulations.

24. It was urged that the petitioner-company submitted an undertaking to abide by the bye-laws and having submitted an undertaking, the petitioner, it was urged, cannot contend that arbitration clause does not govern the transaction between the petitioner-company and the respondent No. 5.

25. These are the rival contentions of the parties. Several cases were cited at the bar on behalf of the parties. But in this case for a decision of the points at issue, the relevant rules, regulations, bye-laws and the provisions of ACA 96 are of greater relevance.

26. First the Court has to examine the obligation of the petitioner-company, a trading member of the NSE. A trading member has been defined under Clause (17) of the bye-laws to mean a stock broker and member of NSE registered in accordance with chapter V of the bye-laws.

27. Chapter V of the bye-laws imposes certain conditions of which conditions (a) and (b) are very pertinent and they are set out below;

"(a) Trading members shall adhere to the Bye-laws, Rules and Regulations of the Exchange and shall comply with such operational parameters, rulings, notices, guidelines and instructions of the relevant authority as may be applicable,

(b) All contracts issued for deals on the Exchange shall be in accordance with the Bye-laws, Rules and Regulations of the Exchange."

28. It is not possible for a trading member whose membership of NSE has been granted, inter alia, on the above conditions to depart from the mandate of the conditions mentioned above. This is further highlighted by the undertaking given by the petitioner-company. The relevant portions of the said undertaking are as follows:

"1. The Undersigned shall comply with all such requirements, existing and future with regard to and in connection with our appointment as a trading member.

2. The Undersigned shall adhere to the Bye-laws, Rules and Regulations framed by NSEIL from time to time.

3. The Undersigned shall abide by the code of conduct as laid down from time to time by NSEIL."

29. Chapter XI of the bye-laws refers to the mode of settlement of disputes between the trading member and its constituents. The relevant clause of arbitration is as follows:

"All claims, differences or disputes between the Trading Members inter se and between Trading Members and Constituents arising out of or in relation to dealings, contracts and transactions made subject to the Bye-laws, Rules and Regulations of the Exchange or with reference to anything incidental thereto or in pursuance thereof or relating to their validity, construction, interpretation, fulfillment or the rights, obligations and liabilities of the parties thereto and including any question of whether such dealings, transactions and contracts have been entered into or not shall be submitted to arbitration in accordance with the provisions of these Bye-laws and Regulations." (underlined by Court)

30. The sweep of the clause is very wide and it certainly covers a situation like the present one.

31. The main defence of the petitioner-company is that it has not dispute Clause 4.3.1. of the Capital Market Regulations, entered into any agreement with its constituents in terms of annexure-3. Now whether it has entered into an agreement with the respondent No. 5 in terms of that regulation is a disputed question of fact. The respondent No. 5 has clearly asserted, as noted above, that such an agreement was entered into. Those factual assertions were not denied by the petitioners. Therefore, the Court is inclined to accept the assertions of the respondent No. 5.

32. Apart from that as a result of various deeming provisions referred to above the Court is also persuaded to hold that even non-execution of an agreement in terms of annexure-3 cannot prevent the application of the arbitration clause over the disputes in question.

33. Of the deeming clauses set out above, the deeming clauses at chapter X and chapter XI of the bye-laws are directly on the point. The deeming clause at chapter X refers to the dealing between the trading member and its constituents. A clear reading of the said clause makes it clear that all dealings between the trading members and its constituents shall be deemed to be made subject to bye-laws.

34. Chapter XI is about arbitration and the deeming clause under the same chapter also makes all transactions made or deemed to be made subject to the bye-laws, rules and regulations of the exchange.

35. A cohesive reading of those deeming clauses at chapters X and XI of the bye-laws brings out a cogency of purpose between the two.

36. It is well known that in construing a deeming provision it is always necessary to bear in mind the purpose behind the provision.

37. The well known dictum of Lord Asquith in *East End Dwellings Co. Ltd. v. Finsbury BC*, reported in 1952 Appeal Cases 109 is very relevant. At page 132 of the report, the learned Judge observed as follows:

"If you are bidden to treat an imaginary state of affairs as real, you must surely,

unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

38. Subsequently, Vice Chancellor Megarry, without disturbing the dictum of Lord Asquith added: "The hypothetical must not be allowed to oust the real further then obedience to the statute compels" [Polydor Ltd. and RSO Records Ire v. Harlequin Record Shop Ltd. and Simon Records Ltd., reported in (1980) 1 CLR 669 .

39. These tests in interpreting a deeming provision have been accepted by Supreme Court time and again. It has been consistently held by the Apex Court that in interpreting such provisions, the Court is to ascertain the purpose behind the fiction and after so ascertaining it, the Court must assume all those facts which are the inevitable corollaries to the giving effect to the purpose behind the fiction. Then full effect must be given to the fiction and it should be carried to its logical end. This has been made clear in the decision of the Supreme Court in *The State of Bombay Vs. Pandurang Vinayak Chaphalkar and Others*, , in which Justice Mahajan accepted the doctrine of Lord Asquith in *East End* (supra). Subsequently, XJustice Madon in *American Home Products Corporation*, reported in *American Home Products Corporation Vs. Mac Laboratories Pvt. Ltd. and Another*, , approved the dictum in *East End* (supra) and *Pandurang Vinayak* (supra).

40. Accepting those tests, as I must, I find that the dominant purpose behind the deeming provision is to make all transactions between a trading member and its constituents subject to the bye-laws, rules and regulations. There can be no escape from this conclusion. So the argument of the learned counsel for the petitioner that in the absence of an agreement between the petitioner-company and the respondent No. 5, the arbitration clause is not attracted cannot be accepted by this Court.

41. It may be noted that neither the legality of the bye-laws or of the deeming clauses has been challenged before this Court. Apart from that bye-laws have an extended area of operation. Reference in this connection may be made to a Division Bench judgment of the Bombay High Court in the case of *Sophy Kelly Vs. The State of Maharashtra and Others*, . Justice Tarkunde speaking for Court referred to at page 171 of the report to the judgment of Lord Justice Lindley in *London Association of Shipowners v. London Docks Committee*, reported in (1892) 3 Chancery 242. Lord Justice Lindley explained the importance of the bye-laws. From page 252 of the report His Lordship's judgment in *London Association* appears as under:

"A bye-law is not an agreement, but a law binding on all persons to whom it

applies, whether they agree to be bound by it or not. All regulations made by a corporate body, and intended to bind not only themselves and their officers and servants but members of the public who come within the sphere of their operations, may be properly called bye-law."

42. Therefore, the deeming clauses referred to in bye-laws on their reasonable construction make it clear that the purpose behind them is to make all transactions with a trading member of NSE subject to the scheme of bye-laws framed under the provisions of SCRA 56. No trading member by refusing to enter into an agreement with its constituents can frustrate the scheme under the bye-laws which have a statutory flavour and were made in public interest. The other objection namely that the petitioner-company has filed a Money Suit in the 2nd Court of Civil Judge (Senior Division) at Alipore and that it bars the jurisdiction of arbitration clause is not tenable. The stage of the suit has not been disclosed. Nor has the Court been told whether the respondent No. 5 has appeared in the suit or taken steps u/s 8(1) of ACA 96. In any event Section 8(3) of ACA 96 is clear that an arbitration proceeding may proceed and an award can be made despite the filing of the suit.

43. Section 8 of ACA 96 is strikingly different from Section 34 of Arbitration Act, 1940. This was first noticed by Bombay High Court in the decision given in the case of *The Bombay Gas Co. Ltd. Vs. Parmeshwar Mittal and others*, . The Apex Court also expressed the same view in *Smt. Kalpana Kothari Vs. Smt. Sudha Yadav and Others*, . The observations of the learned Judges in paragraph at pages 208-209 of the report in the judgment rendered in *Kalpana Kothari* is very pertinent and which is reproduced below:

"In striking contrast to the said scheme underlying the provisions of the 1940 Act, in the new 1996 Act, there is not provision corresponding to Section 34 of the old Act and Section 8 of the 1996 Act mandates that the judicial authority before which an action has been brought in respect of a matter, which is the subject-matter of an arbitration agreement, shall refer the parties to arbitration if a party to such an agreement applies not later than when submitting his first statement. The provisions of the 1996 Act do not envisage the specific obtaining of any stay as under the 1940 Act, for the reason that not only the direction to make references mandatory but notwithstanding the pendency of the proceedings before the judicial authority or the making of an application u/s 8(1) of the 1996 Act, the arbitration proceedings are enabled, u/s 8(3) of the 1996 Act to be commenced or continued and an arbitral award also made unhampered by such pendency. We have to test the order under appeal on this basis."

44. Therefore, the money suit filed by petitioner-company cannot prevent the commencement of an arbitration proceeding. It is still open to the respondent No. 5 to take step in the suit u/s 8(1) to prevent the possibility conflicting decisions, if any.

45. Now coming to the question of the pending criminal prosecution initiated by

the respondent No. 5 this Court finds that there is no bar in proceeding with the arbitration proceeding. In the instant case, fraud cannot be an issue before the arbitral tribunal. The cases which are cited by the learned counsel for the petitioner-company namely (1) General Enterprises and Others Vs. Jardine Handerson Ltd., , (2) Abdul Kadir Shamsuddin Bubere Vs. Madhav Prabhakar Oak, and (3) West Bengal Comprehensive Area Development Corporation and Another Vs. Sasanka Sekhar Banerjee, are not relevant to the points at issue. Those cases were rendered in a different factual context which is discussed below.

46. In the case of General Enterprises and Ors v. Jardine Handerson Ltd., the facts were that a suit was filed by Jardine Handerson alleging that the contract in question was obtained by fraud and for a declaration that the contract is void. The contract contained an arbitration clause. The General Enterprises initiated arbitration proceeding and prayed for stay of the suit. Under those circumstances, the learned Judge held that stay of suit could not be granted. But here the stand of the petitioner-company is that there is no agreement. The prayers in the suit are for a money decree and fraud is not an issue. Apart from that Section 8 is substantially different from Section 34 of the Arbitration Act, 1940. So the decision in the case of General Enterprise (supra) has no remote relevance to facts in the instant case. Here it is nobody's case that any contract was entered into between the parties by fraud.

47. The next decision cited by the learned counsel for the petitioner-company was in the case of West Bengal Comprehensive Area Development Corporation and Another Vs. Sasanka Sekhar Banerjee, . In that case, the question which was decided was that mere allegation of fraud unconnected with the real point at issue will not be enough to stay arbitration. If in deciding the dispute it is necessary for the Arbitrator to enter such questions to decide the real dispute involving the reputation of a professional man, the Court will be reluctant to allow the arbitration and in such a case the trial in open Court is more appropriate. In the instant case, fraud is certainly not the main issue against the writ petitioner. Therefore, the considerations which weighed with the learned Judges in the case of West Bengal Comprehensive Area (supra) are not present in the facts of this case.

48. Similarly, the decision of the Supreme Court in the case of Abdul Kadir Shamsuddin Bubere Vs. Madhav Prabhakar Oak, is also not at all relevant to the facts of this case. In that case, the learned Judges came to the conclusion that allegation of some kind of dishonesty in matters of account does not amount to an allegation of fraud. The Court held unless there are serious allegations of fraud, the Court will not refuse to make a reference u/s 20(4) of Arbitration Act, 1940. This Court fails to appreciate the relevance of the ratio in the case of Abdul Kadir (supra) to the facts of the present case. Therefore, none of decisions cited on behalf of the petitioner-company is of any relevance in the, facts of the instant case.

49. The last point urged by the learned counsel for the petitioner-company is

that in the instant case, the arbitration clause itself is one sided and there is a lack of mutuality and under the said clause only the petitioner-company had the right to refer to arbitration. The learned counsel submitted that unless the arbitration clause gives a bilateral rights of reference, there cannot be any valid arbitration clause. In support of the said contention, the learned counsel for the petitioner-company has relied on a decision in the case of Tote Bookmakers Ltd. v. Development, and Property Holding Co. Ltd., reported in 1985(2) All ER 555. The learned counsel for the petitioner-company has relied on the passage at 558d-559d. In Tote Bookmakers (supra), the judgment of Lord Justice Davies in Baron v. Sunderland Corporation, reported in 1966 (1) All ER 349 was quoted. At page 351 of the judgment in Baron Lord Justice Davies held that it is necessary in an arbitration clause that each party shall agree to refer disputes to arbitration and this is an essential Ingredient of an arbitration clause. The learned Judge held that the clause must have bilateral rights of reference. The learned Judge also founded that a body of twenty-two members hardly resembles an arbitral tribunal. The learned Judges in Tote Bookmakers (supra), therefore, agreed with the conclusions of Lord Justice Davies in holding that in the facts in Tote, there is no arbitration clause.

50. After the said judgment was cited and the hearing was closed the learned counsel for the respondent No. 2 mentioned the matter before this Hon"ble Court for obtaining leave to cite a subsequent judgment of the Court of Appeal taking a contrary view. Thereupon notices were served on the learned counsel for the parties and the matter was heard in the presence of the parties by this Court again on 2nd April, 2002.

51. On 2nd April, 2002 the learned counsel for the respondent No. 2 relied on the judgments of the Court of Appeal in the case of Pittalis and Ors. v. Sherefettin, reported in 1986(2) Weekly Law Reports, 1003. In that case, the learned Judges referred to the decision in the case of Tote Bookmakers (supra) and also to the decision of Lord Justice Davies in Baron v. Sunderland (supra). But the learned Judges of the Court of Appeal did not accept the views expressed either in Tote Bookmakers (supra) or in Baron v. Sunderland (supra) by holding that there is no reason if an agreement between the two parties confers one of them along the right to refer the matter to arbitration, the reference should not constitute an arbitration see page 1008-G). In page 1009 of the report, the learned Judges of the Court of Appeal held that Tote Bookmakers (supra) was wrongly decided (see at page 1009-H). This Court is also of the view that the arbitration clause which is operating in the field in this case is, prima facie, a proper and valid clause and there is no lack of mutuality as has been allegedly urged. In any event, the decision of the learned single Judge in Tote Bookmakers (supra) having been overruled subsequently in the case of Pittalis (supra), this Court finds no substances in the aforesaid contention of the learned counsel of the petitioner-company.

52. In fact, there is nothing in the arbitration clause, in the instant case, to

preclude a reference at the instance of a constituent of a trading member.

53. Apart from that u/s 16 of ACA 96, these questions namely the existence, validity of the arbitration agreement are to be decided by the arbitral tribunal itself. This makes a complete departure from the provisions of Section 31(2), 32 and 33 of the previous law namely Arbitration Act, 1940. The present Section 16 with all its sub-section presents a complete code by itself and the language used is mandatory in nature. So the question of limitation, if any, can also be decided by the arbitral tribunal u/s 16.

For the reasons aforesaid, this Court is of the opinion that the points taken by the learned counsel for the petitioner-company do not succeed and as such are overruled. The writ petition is dismissed. Ad interim orders are vacated.

There will be, however, no order as to costs.