
(2004) 02 P&H CK 0102

In the Punjab And Haryana At Chandigarh

Case No : Letters Patent Appeal No. 235 of 2003

Sudarshan Chopra and Others

APPELLANT

Vs

Company Law Board and Others

RESPONDENT

Date of Decision : 10-02-2004

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 16, 8, 8(1), 8(2)
Companies Act, 1956 — Section 402
Constitution of India, 1950 — Article 226

Citation : (2004) 2 ARBLR 241 : (2004) 137 PLR 12 : (2004) 52 SCL 429

Hon'ble Judges : Kiran Anand Lall, J;H.S. Bedi, J

Bench : Division Bench

Advocate : Ashok Aggarwal and Vikram Aggarwal, for the Appellant; H.L. Tikku Kamal Nijhawan, Arun Kathpalia and Jai Shree Thakur and Puneet Bali, for the Respondent

Final Decision : Dismissed

Judgement

H.S. Bedi, J.—This Letters Patent Appeal is directed against the judgment of a learned Single Judge of this Court dated 14.3.2003 whereby the writ petition challenging the order of the Company Law Board dated 8.12.2000, copy appended as Annexure P-1 has been dismissed. The facts of the case which have been largely taken from the writ petition are as under:-

Lala Jagat Narain, the father-in-law of petitioner No. 1 and grandfather of the petitioner Nos. 2 and 3 founded the Company known as the Hind Samachar Limited in the year 1949. Its main object was the printing and publishing of newspapers, journals, magazines etc. It is the legacy of Lala Jagat Narain and the Company, which he founded, which is the bone of contention in this bitter family feud. Lala Jagat Narain was shot and killed by terrorists on 9.9.1981 an event which signalled the onset of terrorism in the Punjab. After his death, his son Ramesh Chander, husband of petitioner No. 1 and father of petitioner Nos. 2 and 3 took over the reins as the Chief Executive of the Company. He too was

gunned down on 12.5.1984. Petitioner Nos. 1 to 3, and petitioner Nos. 4 to 6 constitute a Hindu Undivided Family. Respondent No. 2 another son of Lala Jagat Narain is one of the share holders and the Chairman-cum/ Managing Director of the Company. Respondent No. 3 Smt. Swadesh Chopra is his wife whereas respondent Nos. 4 and 5 are their sons. The petitioners have been identified as Group A and respondent Nos. 2 to 6 as Group B in the pleadings as also in this judgment wherever the context and the flow of the narrative so requires. It is the case of Group A that till the year 1995, it held a majority of shares in the Company but that year, Vijay Kumar Chopra and his sons of Group B approached petitioner No. 1 seeking joint and equal representation for both the groups in the affairs of the Company. It is the case of Group A that in order to maintain cordial relations, petitioner No. 1 (Group A) agreed to surrender her family shares to respondent Nos. 2 to 6 (Group B) so as to equalise the share holding between them. A memorandum of family settlement. Annexure P2 dated 25.6.1995 was accordingly entered into between the two groups. As per Clause 30 of this memorandum, in case of any dispute, Sh. S.L.Batra and Sh. T.R.Suri would act as arbitrators. The two Groups also entered into a family agreement, Annexure P3, dated 6.5.1996 and as per Clause 17 thereof, it was provided that in case of any misunderstanding or dispute, the matter would be resolved by mutual discussion or if required by appointing an Arbitrator by consensus. It is further the case of Group A that after having been persuaded to relinquish its majority stake in favour of Group B, a shareholders agreement, copy Annexure P-4, was signed on 8.2.1997 and it was agreed that the two groups would henceforth hold their shares in complete parity and that they would endeavour to manage the affairs of the Company with dedication and honesty of purpose. Clause 33 of the Shareholders Agreement also provided for settlement of disputes by Arbitration. It appears that the terms of the Shareholders Agreement, Annexure P4, were adopted and incorporated in the Memorandum & Articles of Association of the Company, Annexure P-5 and Clause 33 thereof was adopted mutatis mutandis in the memorandum as well. It is further the case of Group A that after having received parity in the share holding in the Company, Group-B took control of the Company and ousted Group-A from its management and in order to frustrate whatever little control is still held, filed Company Petition No. 76 of 1999 u/s 397, 398, 402 and 403 of the Companies Act, 1956 before the Company Law Board in total disregard of the Arbitration agreement contained in the Articles of Association of the Company. It is submitted by Group-A that it was in fact Group-B, which had itself perpetrated the acts of oppression and mismanagement with respect to the affairs of the Company. As an advance copy of the petition had been supplied to Group-A, it appeared before the Company Law Board through its counsel on 20.8.1999, who sought time to consult his clients and to react to the interim prayers made in the petition. The Company Law Board vide its order dated 20.8.1999 also directed Group-A to file its reply to the interim prayers made in the Company Petition. It is the case of Group-A that as the dispute between the parties was to be settled by arbitration, it (instead of submitting to the jurisdiction of the Company Law Board) sought its permission on 24.8.1999

to file an application u/s 8 of the Arbitration and Conciliation Act, 1996 (hereinafter called "the Act"). Group A also filed its reply on 13.9.1999 to the interim prayers without prejudice to their contention that the differences and disputes were referable to Arbitration. Several dates were taken by the parties to arrive at a settlement but the efforts did not fructify. It is further the case of Group A that while the efforts for a settlement were being made, Group B using the pending company petition as a camouflage began a fresh wave of terror against it. Group A accordingly moved an application before the Company Law Board seeking inter alia the appointment of an Administrator to manage the affairs of the Company and to maintain the status quo with regard to the assets of the Company, On 16.5.2000, Group A also moved an application u/s 8 of the Act and sought a reference of the dispute to the Arbitrator on the plea that no effective hearing had so far taken place before the Company Law Board. Group B filed a reply to this application whereas Group-A filed its rejoinder. Copies of the application, the reply and the rejoinder have been appended as Annexures P8 to P10 dated 12.5.2000, 8.6.2000 and 11.7.2000 respectively to the petition. The application was taken up by the Company Law Board on several dates and arguments were finally concluded on 25.10.2000. The application was dismissed vide order, Annexure P1 dated 8.12.2000, holding, inter alia that there was no existing binding Arbitration Agreement, and even if there was one Group A had abandoned its claim to Arbitration having submitted the substance of the dispute before the Company Law Board before the filing of the application aforesaid. Group- A thereafter challenged the order in this Court by way of Company Appeal No. 2 of 2001 u/s 10F of the Companies Act. This Court on 22.8.2001 passed the following order:-

"Having heard learned counsel appearing for the parties, it appears to us that the questions of law involved in the case will require detail (sic) hearing.

Admit.

Meanwhile, stay further proceedings before the company Law Board.

List the case for hearing on 2.10.2001"

2. This order was challenged by Group. B before the Hon"ble Supreme Court, which was listed as SLP (Civil) No. 16255 of 2001. The Hon"ble Supreme Court, however, without opining on the merits of the controversy dismissed the SLP. Several interim orders were also made by the High Court in the Company Appeal but it was ultimately dismissed as being not maintainable vide judgment dated 24.4.2002. Copy appended as Annexure P13 to this petition. It is in these circumstances that Group A has filed the present Civil Writ Petition impugning the order, Annexure P1, which too has been dismissed as already mentioned above.

3. In the reply to the writ petition, Group-B took several pleas. It seriously questioned the territorial jurisdiction of this Court to entertain the writ petition. It was further pleaded that Group-A had by its conduct abandoned its claim to

arbitration and had acquiesced to the jurisdiction of the Company Law Board. Reference in this connection was made to the various orders passed by the Company Law Board from time to time, as also the communications addressed to Group-A on 4.9.1999, 7.9.1999 and 11.9.1999, Copies Annexures R5/2 to R5/4 respectively to the petition. It was further pleaded that Group A had replied to the interim application filed with the Company Petition on 13.9.1999 and that reply itself constituted its first statement on the substance of the dispute and as the said reply had been filed without any request for reference to Arbitration, it had abandoned its claim thereto. It was further highlighted that Group A had in fact independently invoked the jurisdiction of the Company Law Board and had filed three applications, one u/s 402 of the Companies Act, another u/s 403 thereof seeking the appointment of an Administrator and a third on 2.3.2002 and that they too constituted the second, third and fourth statements of the substance of the dispute. Special reference was also made to the order dated 17.9.1991 of the Company Law Board and marked as Annexure R5/5. It was also pointed out that Group A had then instituted a suit in the Delhi High Court (being Suit No. 696 of 2002) seeking several reliefs in relation to the management and affairs of the Company. A copy of the plaint has been appended as Annexure R5/16 with the reply. It is the case of Group-B that this suit clearly pertained to the alleged violations made by it in the Shareholders Agreement dated 8.2.1997 and the Articles of Association of the Company, which both contained Clauses for reference to Arbitration. It was further highlighted that Group-A had also sought interim relief in the civil suit and vide order dated 20.3.2002 some relief had in fact been granted. A copy of this order has been appended as Annexure R-5/17. It has accordingly been pleaded that as Group-A had been approbating and reprobating with regard to the jurisdiction of the Company Law Board and had been guilty of suppression of material facts, the High Court should not exercise its discretion in its favour. It has further been pointed out that the appeal filed by the petitioners u/s 10F of the Companies Act against the order of the Company Law Board dated 8.12.2000 had been dismissed on 24.4.2002 and about three months thereafter, the present writ petition had been filed impugning the order dated 8.12.2000.

4. We find from the record that the writ petition first came up before this Court on 15.7.2002, and while issuing notice of motion for 2.9.2002, it was directed that the proceedings before the Company Law Board could go on but the final order should not be pronounced till the next date. The matter came up before the Company Law Board on 16.7.2002 when Group A sought an adjournment on the ground that the matter was pending in the High Court. It is conceded position that the stay order continues to be in operation as on date.

5. The learned Single Judge in his judgment, held that as Group A had not spelt out its intention to seek arbitration at the very initiation of the proceedings before the Company Law Board and had on the contrary made a statement on 17.9.1999 before the Company Law Board that the matter be finally heard by it, it appeared that it had abandoned its claim to arbitration and the fact that it had

later filed a suit in the Delhi High Court clearly confirmed its intention. It also observed that the application filed on 16.5.1999 also did not comply with the provisions of Section 8 of the Act as it had not been accompanied by a copy of the arbitration agreement and that in any case it had been filed long after Group A had submitted its "first statement on the substance of the dispute" before the Company Law Board by filing several applications before it. The Court accordingly held that the finding of the Company Law Board that as Group A had dealt with the basic issues raised in the company petition by filing their reply to the same, it had to be taken that it constituted their first statement on the substance of dispute was correct. The Court also observed that as the Company, Hind Samachar Limited was not a party to the Arbitration Agreements, it could not be bound by it and as a petition under Sections 397, 398 and 402 of the Companies Act vitally affected the Company, the dispute was for this reason as well not referable to Arbitration. The Court also held that the word "may" used in the Arbitration Clause spelt out that there was no inflexible rule that all disputes were to be settled by Arbitration. The Court finally observed that as the Company Law Board had made the impugned order on 8.12.2000 and the matter had been pending in this Court in one form or another for several years, it would be unfair to relegate the parties to arbitration at this belated stage. The writ petition was accordingly dismissed.

6. Aggrieved thereby, the present Letters Patent Appeal has been filed.

7. Mr. Ashok Aggarwal, the learned Senior counsel for the appellants, has argued that the finding of the learned Single Judge that Group A had abandoned its claim to arbitration and had acquiesced to the jurisdiction of the Company Law Board by its conduct was erroneous inasmuch as that the averment with regard to the existence of an arbitration clause had been raised by it at the very initial stage first on 24.8.1999 and also in the reply dated 13.9.1999 to the application for interim relief filed by Group-B. He has in this connection relied upon the averments made in paragraph 1 of the preliminary objections of the reply. He has further pointed out that in this situation the fact a reply had been filed by Group A would not constitute an intention to abandon its claim to arbitration for the reason that Group A had absolutely on option but to make a reply thereto. It has further been pleaded that the delay in the proceedings before the Company Law Board could not be foisted exclusively on Group A as this had occurred at the instance of both parties to explore the possibility of a compromise between them. He has further argued that a mention of the Arbitration Agreement had been made in the reply dated 13.9.1999 and as the various arbitration agreements were already on the file of the Company Petition pending before the Company Law Board, it had to be taken that the objections to the assumption of jurisdiction by the Company Law Board had been raised at the very initial stage. It has also been submitted that the four applications moved by Group A before the Company Law Board i.e., Company Application No. 294 of 1999. Contempt Application No. 6 of 2000, Company Application No. 7 of 2000 and Company Application No. 440 of 2000 also could not be read to mean an acquiescence or

abandonment of the claim to arbitration as these applications did not touch on the substance of the dispute pending before the Company Law Board. It has accordingly been pleaded that there was absolutely no clear intention on the part of Group A to abandon its claim to arbitration. Reference for this argument has been placed on the judgment reported as Food Corporation of India and Anr. v. Yadav Engineer and Contractor 1982 (2) S.C.C. 499. It has, in addition been argued that there was no requirement in law that a formal application u/s 8 of the Act was required to be moved as the copies of the arbitration agreement were already on the file of the Company Petition pending before the Company Law Board and that the existence of the arbitration agreement had been referred to in the reply dated 13.9.1999 and even the technicalities of law (though not required in the circumstances) had been complied with as an application had in fact been filed on 16.5.2000. Reliance for this argument has been placed on a Single Bench judgment of this Court in Parampal Singh and others Vs. Punjab State Ware House Corpn., Chandigarh and others, . It has further been argued that the word "May" used in the Arbitration Clauses had to be read as "Shall" and the reliance of the learned Single Judge and the Company Law Board on Wellington Associates Ltd. Vs. Mr. Kirit Mehta, was misplaced as the arbitration Clauses therein were couched in entirely different terminology.

8. As against this Mr. Kathpalia, the learned counsel for Group B has argued that the conditions for reference to Arbitration clearly did not exist as no objection with regard to the assumption of justification by the Company Law Board had been raised by Group A in that direction showing that it had abandoned its claim. It has been elucidated that Group A had in fact on four different occasions filed the substance of the dispute before the Company Law Board, the first on 13.9.1999; a second on 15.12.1999 when it had moved an application for appointment of an Administrator u/s 402 of the Companies Act; a third on 13.1.2000 in an application u/s 403 of the Companies Act seeking an interim order with respect to the dispute; and the fourth on 3.3.2000 seeking some interim relief in view of the fact that Group B was indulging in serious financial and other irregularities with regard to the affairs of the Company and in neither of these applications it had stated that it reserved its right to claim arbitration. It has accordingly been pointed out that it was for the first time on 16.5.2000 when a formal application u/s 8 of the Act had been moved a clear claim for arbitration had been made. It has, thus, been highlighted that as Group A had moved four applications giving the substance of the dispute long before the formal applications u/s 8 of the Act had been filed, it was now precluded from claiming arbitration and as such the finding of the Company Law Board and the learned Single Judge on this score was correct. It has in addition been pleaded that a formal application u/s 8 of the Act was indeed necessary and the one finally moved on 16.5.2000 too was defective as it was not accompanied by a copy of the Arbitration Agreement. Reference in this connection has been made to the judgment of the Hon"ble Supreme Court in Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another, .

9. It has also been emphasised by Mr. Kathpalia that the arbitration clause was even otherwise uninvokeable for the reason that the Company Hind Samachar Limited was not a party to the Arbitration Agreement, and as the dispute raised before the Company Law Board under Sections 397 and 398 read with Section 402 of the Companies Act was for oppression and mismanagement of a Group of shareholders, no relief could be given by an arbitrator in such a matter. Reliance for the argument has been placed on the judgments reported as Chiranjilal Shrilal Goenka (Deceased) through Lrs. Vs. Jasjit Singh and Others, ; Haryana Telecom Ltd. Vs. Sterlite Industries (India) Ltd., O.P.Gupta v. Shiv General Finance (P) Ltd. and Ors. 47 CC 279 Surendra Kumar Dhawan and Anr. v. R. Vir and Ors. 47 CC 276 and Manavendra Chitnis and Anr. v. Leela Chitnis Studios P. Ltd and Ors. 58 CC 113.

10. Mr. Ashok Aggarwal while controverting Mr. Kathpalia's last argument has urged that as the Company Law Board had decided this issue in favour of Group A and had opined that such a dispute could be the subject matter of arbitration, this matter should not be allowed to be taken up in this appeal. He has in this connection also made a reference to Section 8 of the Act viz-a-viz the provisions of Section 34 of the Arbitration Act, 1940 (hereinafter referred to as the "Old Act") and has argued that as no discretion had now been left with the judicial authority when an Arbitration Agreement existed, the matter ipso facto had to be referred to arbitration come what may and as per Section 16 of the Act, it was now for the Arbitrator alone to opine on the existence or otherwise of an arbitration clause.

11. We propose to take up all arguments seriatim.

12. The first argument with regard to the abandonment of the claim to arbitration and the acquiescence to the jurisdiction of the Company Law Board would be referable to Sections 7 and 8 of the Act. These Sections are reproduced hereunder;-

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

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

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

(a) a document signed by the parties;

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

(c) an exchange of statements of claim and defence in which the existence of the

agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

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

(i) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party no applies not later than when submitting his first statement on the substance of the dispute, refer the Parties to arbitration.

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

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

13. A bare perusal of the Section 7 would reveal that an "Arbitration Agreement" means the agreement by the parties to submit to arbitration and that it shall be in writing and signed by the parties. Section 8 thereof stipulates that the party, who claims the existence of an arbitration agreement may apply "not later than when submitting his first statement on the substance of the dispute." calling for arbitration. It is, therefore, obvious that a time limit has been placed under the Act by which a reference to arbitration can be claimed by a party and that is the submission of the first statement on the substance of the dispute before the Judicial Authority.

14. We now examine on facts as to whether Group A had by word or conduct abandoned its claim to arbitration and had acquiesced to the assumption of jurisdiction by the Company Law Board.

It is the admitted position that the formal application filed by Group A for reference of the dispute to arbitration was made on 16.5.2000 i.e., long after it had first appeared before the Company Law Board. We find from a perusal of the record that the petition had been filed before the Company Law Board on 17.8.1999 and had been listed for hearing on 20.8.1999 when Group A had also entered appearance. The case was thereafter adjourned to 27.8.1999 for consideration on the matter of interim relief but in the meanwhile, the Board made the following order on 24.8.1999, copy Annexure R5/1 with the writ petition.

"The respondents seek to file an application u/s 8 of the Arbitration Act. This may be done by 4.9.1999 and reply to be filed by 9.9.1999. The application will be heard along with the reaction of the respondents on our order dated 20.8.99 on 10th Sept. at 2.30 P.M."

15. The learned counsel for Group B thereafter wrote three letters dated 4.9.1999, 7.9.1999 and 11.9.1999, copies Annexures R5/2 to R5/4, calling upon Group-A to (amongst other things) serve a copy of the application u/s 8 of the Act on it. It is conceded that no reply was received thereto. It appears that the hearing, which had earlier been fixed for 10.9.1999 was in fact taken to 14.9.1999 and further adjourned to 17.9.1999 so as to enable the parties to find out as to whether some arrangements could be made for holding a Board meeting of the Company. The order dated 17.9.1999, Annexure R-5/5 pursuant to the order dated 14.9.1999 is significant and is reproduced hereunder:-

"In pursuance of our Order dated 14.9.1999 learned counsel for the petitioners on the basis of instructions has stated that his clients are not agreeable for the appointment of Chairman for conducting the Board meeting, however they have no objection to the appointment of observer appointed by us. The Respondents have strongly contended that unless an independent Chairman is appointed no purpose will be served. Both the parties are however agreed that the petition could be heard finally. In view of the same we direct that the Respondents (1) and (2) and the other Respondents shall file their reply to main petition within one month and the Petitioners shall file the rejoinder within one month thereafter. This case is fixed for hearing on 16th and 17th December, 1999 at 10.30 A.M. in case it does not conclude shall be taken up on 22.12.99 at 2.30 P.M."

16. The underlined portion clearly reveals that Group A had clearly decided to forego its objections, if any, to the continuance of proceedings before the Company Law Board and had drifted away from Arbitration and had by an explicit statement acquiesced to the Board's jurisdiction.

17. Mr. Aggarwal has, however, placed reliance on the reply dated 13.9.1999 filed by Group-A to the application for interim relief and, in particular, to preliminary objection No. 1. This paragraph is reproduced hereunder:-

"The present reply is being filed in respect of the interim prayers limited to the points for interim relief that were mentioned on behalf of the petitioners before this Hon"ble Board on 20.8.99. The Respondents crave leave to reserve their right to file a detailed reply in relation to the application for interim relief and if necessary in relation to the petition filed by the Petitioners under Sections 397 and 398 read with Section 402 and 403 of the Companies act, 1956. It may however be pertinent to mention that as per the inter-se Agreement of the shareholders, any matters or questions, disputes or controversies that were ever to arise in relation the Shareholders Agreement of 08.02.97, ought to the endeavoured to be settled mutually by conciliation and through the involvement of members of Group "A" and "B" and thereafter if necessary by the course of arbitration."

18. It has been argued by Mr. Aggarwal that Group A had thus clearly reserved its right to file an application u/s 8 of the Act. We find this argument to be

unacceptable. Admittedly there is a reference to the Shareholders Agreement dated 8.2.1997, which does have a Clause for arbitration but the reservation which is sought to be made does not pertain to this matter but is clearly related to the filing of a detailed reply to the application for interim relief and, if necessary, to the Company Petition filed under Sections 397 and 398 read with Sections 402 and 403 of the Companies act. The use of the word "however" after the reference to the Companies Act clearly reveals that arbitration was only an incidental matter and a mere after-thought to the main plea taken earlier. We find that whatever doubt there may be about the matter stands removed by the fact that while the Company Petition was pending before the Company Law Board and Company Appeal No. 2 of 2001 was pending in this Court, Group A filed a suit for mandatory and permanent injunction in the Delhi High Court on 19.3.2002 making a clear shift away from arbitration. Mr. Aggarwal has, however, attempted to explain away this matter by urging that the suit did not cover the dispute raised in the Company Petition as the relief sought therein was clearly different and distinct.

19. We have accordingly examined the pleadings in the suit viz-a-viz those in the Company Petition and find that they very substantially overlap each other. At the very initial stage, the plaint refers to the Shareholders Agreement and the Articles Association of the Company in which the parties had undertaken to run the business as per the terms and conditions made therein, and thereafter goes on to say that the defendants in the suit had in utter disregard of the agreements aforesaid filed a petition under Sections 397 and 398 of the Companies Act on the plea that the affairs of the Company were being conducted in a manner prejudicial to the public and/or the shareholders, and that a dead lock existed between them. The plaint then goes on to dilate on the various acts of omission and commission, which are said to be in violation of the Shareholders Agreement and the articles of Association of the Company and alleges that the affairs of the Company were being run by the defendants "against all canons of good governance and management of the Company" and that they had no right "to mismanage the affairs of the Company for personal gains" and that "the defendants cannot be permitted to act in violation of the Shareholders Agreement of the Company" and refuse "to adhere to the terms of the Shareholders Agreement and Articles of Association" of the plaintiff Company, which is the magna-carta of the Company and that in view of the above facts the plaintiffs have "no alternative or efficacious remedy but to approach this Court for the redressal of their grievances."

20. It will be seen from the gist of the plaint that it is based entirely on the Shareholders Agreement and the Articles of Association of the Company, which as per the plaintiffs (Group A) is the magna-carta of the dealings inter se.

21. It has then been contended by Mr. Aggarwal that as some urgent interim relief was sought by Group A, it had absolutely no option but to approach the Delhi High Court for that relief. We find this argument also to be rather specious

for the reason that if its case was that the matter was referable to arbitration (as has now been contended) there was ample authority with the Arbitrators to grant interim relief in terms of Section 9 of the Act, as it was clearly visualised under that provision, and that in the ultimate analysis, the vacillation on its part was one of the factors, which had led to the rejection of the application u/s 8 of the ACE. It is also significant that an appeal against the order of the Company Law Board, Annexure P-1, was pending in this Court at that time. Mr. Aggarwal has, however, placed reliance on Food Corporation of India's case (*supra*) to contend that a party, who waived or abandoned its claim to arbitration was required to unequivocally indicate its intention to do so and in the absence of such clear indication, it could not be presumed that the claim had been abandoned or waived as the ordinary process of law was that a party should be bound by its contracts, which may include a valid arbitration clause. He has also urged that merely because the reply to the interim application had been filed by Group A on 13.9.1999, it did not conclusively prove to be a waiver. Mr. Aggarwal has in particular relied on the following observations:-

"Therefore, the expression "taking any other steps in the proceedings" must be given a narrow meaning in that the step must be taken in the main proceeding of the suit, and it must be such step as would clearly and unambiguously manifest the intention to waive the benefit of the arbitration agreement and to acquiesce in the proceedings. Interlocutory proceedings are incidental to the main proceedings. They have a life till the disposal of the main proceedings. As the suit or the proceeding is likely to take some time before the dispute in the suit is finally adjudicated, more often interim orders have to be made for the protection of the rights of the parties. Such interlocutory proceedings stand independent and aloof of the main dispute between the parties involved in the suit. They are steps taken for facilitating the just and fair disposal of the main dispute. When these interlocutory proceedings are contested it cannot be said that the party contesting such proceedings had displayed an unequivocal intention to waive the benefit of the arbitration agreement or that it has submitted to the jurisdiction of the court. When *ex parte* orders are made at the back of the party, the other party is forced to come to the court to vindicate its right. Such compulsion cannot disclose an unambiguous intention to give up the benefit of the arbitration agreement. Therefore, taking any other steps in the proceedings must be confined to taking steps in the proceedings for resolution of the substantial dispute in the suit. Appearing and contesting the interlocutory applications by seeking either vacation thereof or modification thereof cannot be said to be displaying an unambiguous intention to acquiesce in the suit and to waive the benefit of the arbitration agreement. Any other view would both be harsh and inequitable and contrary to the underlying intent of the Act. The first party which approaches the court and seeks an *ex parte* interim order has obviously come to the court in breach of the arbitration agreement. By obtaining an *ex parte* order, if it forces the other party to the agreement to suffer the order, or by merely contesting be imputed the intention of waiving the benefit of arbitration

agreement, it would enjoy an undeserved advantage. Such could not be the underlying purpose of Section 34. Therefore, in our opinion, to effectuate the purpose underlying Section 34 the narrow construction of the expression "taking any other steps in the proceedings" as hereinabove set out appears to advance the object and purpose underlying Section 34 and the purpose for which the Act was enacted."

22. We find that this judgment does not advance Mr. Aggarwal's argument as it was dealing with the expression "taking any other steps in the proceedings" used in Section 34 of the Old Act under which there was great scope for ambiguity.

23. Mr. Kathapalia has, on the contrary, placed reliance on The State of Uttar Pradesh and Another Vs. Janki Saran Kailash Chandra and Another, which also pertains to a discussion on Section 34 of the Old Act but which would nonetheless be pertinent even now on this point. In para 7 of the report, it has been observed as under:-

"When a party to an arbitration agreement commences any legal proceedings against any other party to the said agreement with respect to the subject matter thereof, then the other party is entitled to ask for such proceedings to be stayed so as to enable the arbitration agreement to be carried out."

24. Admittedly Group A never complies with this direction.

25. Reliance has also been placed by Mr. Kathpalia on Food Corporation of India v. Sreekanth Transport 1999 SC 2184. In this case the question was as to whether an agreement for arbitration could be enforced by the Food Corporation of India, in the light of the fact that the Corporation itself had filed a suit in the Civil Court for a similar relief. It was observed as under:-

"There is, therefore, a positive act on the part of the Food Corporation of India not to put any reliance on to that particular clause of the agreement. There is as a matter of fact, thus, on the state of facts, as above, appears to be a positive relinquishment or abandonment of a right so far as the adjudication of the excepted matters are concerned by the Appellant-Corporation since the Corporation itself wanted to have it adjudicated by a Civil Court."

26. The learned counsel has also referred to Magma Leasing Limited Vs. NEPC Micon Limited and Another, . The facts of the case were that the plaintiff-Magma Leasing had entered into an agreement with the first defendant, Micon Limited for supply of certain goods. The agreement also provided for arbitration in case of a dispute. As a part of the transaction, the first defendant also issued several post dated cheques covering the amounts to be paid in instalments for the goods. As some of the cheques were dishonoured, Magma Leasing filed a suit for the recovery of the amount of default. The first defendant filed its reply invoking the arbitration clause and also stated that it too had filed a civil suit in the High Court for a declaration that the Magma Leasing was not entitled to claim the payment on account of post dated cheques. Several interim orders were also

obtained and it was in this situation, the High Court observed:-

"9. It is thus clear that the first defendant has by instituting its aforesaid suits in respect of the said agreements in this Court as well as in the Madras High Court given a complete go-bye to the said arbitration agreement. It follows therefore that the said defendant is precluded from invoking the said arbitration agreement and from maintaining the present application. It is often stated that a party can blow hot and hotter but he is not entitled to blow hot and cold as the first defendant is now seeking to do.

10. xx xx xx xx xx

11. The "party" referred to in Section 8(1) to my mind is a party who is entitled to maintain the application thereunder. The party to the arbitration agreement who has himself instituted a suit is clearly not the "party" envisaged. The first defendant although a party to the said arbitration agreement has elected to institute the aforesaid suits in enforcement of its rights and as such it cannot be said to be a "party" within the meaning of that sub-section. It was submitted by the learned Counsel on behalf of the said defendant that the said defendant was not aware of its right to enforce the said arbitration agreement when it instituted the aforesaid suits in this Court and in the Madras High Court. I am not impressed by the said submission. By reason of its conduct in instituting the aforesaid suits the first defendant is estopped from maintaining the present application."

27. An overall reading of the judgments would reveal that the parties need to be bound by their contracts and the Courts would be slow in stepping in and to assume jurisdiction in such cases but a party may by its word or conduct opt out of the clause related to arbitration. In the light of the facts that have been brought out above, we are of the opinion that Group A had not only by its conduct but even by specific words abandoned its claim to arbitration and acquiesced to the jurisdiction of the Company Law Board.

28. It is in this background that Mr. Kathpalia's subsidiary argument must be dealt with. He has submitted that this Court while exercising jurisdiction under Article 226 of the Constitution of India should not act as a Court in appeal, and as the Company Law Board and the learned Single Judge had given a finding of fact that Group A had abandoned its claim to arbitration, no interference was called for by us. Reliance for this argument has been placed on *Satyanarayan Laxminarayan Hegde and Others Vs. Millikarjun Bhavanappa Tirumale*, . In this judgment, it has been observed that the High Court should ordinarily not interfere in the orders of Subordinate Tribunals and unless there was an error apparent on the face of the record, interference was not called for. It was further observed that:-

"An error which has to be observed by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. As the above discussion of the rival

contentions show the alleged error in the present case is far from self evident and if it can be established, it has to be established, by lengthy and complicated arguments. We do not think such an error can be cured by a writ of certiorari according to the rule governing the powers of the superior court to issue such a writ. In our opinion, the High Court was wrong in thinking that the alleged error in the judgment of the Bombay Revenue Tribunal viz, that an order for possession should not be made unless a previous notice had been given was an error apparent on the face of the record so as to be capable of being corrected by a writ of certiorari."

29. We are, therefore, of the opinion that even on this score, this Court would be loathe and slow to interfere in such a matter. We, on the contrary, find absolutely no reason to differ with the findings of fact recorded by the Company Law Board and the learned Single Judge.

30. This appeal could well be dismissed on the discussion above, but as the learned counsel have argued the matter in extenso, we have thought it fit to deal with all the issues that have been raised.

31. Mr. Aggarwal's second argument is a corollary of the first one and also flows from an interpretation of Section 8 of the Act and does, to some extent, overlap with the issue of abandonment dealt with above. It has been contended that under Sub-section (1) of Section 8, it was open to Group A to apply for referring the matter to arbitration not later than when submitting its first statement on the substance of the dispute and as the substance of the dispute had for the first time been set out in the application u/s 8 of the Act on 16.5.2000, it could not be said that Group A had either abandoned its claim to arbitration or had acquiesced to the proceedings before the Company Law Board. He has pointed out that the reply to the application for interim relief in the Company petition filed on 13.9.1999 was in fact only for the purpose of meeting the averments made in the application filed by Group B and it could, therefore, not be said that the same constituted a statement on the substance of the dispute. He has also pleaded that the subsequent applications filed on 15.12.1999, 13.1.2000 and 13.3.2000, to which reference has been made above, also did not constitute the first statement on the substance of the dispute and as such it had to be taken that the substance for the first time had been submitted before the Company Law Board in the application dated 16.5.2000 and any statement or action taken prior to that date could not be taken as having foreclosed the plea for arbitration. Reliance has been placed on the judgment of the Hon'ble Supreme Court in Food Corporation of India's case (*supra*), to contend that a mere participation in the proceedings on the interim or interlocutory matter would not constitute an intention to waive or abandon the arbitration agreement or acquiescence to the proceedings before the Company Law Board.

32. Mr. Kathpalia has, however, stated that the aforesaid judgment was made in the background of the provisions of Section 34 of the Old Act under which the consideration was as to what constituted a waiver or abandonment of the claim

manifestly different and as Section 8 of the Act had clearly fixed the time as being the date on which the substance of the dispute was put before the judicial authority, the aforesaid observations were no longer applicable.

33. We have carefully considered this argument as well. We find from a perusal of Section 8 that it rigidly fixes the time by which the party claiming arbitration must raise the issue before the Judicial Authority. It is in this background that we have examined the four documents filed by Group A, which are on record. The first is the reply dated 13.9.1999 to the application for interim relief. We observe that the substance of the dispute has been clearly set out in the course of a long and lengthy pleading. Likewise we have perused the application for appointment of an Administrator filed u/s 402 of the Companies Act (C.A. No. 294 of 1999 dated 15.12.1999) by Group A wherein it has been alleged that Group B had been violating the Shareholders Agreement and Articles of Association and also narrating the steps taken to settle outstanding issues. The second application is C.A. No. 7 of 2000 dated 13.1.2000 filed u/s 403 of the Companies Act making a prayer for interim relief on the plea that after the filing of the Company Petition, Group B had been indulging in oppression and mismanagement and violating the Shareholders Agreement which was prejudicial to the affairs of the Company. Details have accordingly been set out as to how by its conduct, the company was being adversely affected. The third is C.A. No. 440 of 2000 dated 3.3.2000 wherein full details with regard to the oppression and mismanagement at the hands of Group B has been brought out and it has been prayed that the Board be pleased to:-

- a) appoint an independent Administrator to supervise the working of the company with adequate powers to control the day to day working, pending further proceedings, as also;
- b) to disallow all cash transactions unless approved jointly by both groups in the shape of withdrawal from Banks by self cheque only;
- c) Receive proceeds of all sales of newsprint and aluminium scrap by cheque or demand draft only;
- d) The petitioners be restrained from removing the assets and records of the Company and further be directed to bring back all the records which have been removed from the Jalandhar office.

34. It bears highlighting that u/s 8 only the "substance" and not full details are required to be set out. A bare perusal of the aforesaid applications would reveal that the substance of the dispute had in fact been set out in each one of them. We have also perused the application filed on 16.5.2000. It is the case of Group A that it is this application which contained the substance of the dispute. We find that this application is exclusively a repetition of what had already been said in the four documents referred to herein above. The application u/s 8 of the Act is also significant for yet another reason. In para 9 of the application, it has been pleaded that:-

"The respondent on the first date of hearing had submitted that they wish to file an application under the said Act for reference of the disputes and difference for arbitration in terms of the above detailed arbitration clause. It is further submitted that the respondent is presenting the present application before filing its first statement on the substance of the dispute. The respondents submit that they are willing to go through the arbitration proceedings as agreed by and between the parties hereto and have not submitted to the present proceedings as would be evinced from the records."

35. The "wish" referred to in the application was evidently expressed and noted in the order dated 24.8.1999, Annexure R-5/1. It bears repetition that despite three communications made by the counsel for Group B to the counsel for Group A asking for a copy of the application, no reply was forthcoming and no application was in fact filed till 16.5.2000 i.e. after a gap of nine months. The "wish", even if there was one, was clearly a non-starter.

36. The Hon'ble Supreme Court in P. Anand Gajapathi Raju and Others Vs. P.V.G. Raju (Died) and Others, while examining the conditions under which Section 8(1) and (2) of the Act could be enforced, observed as under:-

"The conditions which are required to be satisfied under Sub-sections (1) and (2) of Section 8 before the Court can exercise its powers are;-

- 1) there is an arbitration agreement;
- 2) a party to the agreement brings an action in the court against the other party.
- 3) subject-matter of the action is the same as the subject matter of the arbitration agreement;
- 4) the other party moved the court for referring the parties to arbitration before it submits his first statement on the substance of the dispute.

This last provision creates a right in the person bringing the action to have the dispute adjudicated by the court, once the other party has submitted his first statement of defence. But, if the party who wants the matter to be referred to arbitration applies to the court after submission of his statement and the party who has brought the action does not object, as is the case before us, there is no bar on the court referring the parties to arbitration."

37. The last paragraph of the above quoted judgment clearly reveals that by the consent of the parties, the matter may be referred to arbitration even after the submission of the first statement of the party before the judicial authority and conversely by implication if a party objects to the application such a reference cannot be made.

38. It has also been contended by Mr. Aggarwal that Section 8 of the Act did not envisage any particular form in which the application u/s 8 was to be made and as the reference to the arbitration clause had been made in the reply filed on 13.9.1999, it had to be held that the requisite application had in fact been made.

It bears reiteration that there is absolutely no prayer in this reply that the matter be referred to the arbitrator. We find that the matter stands settled by the Hon''ble Supreme Court in P.Anand Gajapathi Raju and Ors. case (supra) and the judgment of the Hon''ble Supreme Court in Sukanya Holdings Pvt. Ltd.'s case (supra). This was a case where all parties to the dispute were not parties to the arbitration agreement. The Court in paragraphs 12 and 15 of the judgment observed as under:-

"Further, the matter is not required to be referred to the Arbitral Tribunal, if:- (i) the parties to the arbitration agreement have not filed any such application for referring the dispute to the arbitrator; (2) in a pending suit, such application is not filed before submitting first statement on the substance of the dispute; (3) such application is not accompanied by the original arbitration agreement or duly certified copy thereof. This would, therefore, mean that Arbitration Act does not oust the jurisdiction of the Civil Court to decide the dispute in a case where parties to the Arbitration Agreement do not take appropriate steps as contemplated under Sub-sections (1) and (2) of Section 8 of the Act."

Para 15

"The relevant language used in Section 8 is:- "in a matter which is the subject matter of an arbitration agreement", court is required to refer the parties to arbitration. Therefore, the suit should be in respect of a matter which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced- "as to a matter" which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Section 8. The words "a matter" indicates entire subject matter of the suit should be subject to arbitration agreement."

39. There is yet another angle to this agreement. Sub-section (2) of Section 8 of the Act is couched in the negative but is imperative in terms when it says that the application referred to in Sub-section (1) "Shall not be entertained unless it is accompanied by the original arbitration agreement, or a duly certified copy thereof." It is conceded position that no copy of the arbitration agreement has ever been filed by Group A.

40. Mr. Aggarwal has, however, contended that as the copy of the Arbitration Agreement had already been filed with the Company Petition, there was absolutely no need to file another copy with the reply dated 13.9.1999 or the application dated 16.5.2000. Reliance for this assertion has been placed on a Single Bench judgment of this Court in Parampal Singh's case (supra), Admittedly, the observations of the learned Single Judge do advance the argument but in the light of the judgments of the Hon''ble Supreme Court quoted above, which make the provisions of Sub-section (2) of Section 8 mandatory, we find that the aforesaid judgment does not lay down the correct law and must accordingly be overruled.

41. We are, therefore, clearly of the opinion that Group A not only abandoned its claim to seek arbitration but had even otherwise forfeited this right as it had submitted to arbitration before it had filed the first substance of its claim before the Company Law Board.

42. Mr. Kathpalia's reliance on Regulations 14 and 17 read with the Annexures to the Company Law Board Regulations, 1991, which have been framed by the Company Law Board pursuant to the power conferred by Sub-section (6) of Section 10E of the Companies Act, 1956, to contend that as a matter of fact even these provisions also visualise an application in a particular form and accompanied by certain documents, is however misplaced. We have perused the different format provided for different categories of applications but find that these would apply only to applications made under the Companies Act and not to an application u/s 8 of the Act.

43. The last two arguments of the learned counsel for the parties flow from an interpretation of arbitration clause Article 33 in the Shareholders Agreement dated 8.2.1997, Annexure P-4 to the petition, which corresponds largely to Clause 190 of the Articles of Association dated 9.8.1949, Annexure P5 as amended and to the scope and ambit of Sections 397, 398 and 402 of the Companies Act.

44. Relying on the terminology used in paragraph 190 of the Articles, Mr. Aggarwal has argued that the word "may" used therein was to be read as "shall" and as such there was no option with the Company Law Board but to relegate the parties to arbitration. He has also urged that in any case it was for the Arbitrator to decide on the existence or otherwise of an Arbitration Agreement as provided by Section 16 of the Act.

45. Mr. Kathpalia has, however, controverted the above argument and also raised a plea that the reliefs sought in the Company Petition Under Sections 397, 398 read with Section 402 of the Companies Act were not available to a party in arbitral proceedings and as such the very basis of Group-A's claim was lacking. He has pointed out that as Sections 397 and 398 of the Companies Act were part of Chapter VI thereof and this Chapter was a self contained Code, no arbitration proceedings were permissible, He has further highlighted that as the Company and the shareholders holding 2.4% of the shares were not parties to the Arbitration Agreements, it could not made applicable to it. He has also pointed out that Section 16 of the Act did not oust the jurisdiction of the Judicial Authority to opine on the existence of an Arbitration Agreement.

46. Mr. Aggarwal has, however, strongly challenged this assertion and has submitted that as the finding on this issue has been given by the Company Law Board in Group A's favour and it had been categorically held that the arbitration Clause could be enforced even with respect to a dispute raised in a petition under Sections 397 and 398 read with Section 402 of the Companies Act and that as this finding had not been seriously challenged before the learned Single Judge, it

was not open to this Bench sitting in appeal to go into the matter and to arrive at a different conclusion. He has also urged that as per the admitted position and as per the understanding between the two Groups, the paid up capital of the Company was to be held equally between them to the extent of 48.8% each making a total of 97.6% in their hands whereas the balance 2.4% was in the hands of others and (unless mutually agreed to in writing) the parties were restrained from disturbing this ratio, it was clear that the Company was in fact in the nature of a partnership and as such clearly subject to arbitration. In this connection he has referred to Section 20 of the Specific Relief Act, 1963 and to Section 40 of the Indian Partnership Act, 1932 as also to a judgment of the Hon"ble Supreme Court in M/s. V.H. Patel and Company and Others Vs. Hirubhai Himabhai Patel and Others, .

47. We have heard the learned counsel for the parties very carefully on this aspect as well.

48. It is true that the Company Law Board following its precedents, has given a finding that a dispute under Sections 397 and 398 of the Companies Act could be a subject matter for arbitration. We agree with Mr. Aggarwal when he says that though the decision of the Company Law Board can not be said to be binding on this Court but it would still have great persuasive value and must be given due consideration. We, however, find that Mr. Aggarwal's argument that as this issue had not been seriously debated before the learned Single Judge, this Court should stay its hands in this Letters Patent Appeal, is clearly unwarranted. It has to be borne in mind that the matter in the writ petition before the learned Single Judge was in the nature of a first appeal and the present proceedings are in the nature of a second appeal. Moreover, we find that this I technical consideration cannot shackle the writ jurisdiction of this Court in what is I purely a question of law.

49. Section 2-A of the Act defines a "Party" to mean a party to the arbitration agreement. Admittedly, the Company is not a party to the Arbitration Agreement as the same is confined only to groups A and B which constitute the parties in this appeal. In the family settlement dated 6.5.1996, the Arbitration Clause (Clause 17) provides that in case of any misunderstanding or dispute, the matter shall be resolved by mutual discussion or if required by appointing an Arbitrator when required by consensus. Paragraph 28 of the Shareholders Agreement dated 8.2.1997, Annexure P4, reads as under:-

"No failure to exercise nor any delay in exercising on the part of any party any right or remedy hereunder shall operate as a waiver thereof nor shall any single partial exercise of any right remedy previous any further or other exercise thereof or the exercise of any other right of remedy. The rights and remedy herein provided are cumulative and not exclusive of any rights or remedies provided by law."

50. Likewise sub paras (iv) and (v) of Paragraph 4 are reproduced below;-

"(iv) in the event a Group/Party attempts a sale, transfer or disposition of shares in breach of the Agreement the other Group/Party shall be entitled to interlocutory relief from court to resent such transfer.

(v) In pursuant to the agreed basic principles of the Agreement, Parties shall make concerted efforts to purchase 2.4% shares of the Company from the general public (other than from a member of Group A or Group-B defined as "Others" in Article 4 (b) above). If and when any share(s) is/are purchased from general public, the same shall be equally divided and owned by and between parties, so that at every point of time Group-A and Group-B have equal participation in the equity of the Company, If parties do not abide by the provisions of this Article then the aggrieved party shall have the right to approach the court of law and seek relief from the court and resent such transfer."

Paragraph 190 of the Articles is also reproduced below;-

"190. The parties shall make endeavour to settle by mutual conciliation any claim, dispute or controversy (dispute) arising out of or in relation to the shareholders agreement, including any dispute with respect to the existence or validity thereof, the interpretation thereof, the activities performed thereunder, or the material breach of any term(s) of the shareholders agreement by either party which remains unresolved for Sixty (60) days after receiving written notice of such breach from the other Party or deadlock or material disagreement which remains unresolved for three consecutive Board Meeting or nine months. "That as part of such conciliation process, members of Group A and Group B will meet each other, in order to settle disputes of any nature in reaching a solution to the problems/disputes. Any claim, dispute, deadlock or controversy which cannot be resolved through conciliation within 15 days or such extended period as Parties may unanimously agree, a party may refer the claim, dispute or difference to arbitration as hereinunder provided in accordance with the New Indian Arbitration and Conciliation Act, 1996. The arbitration shall be held in the city where the registered office of the company is situated. There shall be three arbitrators in arbitration proceedings. Group A and Group B shall have the right to appoint one arbitrator each and two such appointed arbitrators shall appoint the third arbitrator. The applicable law shall be Indian Law. The costs and expenses of such arbitration shall be allocated between the borne by the parties.

51. A cumulative reading of these paragraphs would reveal that as the Company and the shareholders holding the miniscule 2.4% of the shares were not parties to the Arbitration Agreements, an option had apparently been left with Groups A and B that they may go in for arbitration if they thought it fit to do so. It is true that two of the paragraphs quoted above undoubtedly refer to the intervention of the Court if an attempt was made to disturb the shareholders ratio amongst the two warring groups but when all the Clauses are read together in the context of the word "May", it would be clear that it was not the intention of the parties to have a categoric agreement that arbitration alone would be the remedy available

to it. This becomes even more explicit on a reading of paragraph 28 quoted above with stipulates that all the legal remedies open to a party would be open for consideration. In this connection, the judgment of the Hon'ble Supreme Court in Wellington Associates Ltd, 's case (supra) becomes relevant. In this case, Clause 4 and 5 of the arbitration agreement were under consideration. These Clauses are reproduced hereunder:-

"4. It is hereby agreed that, if any dispute arises in connection with these presents, only Courts in Bombay would have jurisdiction to try and determine the suit and the parties hereto submit themselves to the exclusive jurisdiction of the Courts in Bombay.

5. It is also agreed by and between the parties that any dispute or differences arising in connection with these presents may be referred to arbitration in pursuance of the Arbitration Act, 1940 by each party appointing one arbitrator and the arbitrators so appointed selecting an umpire. The venue of arbitration shall be at Bombay."

The Court construing the implication of the two clauses observed as under;-

"The words in Sub-section (i) of Section 7, "means an agreement by the parties to submit to arbitration", in my opinion, postulate an agreement which necessarily or rather mandatorily requires the appointment of an arbitrator/arbitrators. Section 7 does not cover a case where the parties agree that they "may" go to a suit or that they "may" also go to arbitration."

and then went on to conclude as under;-

21. Does Clause 5 amount to an arbitration clause as defined in Section 2(b) read with Section 7? I may here state that in most arbitration clauses, the words normally used are that "disputes shall be referred to arbitration." But in the case before me, the words used are "may be referred"..

22. It is contended for the petitioner that the word "may" in Clause 5 has to be construed as "shall". According to the petitioner's counsel, that is the true intention of the parties. The question then is as to what is the intention of the parties. The parties, in my view, used the words "may" not without reason. If one looks at the fact that Clause 4 precedes Clause 5, one can see that under Clause 4 parties desired that in case of disputes, the civil courts at Bombay are to be approached by way of a suit. Then follows Clause 5 with the words "it is also agreed" that the dispute "may" be referred to arbitration go to the civil court by way of suit but can also go before on arbitrator. Thus, Clause 5 is merely an enabling provision as contended by the respondents. I may also state that in cases where there is sole arbitration clause couched in mandatory language, it is not preceded by a clause like Clause 4 which discloses a general intention of the parties to go before a civil court by way of suit. Thus, reading Clause 4 and Clause 5 together, I am of the view that it is not the intention of the parties that arbitration is to be the sole remedy. It appears that the parties agreed that they

can also go to arbitration in case the aggrieved party does not wish to go a civil court by way of a suit. But in that event, obviously, fresh consent to go to arbitration is necessary. Further, in the present case, the same Clause 5, so far as the venue of arbitration is concerned uses the word "shall". The parties, in my view, must be deemed to have used the words "may" and "shall" at different places, after due deliberation."

52. The Court concluded in this situation that the word "may" could not be read as shall. We find from the fact of the present case, as set out above, that it cannot be categorically be said that the parties had undertaken to, in all situations, to have their disputes settled by Arbitration and Arbitration alone.

53. Mr. Aggarwal's argument that the Arbitrator alone was competent u/s 16 of the Act to opine on the existence or otherwise of an Arbitration Agreement is equally untenable. It is clear from a bare reading of Section 16 that it does not bar any judicial authority from determining as to whether the Arbitration Agreement exists or not. It would also be anomalous to hold that where there is a doubt with regard to the existence of an Arbitration Agreement, it is the Arbitrator and the Arbitrator alone, who could opine on the matter. This matter too has been decided in Wellington Associates Ltd's case (supra).

54. It is also clear from the observations of the Hon'ble Supreme Court aforequoted that before the matter can be referred to arbitration, the parties must all be present before the arbitrator. Admittedly in this case neither the Company nor the shareholders holding 2.4% of the shares are parties to any of the agreements signed between Groups A and B.

55. We now come to second of the two arguments referred to in the immediate preceding paragraphs. In this connection, we reproduce here Sections 397, 398, 402 and 403 of the Companies Act;-

Section 397:

"397. Application to Company Law Board for relief in cases of oppression.- (I) Any member of a company who complains that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members (including any one or more of themselves) may apply to the Company Law Board for an order under this section, provided such members have a right so to apply in virtue of Section 399.

(2) If, on any application under Sub-section (1), the court is of opinion-

(a) that the company's affairs are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members; and

(b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up.

the Company Law Board may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.

Section 398:

398 Application to Company Law Board for relief in cases of mismanagement.-

(1) Any members of a company who complain-

(a) that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner prejudicial to the interest of the Company, or

(b) that a material change not being a change brought about by, or in the interest of, any creditors including debenture holders, or any class of shareholders, of the company has taken place in the management or control of the company, whether by an alteration in its Board of directors or manager, or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to public interest or in a manner prejudicial to the interest of the company;

may apply to the company Law Board for an order under this section, provided such members have a right so to apply in virtue of Section 399.

(2) If, on any application under Sub-section (1), the Company Law Board is of opinion that the affairs of the company are being conducted as aforesaid or that by reason of any material change as aforesaid in the management or control of the company, it is likely that the affairs of the company will be conducted as aforesaid, the Company Law Board may, with a view to bringing to an end or preventing the matters complained of or apprehended, make such order as it thinks fit.

Section 402:

402. Powers of Company Law Board on application u/s 397 or 398.-Without prejudice to the generality of the powers of the Company Law Board u/s 397 or 398, any order under either section may provide for

a) the regulation of the conduct of the company's affairs in future;

b) the purchase of the shares or interest of any members of the company by other members thereof or by the company.

c) in the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital;

d) the termination, setting aside or modification of any agreement, howsoever arrived at between the company on the one hand; and any of the following persons, on the other, namely;-

- i) the managing director,
- ii) any other director.
- v) the manager,

upon such terms and conditions as may, in the opinion of the Company Law Board, be just and equitable in all the circumstances of the case;

e) the termination, setting aside or modification of any agreement between the company and any person not referred to in Clause (d), provided that no such agreement shall be terminated, set aside or modified except after due notice to the party concerned and provided further that no such agreement shall be modified except after obtaining the consent of the party concerned;

f) the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of the application u/s 397 or 398, which would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference;

g) any other matter for which in the opinion of the Company Law Board it is just and equitable that provision should be made.

Section 403:

403. Interim order by Company Law Board.- Pending the making by it of a final order u/s 397, 398, as the case may be, the Company Law Board on the application of any party to the proceeding, make any interim order which it thinks fit for regulating the conduct of the company's affairs, upon such terms and conditions as appear to it to be just and equitable.

56. A bare reading of the aforequoted sections would reveal that interference by the Company Law Board is called for where the affairs of the Company are being conducted in a manner prejudicial to the interest of the general public or in a manner oppressive to any member(s) and Shareholders of the Company. The various Clauses of Section 402 also show that the orders envisaged thereunder cannot be given to a party/parties by an Arbitrator. It is true that as per the documents on record the shares of the two contesting groups come to 97.6% but the fact remains that the balance 2.4% is in the hands of other persons. As held by the Hon'ble Supreme Court in *Cosmosteels Pvt. Ltd. and Ors. v. Jairam Das Gupta and Ors.*, 48 Company Cases 312, the Scheme of Sections 397, 398 and 402 appear to constitute a Code by itself for granting relief to oppressed minority shareholders. It is also clear that the interest of the 2.4% minority shareholders and the Company could be, prejudicially affected if the matters were put to Arbitration and finally decided by the arbitrator, whereas an order made by the Company Law Board under Sections 397, 398, 402 and 403 would be appealable u/s 10F of the companies Act. These aspects become relevant in the light of the observations in *Chiranjilal Shriial Goenka's* case (*supra*). In this matter, the

question of the probate of a will was referred by the consent of the parties for arbitration to retired Chief Justice of the Bombay High Court. As some proceedings with regard to the probate were also pending in Court, the question arose as to whether the Arbitrator could decide on the validity of the Will. The Hon"ble Supreme Court observed that it was only the probate court, whose order was appealable, which could decide this question the moreso, as the decision of the Arbitrator would deprive the losing party of the statutory right of appeal provided u/s 299 of the Indian Succession Act. The Court also observed that the argument as the parties had consented to the reference of the dispute to arbitration, no interference by the Court was called for, could be of no avail as consent could not confer jurisdiction nor there was any estoppel against a statute. We find that the aforesaid observations would clearly apply in the present case as well for the reasons already set out above.

57. The observations of the Hon"ble Supreme Court in Haryana Telecom Ltd. "s case (supra) are equally relevant. In the aforesaid case, the Hon"ble Supreme Court observed while construing the scope of Section 8 of the Act vis-a-vis the authority of an arbitrator appointed by consent of the parties, observed that:-

"The claim in a petition for winding up is not for money. The petition filed under the Companies Act would be to the effect, in a matter like this, that the company has become commercially insolvent and, therefore, should be wound up. The power to order winding up of a company is contained under the Companies Act and is conferred on the court. An arbitrator, notwithstanding any agreement between the parties, would have no jurisdiction to order winding up of a company. The matter which is pending before the High Court in which application was filed by the petitioner herein was relating to winding up of the company. That could obviously not be referred to arbitration and, therefore, the High Court, in our opinion was right in rejecting the application.

58. We are also of the opinion that the unanimous opinion in the High Courts dealing directly with the issue raised appears to be that no arbitration in cases such as the present one is permissible. In O.P.Gupta's case (supra), while dealing with an identical situation, a Single Bench of the Delhi High Court observed as under;-

"I fully agree that no arbitrator can possibly give relief to the petitioner under Sections 397 and 398 and will be unable to pass any order u/s 402 or 403 of the Companies Act. An order of stay in these proceedings will be tantamount to dismissing the petition."

and again

"I must also refer to Section 9(b) of the Companies Act, 1956 which states that any provision in any memorandum, article or agreement to the extent that it is repugnant to the Act will be void. In view of the fact that the learned counsel for the applicant relies on article of the company which is in consistent with the provisions of Section 397 and 398. I would hold that the article regarding

arbitration would be void. He also states that the subject matter of the present petition cannot be tried by this Court but has to be referred to arbitration before it can be proceeded with. I find an obvious repugnancy between Article 43 of the Articles and Section 397 and 398 of the Companies Act, 1956. This repugnancy can be resolved in one of two ways, either the article is wholly void by reason of Section 9(b) of the Act or the article does not apply when proceedings for winding up a company or a petition u/s 397 or 398 are moved in the court. In either case, the article cannot be called into play for the purpose of staying the present proceedings. The application is accordingly rejected with costs. The costs I assess at Rs. 100/-."

59. Likewise in Surindra Kumar Dhawan's case (supra), it was held as under;

"This article shows that if there is a difference between the company and its directors or between the directors themselves or between any members of the company or between the company and any person, then the same will be referred to arbitration. The jurisdiction of the court under Sections 397 and 398 of the Companies Act, 1956 or u/s 433 is concerned with the management of the company in the special circumstances provided in Sections 397 and 398 or for winding up when the situation provided in Section 433 arises. This is a statutory jurisdiction which cannot be ousted by arbitration clause."

60. In Manavendra Chitnis's case (supra) it was observed as under;-

"It is abundantly clear that merely because there is an arbitration clause or an arbitration proceedings or for that matter an award, the Court's jurisdiction under Ss. 397 and 398 cannot stand fettered. On the other hand, courts have gone to the length to hold that the matter which can form the subject matter of an arbitration, for an arbitrator can have no powers such as are conferred on the court, such as S.402 of the Companies Act.

61. As already noted above, the relief that has been sought by Group B cannot be granted by an Arbitrator and is available only under the provisions of Sections 397 and 398 read with Sections 402 and 403 from the Company Law Board. Moreover, the statutory jurisdiction of the Company Law Board and the right of appeal against its orders cannot be ousted even by consent of parties. In this view of the matter, Mr. Aggarwal's argument based on the analogy of the Specific Relief Act and the Partnership Act and the judgments relied upon by him can have absolutely no applicability.

62. We accordingly affirm the judgment of the learned Single Judge and dismiss the appeal. Copies of the judgment be provided dasti on application and in the meanwhile (in the light of the directions of the Hon'ble Supreme Court with regard to the urgency in the matter) we direct the Reader to supply a copy each to the parties/or their counsel under his own signatures.