
(2012) 01 DEL CK 0173

In the Delhi High Court

Case No : I.A. No. 335 of 2011 and I.A. No. 336 of 2011 in C.S. (OS) No. 2589 of 2010

Ultra Home Constructions (P) Ltd.

APPELLANT

Vs

Choice Hotels International Inc. and Others

RESPONDENT

Date of Decision : 13-01-2012

Acts Referred:

Citation : (2012) 1 ARBLR 318 : (2012) 194 DLT 143 : (2012) 127 DRJ 724

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : V. Giri with Mr. Narendra Kumar, Mr. Bipin Kumar, Mr. Rakesh Kumar and Mr. Suresh Chandra Sharma, for the Appellant; K. Datta, with Mr. Manish Srivastava and Mr. Kapil for Defendant No. 2 Mr. Mudit Sharma, with Mr. Moazzam Khan, for Defendant No. 3, for the Respondent

Judgement

Manmohan Singh, J.—By this common order, I propose to decide two applications filed by the defendant Nos. 2 and 3 being I.A. No. 335/2011 and IA No. 336/2011 which are u/s 5 & 8 of the Arbitration and Conciliation Acts, 1996 (hereinafter referred to as "the Act"). As the prayer sought by both defendants is same, thus a common order is being passed.

2. The plaintiff has filed the present suit praying, inter alia, grant of decree of declaration that the assignment of the Franchise Agreement dated 19.06.2008 (hereinafter referred to as "the Franchise Agreement or FA") and Hotel Operation Agreement dated 19.06.2008 (hereinafter referred to as "the Hotel Operation Agreement or HOA") is bad in law, inter alia, seeking a declaration that applicant herein cannot unilaterally assign Franchise agreement as well as Hotel Operation Agreement, in favor of Defendant No. 3 without prior consent or approval of the plaintiff. It is the case of the plaintiff that the subject matter of dispute vide the present suit cannot be subjected to arbitration and the suit filed by the plaintiff is maintainable.

3. As per the plaint, the plaintiff, with the intention of constructing a hotel with

the defendant No. 1s" brand "Clarion" entered into a memorandum of understanding (hereinafter referred to as the MoU) dated 17.02.2008 with the defendant No. 1 and thereafter the Franchise Agreement and the related Hotel Operation Agreement, both dated 19.06.2008 were entered into between the plaintiff and defendant No. 2.

4. According to the plaintiff, at the time of entering into the MoU and thereafter the agreements dated 19.06.2008, the defendant Nos. 1 & 2 had represented to the plaintiff that the defendant No. 2 is the Master Franchise of defendant No. 1 and has been licensed to grant franchises for the brands of defendant No. 1 and also that the defendant No. 2 has special knowledge and expertise in respect of design, construction, furnishing, equipping, operating and marketing of hotels. On the basis of the above said representations only the plaintiff had entered into the MoU and the agreements dated 19.06.2008 with the defendant No. 2.

5. Under the said MoU and the agreements, the defendant No. 2 granted the plaintiff, the right to use the Franchised Marks and also agreed to provide reservation services to the plaintiff for the hotel and other hotel under the system of defendant No. 1. Thus, the plaintiff was not only entitled to use "Clarion" but was also entitled to receive service reservations for other Franchised Marks/Proprietary Marks of defendant No. 1 which included "Choice" "Quality" "Comfort" and "Sleep". Thereafter, the plaintiff and defendant No. 2 also entered into a HOA, whereby the plaintiff entrusted the completion of hotel, its operation, administration and maintenance to the defendant No. 2.

6. That on 05.02.2010, the plaintiff received two letters, one from the defendant No. 1 and the other from defendant No. 2 wherein it was stated that as the defendant No. 1 had restructured its brand in India in December 2009 therefore, now all the Clarion Hotels in the country shall be managed and marketed by defendant No. 3. Hence, the defendant No. 2 has entrusted its rights and obligations under the agreement and the HOA to defendant No. 3. According to the plaintiff, defendant No. 3 is not similarly qualified as the defendant No. 2 neither it has the same experience and goodwill as the defendant No. 2 nor did it have any dealing with the plaintiff.

7. It is also stated that even if the reasons given for forcing the defendant Nos. 2 and 3 upon the plaintiff are accepted, it would conclusively establish that the defendant No. 2 had lost its rights to use the "Clarion" brand and after losing its rights to use the "Clarion" brand in the territory, the defendant No. 2 had no right to assign the same to any third party including defendant No. 3.

8. Therefore, vide letter dated 15.03.2010 the plaintiff rejected the said change by means of assignment. By legal notice dated 26.04.2010 the plaintiff terminated the agreements and sought refund of the money paid under the agreements.

9. Later on plaintiff had sent two separate notices dated 20.10.2010 to the defendant No. 2 inter alia invoking the Arbitration Clause(s) under the Franchise

agreement and the HOA and in its reply dated 10.11.2010 to the said notices, the defendant No. 2 appointed Mr. Justice V.S. Aggarwal (Retd.) as its nominee Arbitrator. The Learned Arbitrator, vide order dated 27.11.2010 accepted the reference of defendant No. 2 also and directed the parties to appear before the Arbitral Tribunal.

10. The defendant No. 3 also initiated arbitration before Arbitral Tribunal for seeking damages under HOA on the claim that it has stepped in to the shoes of defendant No. 2. The plaintiff has joined the arbitration under protest to avoid ex parte award and in order to show its bona fide, the plaintiff had also moved an application u/s 16 of Arbitration and Conciliation Act stating inter alia that defendant No. 3 is a stranger and further that it is not entitled to constitute the Arbitral Tribunal on its own. However, the same has been rejected. Thus, the plaintiff is compelled to participate in two different Arbitration Proceedings under the Franchise Agreement for the same cause of action.

11. It was submitted by the plaintiff that the said assignment in favor of defendant No. 3 in place of defendant No. 2 is contrary to the Agreement. The introduction of defendant No. 3 is in violation of clause 13.1 of FA.

12. It has been informed by the Learned Counsel appearing on behalf of defendant No. 3 that the arbitration proceedings with respect to the Franchise Agreement dated 19.06.2008 are at evidence stage and defendant No. 3 has already filed the affidavit of evidence of their witnesses.

13. During pendency of arbitration proceedings, the plaintiff has filed the present suit for permanent injunction and declaration seeking following reliefs :

a. Declaration declaring that the assignment of the Franchise Agreement dated 19.6.2008 and the Hotel Operation Agreement dated 19.6.2008 is bad in law as defendant No. 2 did not have the license to grant right to use "Clarion" brand at the time of assignment on 5.2.2010;

b. Declaration declaring that defendant No. 1 and defendant No. 2 cannot unilaterally impose any assignee including defendant No. 3 upon the plaintiff without its prior consent or approval;

c. Permanent injunction restraining defendant No. 3 and or its agents, associates, employees and/or representatives from embroiling plaintiff in any proceedings under Franchise Agreement dated 19.6.2008 and the Hotel Operation Agreement dated 19.6.2008, and from threatening in any manner business associates of the plaintiff.

d. For costs.

14. Upon service of summons of the suit and prior to filing of the written statement, the defendant No. 2 filed an application u/s 5 & 8 of the Arbitration & Conciliation Act, 1996, on the ground that there exist an arbitration clause in the said agreement.

15. In I.A. No. 335/2011 the defendant No. 2 is seeking prayer of dismissal of the suit or stay of proceedings. It is stated in the application that the Arbitration was invoked by the plaintiff by himself by letter dated 20.10.2010 in respect of the agreements and has now raised the same disputes under this suit which are subject matter of the Arbitration proceedings pending before the Sole Arbitrator. Thus, the plaintiff is stopped from filing any suit qua defendant No. 2 in respect of disputes arising out of the above said agreements and HOA.

16. No doubt it is the case of the plaintiff in the plaint that there is an arbitration agreement between the parties in respect of the HOA also which contains the arbitration clause and there is a dispute between them and he has invoked the arbitration clause vide his letter dated 20.10.2010.

17. For the purpose of deciding the present application, the first factor that is required to be determined is that whether all the ingredients of Section 8 of the Act are satisfied or not. The first ingredient is whether the disputes that are the subject matter of the suit fall within the scope of arbitration and in the instant suit the dispute between the parties has arisen on the alleged breach of the agreements and the HOA, which admittedly contain an Arbitration Clause. The subject matter of the present case is mainly to challenge the validity of the agreements and to stay the proceedings before the learned Arbitrator. The last ingredient required to be satisfied is whether application has been made before filing of the first statement on the substance of the dispute and in the instant suit, the defendant has not filed first statement on the substance of dispute and has not submitted itself to the jurisdiction of his court. It is also no doubt that the relief sought by the plaintiff from this Court, can be decided by the Arbitral Tribunal.

18. It is stated by the defendant No. 2 that once all the necessary pre-requisites enshrined u/s 8 of the Act are fulfilled and there is no dispute regarding the validity of the Arbitration Agreement, then in such an eventuality the judicial authority ceases to exercise jurisdiction and the dispute should be left to be adjudicated by the Arbitrator. Thus, the suit is liable to be dismissed.

19. It is also stated that the allegation of the plaintiff that the defendant No. 2 has failed to do its duties under the agreements by assigning to defendant No. 3 the rights without knowledge and consent of the parties and same is contrary to the various clauses of the agreement. Thus, the defendant No. 2 has played fraud upon the plaintiff. As per defendant No. 2, the said allegations are vague and have been made by the plaintiff only in order to wriggle out of the Arbitration proceedings, even otherwise the said dispute can also be decided by the Arbitral Tribunal.

20. In I.A. No. 336/2011 filed by defendant No. 3, it is stated that pursuant to the restructuring of its brands by Choice International Inc. in December 2009, the defendant Nos. 2 & 3 also executed an agreement dated 05.02.2010 whereby the defendant No. 2 assigned all its rights in all the hotels being

managed under the Clarion brands to the defendant No. 3 and the plaintiff was intimated regarding the same.

21. The reasons given by the defendant No. 3 are that the promoter group in defendant No. 2 prior to December 2009 was the same as the present promoter group of defendant No. 3 and the core group of defendant No. 3 is substantially the same as was acting on behalf of defendant No. 2. Further, as per the terms of the agreement and the HOA there was no restriction on defendant Nos. 1 & 2 to change their shareholding pattern and the member/share holders of defendant Nos. 1 & 2 could have divested their entire stake to any third party/entity(ies) and the plaintiff under the said agreements had no right to termite the said agreements. On the contrary, there are specific restriction on the plaintiff from assigning its rights and obligation under the said agreements. The defendant No. 3 has referred clause 13.4 of the of the said agreements admittedly executed between the plaintiff and defendant No. 2 wherein it is stated that the defendant No. 2 shall have the right to transfer all its rights and obligations under the Franchise Agreement to any person/entity. The relevant extract of the same reads as follows:

13.4 Master Franchisee shall have the right to transfer all or any part of its rights or obligations under this Agreement to any person or legal entity.

22. In reply, it is stated by the plaintiff that the present suit is not barred u/s 9 CPC as it is not barred in any law. Even Section 8 of Arbitration and Conciliation Act, 1996 does not create any bar as such. Thus, the suit cannot be dismissed as prayed at this stage. Order 2 Rule 2 CPC allows any plaintiff to seek all possible relief arising out of the same cause of action. The explanation to Order 2 Rule 2 CPC states that "an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action." Similarly, Order 1 Rule 3 CPC requires all defendants to be joined in suit if separate suits against them may arise essentially on a common question of law and fact amongst others. It is also stated that Section 41(a) of Specific Relief Act, 1963 also does not bar the suit by the use of words -"unless such restraint is necessary to prevent multiplicity of proceedings".

It is submitted that defendant Nos. 2 and 3 have argued on merit and in fact have sought rejection of the plaint under Order 7 Rule 11 CPC. Therefore, it must be presumed that they have shown intention to submit to the jurisdiction of this Court. Thus, their application u/s 8 must be dismissed.

23. It is stated that defendant No. 1 is a necessary party in view of Order 1 Rule 3 CPC, Section 41(a) of Specific Relief Act, 1963 and Clause 16.3 of FA and in order to avoid multiplicity of litigation there is no other alternative to file the present suit against the defendant No. 1 also though the defendant No. 1 is not the signatory thereto.

24. Against the defendant No. 3, it is stated that the defendant No. 3 is simply a

stranger to these Agreements. There is no privity of contract. Defendant No. 3 is not party as per Section 2(1)(h) of the Act which is a complete and exhaustive Code in itself. Therefore, the Arbitral Tribunal constituted by defendant No. 3 is totally illegal, void and non est in law and these acts of defendants cannot be determined before Arbitrator. Therefore, only Civil Court can decided the same.

25. It is also alleged by the plaintiff that every company is a separate legal entity and therefore, the Directors having switched company under restructuring or whatever can claim right to seek performance under an Agreement signed with the previous company. The plaintiff has also made few submissions about the validity of agreements on merits by referring its replies to the applications for which I feel, it is not necessary to deal with them except the concerning clauses referred by the parties and documents.

26. In support of its submissions the plaintiff has referred the following decisions :

- i. Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another, .
- ii. Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. and Others, .
- iii. M.R. Engineers and Contractors Pvt. Ltd. Vs. Som Datt Builders Ltd., .
- iv. Indowind Energy Ltd. Vs. Wescare (I) Ltd. and Another, .
- v. Shrikant Vs. Vasantrya and Others, .
- vi. Indu Kakkar Vs. Haryana State Industrial Development Corporation Ltd. and Another, .
- vii. Khardah Company Ltd. Vs. Raymon & Company (India) Pvt. Ltd. (1963) 3 SCR 183.
- viii. Eastern Coalfields Ltd. Vs. Sanjay Transport Agency and Another, .

27. Before any discussion of the rival submissions of the parties, it is necessary to refer few relevant dates and event upto the date, the details of the same are given as under :

S. No.

Date

Particulars

a.

05.11.1999

Choice Hotels International Inc. (Defendant No. 1) entered into a Master Franchise Agreement with Choice Hospitality (India) Ltd. (Defendant No. 2)

b.

19.06.2008

Ultra Homes Construction Pvt. Ltd. (Plaintiff) was desirous of constructing a ? Clarion? Hotel at Greater Noida. The defendant No. 2 entered into a Franchise Agreement with the plaintiff thereby granting him a license to use the ?Clarion? brand and other associated proprietary mark [clause 2.1 at page 22 read with clauses 1.7 and 1.8]

c.

21.12.2009

Choice Hotels Licensing B.V. entered into a Master Franchise Agreement with Inova Hotels & Resorts Pvt. Ltd. D-3 and its promoters were the promoters of D-2 at the time of D-2 had entered into with the Agreement with the plaintiff both dated 19.06.2008.

d.

05.02.2010

D-2 pursuant to the Master Franchise Agreement dated 21.12.2009 entered into an assignment and assigned all its rights, title and interest in and to the Agreements including the Hotel Operation Agreement and the Franchise Agreement executed between D-2 and the plaintiff both dated 19.06.2008 to D-3.

e.

05.02.2010

D-2 informed the plaintiff about assignment of the Franchise Agreement and the Hotel Operation Agreement.

f.

05.02.2010

D-3 informed the plaintiff about assignment of the Franchise Agreement and the Hotel Operation Agreement.

g.

26.04.2010

Plaintiff issued notice to D-2, terminating the Franchise Agreement and the Hotel Operation Agreement.

h.

28.06.2010

D-3 called upon the plaintiff to withdraw its termination and cease and desist from operating the Hotel through any entity except D-3.

i.

16.07.2010

The letter dated 28.06.2010 was sent again as the delivery of the said letter was returned with the remarks that after repeated attempts the addressee was not found.

J.

04.10.2010

D-3 invoked the arbitration under Clause 19 of Franchise Agreement.

k.

04.10.2010

D-3 invoked the arbitration under Clause 26 of the Hotel Operation Agreement.

l.

07.10.2010

In the arbitration invoked under the Franchise Agreement, the learned Arbitrator entered reference and issued notice to the parties concerned.

m.

20.10.2010

Plaintiff invoked arbitration against D-2 under Clause 26 of the Franchise Agreement.

n.

20.10.2010

Plaintiff invoked arbitration against D-2 under Clause 19 of the Franchise Agreement.

o.

27.10.2010

Plaintiff responded to the appointment notice sent by D-3 under Clause 19 of the Franchise Agreement.

p.

27.10.2010

Plaintiff responded to the appointment notice sent by D-3 under Clause 26 of the Franchise Agreement.

q.

12.11.2010

Plaintiff did not appear before the Arbitrator and sent a communication to the Arbitrator disputing the existence of Arbitration Agreement.

r.

09.12.2010

Plaintiff entered appearance before the Arbitral Tribunal in the arbitration initiated by D-3 under Clause 19 of the Franchise Agreement and requested that the question that there is no privity of contract between the parties and the reference for arbitration is not valid should be decided in the first instance.

s.

18.12.2010

The plaintiff filed the present suit.

t.

10.01.2011

D-3 filed an Application in the present suit being IA No. 335/2011 u/s 8 of the Arbitration and Conciliation Act, 1996 inter alia praying that the plaint of the plaintiff be rejected under Order VII Rule 11 of CPC as the present suit is barred in terms of Section 5 of Arbitration and Conciliation Act, 1996 and Section 41 (b) of Specific Relief Act.

u.

12.02.2011

An application filed by the plaintiff before the Arbitral Tribunal u/s 16 of the Arbitration and Conciliation Act, 1996 to contend that the Arbitral Tribunal had no jurisdiction to entertain the reference on the ground that there is no contractual relationship between D-3 and plaintiff and the same was dismissed.

v.

16.05.2011

The plaintiff filed an application in the arbitration proceedings initiated by it under the Franchise Agreement dated 19.06.2008 against D-2, wherein it inter alia praying that Choice Hotels International Inc./defendant No. 1 be impleaded as a party to the said arbitration proceedings.

28. It is well settled principle of law that once it has been established that all the necessary pre-requisites enshrined u/s 8 of the Act are fulfilled and there is no dispute regarding the validity of the Arbitration Agreement, then in such circumstances, the judicial authority ceases to exercise jurisdiction and the dispute is to be adjudicated upon by the learned Arbitrator as Section 8 of the

Act is mandatory in nature. In cases where there is an arbitration clause in the agreement, it is for the court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be determined in the suit. The Court has to refer the dispute to arbitration, if requirements of the said Section are fulfilled. Exercise of discretion by the judicial authority has been taken away under new Act, 1996. (See - Rashtriya Ispat Nigam Limited and Another Vs. Verma Transport Company, , NIIT Ltd. v. Ashish Deb And Excel Advanced Systems Pvt. Ltd. 2004 (2) ARB. LR 133 (Mad.) (DB) and The Bombay Gas Co. Ltd. Vs. Parmeshwar Mittal and others,).

29. In the present suit, it appears from the plaint that the plaintiff itself invoked arbitration by letter dated 20.10.2010 in respect of both Franchise Agreement as well as Hotel Operation Agreement alleging that defendant No. 2 has breached its obligations of the agreements by assigning its rights and obligations to M/s Innova Hotels and Resorts Limited without the consent of the plaintiff. It is also the admitted position that the plaintiff has raised the same disputes in the arbitration proceedings in respect of the Franchise Agreement to resolve all disputes and differences between them. The plaintiff has admittedly filed its statement of claim before the learned Arbitrator against defendant No. 2. The plaintiff has also filed an application seeking impleadment of defendant No. 1 as necessary and property party in the arbitration proceeding.

30. A mere reading of the plaint also reveals that the plaintiff has based its claim on the basis of the Franchise Agreement as well as Hotel Operation Agreements both dated 19.06.2008, which were the written agreements governing the terms and conditions between the parties, i.e., the plaintiff and defendant No. 2, and the same were duly signed by the parties and also contained arbitration agreement.

31. Later on, the dispute also arose between the plaintiff and defendant No. 3. The defendant No. 3, being aggrieved by the act of breach and termination of the agreements, invoked a separate arbitration and filed claim petition against the plaintiff, which is also pending before the learned Arbitrator. The plaintiff filed an application u/s 16 of the Act thereby raising the issue of the jurisdiction of the Tribunal to adjudicate the claim on the ground of assignment of Agreements by defendant No. 2 in favor of defendant No. 3 and also alleged that there exists no privity of contract with defendant No. 3 who is merely a stranger. The defendant No. 3 is not a party to the agreement which is executed by the plaintiff. Thus, the arbitrator had no jurisdiction to adjudicate the dispute between the plaintiff and defendant No. 3. However, by order dated 12.02.2011, the application of the plaintiff was dismissed by the learned Arbitrator and proceeded to continue with the arbitration.

32. It is admitted fact that the plaintiff and defendant No. 2 entered into the agreements containing Clause 29 of the Hotel Operation Agreement and Clause 26 of the Hotel Operation Agreement for resolution of all their disputes through arbitration. It is further admitted between them that as per Clause 13.4 of the

Franchise Agreement, the defendant No. 2 had right to assign its rights and obligations under the agreements to a third party without any demur. In view of thereto, the defendant No. 2 assigned its rights and obligations under the agreements in favor of defendant No. 3 vide letter dated 05.02.2010 and the plaintiff was intimated of the same. The plaintiff had admittedly terminated the contract and invoked the arbitration clause seeking reliefs against the defendant No. 2. The said dispute is pending for adjudication before the learned Arbitrator.

33. The first ingredient of Section 8 of the Act which is to be satisfied is that the disputes which are subject matter of suit falls within the scope of arbitration agreement and can be adjudicated in arbitration proceedings. It is stated that the dispute between the parties has arisen on alleged breach of the Franchise Agreement and Hotel Operation Agreement, which obviously contains an arbitration clause, wherein all the disputes arising thereof are to be adjudicated by an arbitrator. It is also not in dispute that grievance of the plaintiff and in a way the reliefs sought in the present suit are common to the claims in statement of claim in pending arbitral proceedings before the learned Arbitrator which have already been commenced at the instance of the plaintiff and as per settled law, it has to be adjudicated upon in arbitration proceedings. Secondly, it is not in dispute that the agreement between defendant No. 2 and the plaintiff is a written agreement containing an arbitration clause. The plaintiff in the present suit has sought relief of declaration that assignment dated 05.02.2010 is bad in law which is the same as mentioned in statement of claim before the learned Arbitrator. Thirdly, in the present suit, the defendant has not filed first statement on substance of the dispute and has not submitted himself to jurisdiction of this Court and thus, the last requirement is also satisfied.

34. It is further stated by the defendant No. 3 that the plaintiff was informed about the said restructuring on the day of the assignment itself i.e. on 05.02.2010 by both defendant Nos. 2 & 3 through their respective letters to the plaintiff. The defendant No. 3 in its response to the plaintiffs legal notice dated 26.04.2010 sent its letter dated 28.06.2010 informing the plaintiff that the termination of HOA and the Franchise Agreement are without any basis and also called upon the plaintiff to pay its outstanding dues towards pre-opening technical fee. But the plaintiff did not pay its legitimate dues to defendant No. 3 and also failed to comply with various notices issued by defendant No. 3.

35. The issue which arises for consideration before the Court is pertaining to the application filed by the defendant No. 3 as to whether prima facie there is an arbitration agreement between the plaintiff and defendant No. 3. The disputes which are the subject matter of the present suit emanate from Franchise Agreement and Hotel Operation Agreements dated 19.06.2008 between the plaintiff and defendant No. 2. Both agreements have an arbitration clause. The Franchise Agreement and the Hotel Operation Agreement were assigned by virtue of a written agreement by defendant No. 2 in favor of defendant No. 3, namely, the assignment and assumption of contracts dated 05.02.2010.

36. Admittedly, the validity of assignment is an arbitration dispute and pending adjudication before the arbitrator. Clause 13(4) of the Franchise Agreement permits defendant No. 2 to assign the agreement without any consent of the plaintiff and clauses 20.7 and 20.8 set out that the agreement shall be binding on an inure to the benefit of the successors and permitted assigns of Master Franchisee, defendant No. 2, and choice.

37. It is the admitted case of the parties that defendant No. 2 by letter dated 5.2.2010 assigned both Franchise as well as Hotel Operation Agreement both admittedly containing arbitration agreements. It is well settled law that if a contract is assignable as a result whereof the parties hereto are bound thereby, the arbitration agreement can be enforced. Clause 13.4 of the agreement shows that the defendant No. 2 had right to assign its rights and obligations under the agreements to a third party and specifically without any demur from any quarter whatsoever. Further, the recital of the agreement would reveal that parties have agreed that the agreement shall be binding on assigns as well as successors of respective parties to agreement. (See Birla VXL Ltd. Vs. DLF Universal Ltd. 2003 (42) SCL 153 (Del.), Bestech India Private Limited Vs. MGF Developments Ltd. and Others, and Virender Yadav Vs. Aerosvit Airlines and Others,)

38. The assignment by the owner of all the brands including Clarion brand. By virtue of alleged assignment, the defendant No. 3 with effect from 05.02.2011 is the Master Franchise of "Clarion Brand" and the Franchise Agreement and Hotel Operation Agreements relate to Clarion Brand in favor of defendant No. 3, who steps into the shoes of defendant No. 2.

39. In so far as allegation relating to fraud is concerned as alleged by the plaintiff, the dispute cannot be referred to arbitration and further allegation made by the plaintiff that the defendant No. 2 has assigned the agreement to defendant No. 3 without its consent, and hence it amounts to fraud upon the plaintiff, it is settled principle of law that the courts while deciding an application u/s 8 of the Act are not to go into the merits of the dispute including the ground of fraud, undue influence, misrepresentation, etc., as the same are also capable of being adjudicated by the Arbitrator who is competent to decide all issues relating to the Franchise as well as Hotel Operation Agreement including allegations of fraud. (see Sunder Kukreja and Others Vs. Mohan Lal Kukreja and Another, and Applied Electronics Limited Vs. Mahanagar Telephone Nigam Ltd. and Another,)

40. As regards the next objection raised by the plaintiff that the defendant No. 1 is not a party to the arbitration agreement whereas the plaintiff himself has impleaded defendant No. 1 in the present suit and has also filed an application for impleadment of defendant No. 1 as party to the arbitration proceedings.

In number of decisions, it is held that when there neither exist any privity between the parties nor any consideration was involved, it cannot be said that the arbitration cannot proceed in the absence of the said third party specifically,

when it is not in dispute that the subject matter of the suit and the claims therein are within the ambit of the arbitration agreement. (See *Applied Electronics Ltd. (supra)*, *Kotak Mahindra Bank Vs. Sundaram Brake Lining 2008 (4) CTC 1 (Mad.)* and *Srivenkateswara Constructions and Others Vs. The Union of India,).*

41. As regards the decisions referred to by the plaintiff are concerned, the same do not help the case of the plaintiff and all the decisions are distinguishable as the facts in the present case are materially different. The details are given as under:

(a) *Indowind Energy Ltd (supra)*.

The said decision has no bearing to the present case as the issue which the Hon"ble Supreme Court was considering in the said judgment was as to whether Indowind who is one of the promoters of Subuthi could be said to be a party to the Arbitration Agreement between Subuthi and Wescare. The same pertained to oral contract being not permissible in law.

In the light of said issue the Supreme Court dealt with the provisions of the Act and held that as Indowind which is a company had not signed the agreement as Indowind it cannot be said to be a party to the Agreement between Subuthi and Wescare and thus not party to the Arbitration Agreement. However, in the present case there is a written and signed Assignment Agreement between defendant No. 2 and defendant No. 3. The plaintiff has agreed to the Unilateral Assignment in the Franchise and Hotel Operation Agreements in terms of Clause 13.4.

(b) *Booz Allen and Hamilton Inc. (supra)*.

In para 19 of the said judgment 5 tests to be applied by the Court in an application u/s 8 are set out. The issue which the Hon"ble Apex Court was considering was with respect to arbitrable and non-arbitrable disputes.

In the present case, all the test referred in the judgment are fulfilled within the meaning of Section 8 of the Act and the entire dispute emanates from Franchise and Hotel Operation Agreements. Thus, the matter referred has no application to the facts and circumstances of the case.

(c) *M.R. Engineers & Contractors (P) Ltd. (supra)*

The scope of controversy which the Supreme Court considered in the said judgment was with respect to two distinct and separate contracts, one the main contract and another a sub-contract. The main contract was between PWD, Kerala and Som Datt Builders Ltd. whereas the sub-contract was between M.R. Engineers & Contractors (P) Ltd. and Som Datt Builders Ltd. In the sub-contract, there was no clear indication with respect to the incorporation of arbitration clause of the main contract.

In the present case, *prima facie* there has been assignment by defendant No. 2

in favor of defendant No. 3 in view of valid clause of the agreements which was cited by the plaintiff. Therefore, facts are materially different.

(d) Eastern Coal Fields Ltd. (supra).

The said judgment has no application as the arbitration clause which the Supreme Court was considering in terms of the express language used in the clause did not extend to private parties. The said judgment has no bearing to the facts of the present case.

(e) Shrikant (supra)

The said judgment deals with the issue of severability of the Agreement and Arbitration clause. The said issue has neither been argued nor pleaded and has no relevance to the facts of the present case.

On the other hand, paras 15 and 16 of the said judgment support the case of the defendant No. 3 as it has been held that a contract should be read as a whole and where there is no ambiguity in the provisions of the Contract, the Court should not re-write the contract.

(f) Sukanya Holdings (P) Ltd. (supra)

The said judgment has no application to the facts and circumstances of the case. In the present case, the Arbitral Tribunal has already under the Franchise Agreement ruled upon its jurisdiction.

42. The defendant Nos. 2 and 3 rely upon following judgments with respect to rejection of the plaint:

a. K.V. Aerner Cementation India Ltd. Vs. Bajranglal Agarwal & Anr. 2001 (3) RAJ 414 (SC). Relevant para 1 and 2 are reproduced as under :

1. These special leave applications are directed against an order of a learned Single Judge of Bombay High Court refusing to interfere with an order of the Civil Court vacating an interim order of injunction granted by it earlier. The suit in question had been filed for a declaration that there does not exist any arbitration clause and as such the arbitral proceedings are without jurisdiction. The learned Single Judge of Bombay High Court came to hold that in view of Section 5 of the Arbitration and Conciliation Act, 1996 read with Section 16 thereof since the Arbitral Tribunal has the power and jurisdiction to make rule on its own jurisdiction, the Civil Court would not pass any injunction against an arbitral proceeding.

2. Mr. Dave, the learned Senior Counsel appearing for the petitioner contends that the jurisdiction of the civil Court need not be inferentially held to be ousted unless any statute on the face of it excludes the same and judged from that angle when a party assails the existence of an arbitration agreement, which would confer jurisdiction on an Arbitral Tribunal, the Court committed error in not granting an order of injunction. There cannot be any dispute that in the absence

of any arbitration clause in the agreement, no dispute could be referred for arbitration to an Arbitral Tribunal. But, bearing in mind the very object with which the Arbitration and Conciliation Act, 1996 has been enacted and the provisions thereof contained in Section 16 conferring the power on the Arbitral Tribunal to rule on its own jurisdiction including ruling on any objection with respect to existence or validity of the arbitration agreement, we have no doubt in our mind that the Civil Court cannot have jurisdiction to go into that question. A bare reading of Section 16 makes it explicitly clear that the Arbitral Tribunal has the power to rule on its own jurisdiction even when any objection with respect to existence or validity of the arbitration agreement is raised and a conjoint reading of Sub-sections (2), (4) and (6) of Section 16 would make it clear that such a decision would be amenable to be assailed within the ambit of Section 34 of the Act. In this view of the matter, we see no infirmity with the impugned order so as to be interfered with by this Court. The petitioner who is a party to the arbitral proceedings may raise the question of jurisdiction of the Arbitrator as well as the objection on the ground of non-existence of any arbitration agreement in the so-called dispute in question and such an objection being raised, the Arbitrator would do well in disposing of the same as a preliminary issue so that it may not be necessary to go into the entire gamut of arbitration proceedings.

b. Bhushan Steel Ltd. v. Singapore International Arbitration Centre & Anr. 2010 (118) DRJ 112. Relevant paras 2 and 9 are reproduced as under :

2. The present suit has been filed seeking the following reliefs:

a) declare that the purported arbitration agreement incorporated in the eight (8) Sales Contract executed between the plaintiff and the defendant no. 2 for supply of coated steel coils is vague and indeterminate and hence void and incapable of being enforced;

b) defendant no. 1 has no jurisdiction under the Sales Contracts and arbitration proceedings cannot be commenced or consummated under the aegis of defendant no. 1;

c) declare that the Sales Contract would be interpreted in terms of and governed by Indian Contract Act, 1872 and that the proper or substantive law in the instant case would be Indian Law;

d) grant permanent injunction in favor of the plaintiff and against the defendants and defendant no. 1 restraining them from initiating the arbitration proceedings, pursuant to the purported arbitration notice under the aegis of defendant no. 1;

e) declare that there is no arbitrable dispute between the plaintiff and defendant no. 2.

9. In the application under consideration, defendant no. 2 has contended that the plaint ought to be rejected based on the following arguments :

(i) The suit is barred by Section 5 of the Arbitration and Conciliation Act, 1996

("the Act" for short). Defendant no. 2 has contended that the plaintiff has sought to challenge the arbitration clause in the sales contract and not the entire contract and a declaration to the effect that the arbitration clause in an agreement is null and void cannot be challenged by way of a civil suit as the Civil Court's jurisdiction is very limited as laid out in Section 5 of the Act. While arguing that the limited scope for action u/s 5 of the Act does not allow this Court to interfere in the present matter, Learned Counsel for the defendants referred to the judgment titled Roshan Lal Gupta Vs. Parasram Holdings Pvt. Ltd. & Anr. reported as 157 (2009) DLT 712 which can be read as under :

5....It is not as if the civil Court per se does not have jurisdiction to entertain a suit emanating from a transaction subject matter of arbitration agreement. A civil Court cannot dismiss a suit instituted before it, even though found to be subject matter of an arbitration agreement, at the threshold. It is always open to the defendant to the suit to waive, give up and abandon the plea of arbitration and if that were to happen then the suit will continue before the civil Court.....

20....A peremptory Section 5 prohibiting the jurisdiction of Courts save as expressly provided under the Act has also been introduced. If in spite of the said changes, this Court is to hold that a suit is maintainable where the contract containing the arbitration clause is challenged on ground of forgery and the Court in such suit is empowered to injunct arbitration proceedings (as otherwise no purpose would be served by such suit), in my view, it would tantamount to negating the effect of the change in the statute. It may also be noticed that arbitration is normally provided for in commercial agreements and whereunder after the disputes have arisen, one of the parties is always interested in delaying the disposal of the claims of the other. In fact, the parties while providing for arbitration in commercial contracts do so for the reasons of expediency. If notwithstanding the aforesaid material changes between the old and the new Act, it is to be held that a suit as a present one is maintainable, it would give a tool in the hands of the party wanting to delay the disposal of the claims of the other; in each case suits would be instituted and stay of arbitration proceedings would be sought.

The plaint in the referred matter was rejected and appeal filed by the plaintiff before the Division Bench was also dismissed.

c. Devinder Kumar Gupta Vs. Realogy Corporation and Another, . Relevant paras 2, 3, 6, 14 and 15 are reproduced as under :

2. The case of the Plaintiff is that there is no arbitration clause in the Guarantee and Indemnification Agreement to which he is a party and which is appended as Ex. -1 to the Sub Franchise Agreement. This is also the case of the Plaintiff that there is no provision in Guarantee and Indemnification Agreement executed by him, whereby the provisions of Century 21 Sub Franchise Agreement would be incorporated in the Guarantee and Indemnification Agreement and at no point of time, he agreed to informal dispute resolution, arbitration or any other method of

alternative dispute resolution.

3. The Sub Franchise Agreement was terminated by Defendant No. 1 on the ground of non-payment of Continuing Service Fees. The case of the Plaintiff is that the termination was illegal, null and void since non-payment of Continuing Service Fee did not constitute breach of a material provision of the agreement entitling Defendant No. 1 to terminate it.

6. The application has been opposed by Defendant No. 1 which has claimed that the declaration sought by the Plaintiff with respect to the arbitration agreement cannot be granted by a Civil Court nor can this Court restrain Defendant No. 1 from pursuing the arbitration proceedings before American Arbitration Association. Though no reply has been filed by Defendant No. 1, it was submitted during arguments that in fact there is an arbitration clause between the parties which covers the disputes raised in the present suit. Hence, the first question which comes up for consideration in this case is as to whether existence of an arbitration agreement between the Plaintiff and Defendant No. 1 can be challenged by filing a civil suit and whether a civil court, in such a suit, can stay arbitration proceedings.

14. The Learned Counsel for the Plaintiff has also referred to the decision of Shin-Etsu Chemical Company Ltd. (supra). This judgment, as noted earlier, was considered by a learned Single Judge of this Court and his decision has been upheld by a Division Bench of this Court. Even otherwise, I find no proposition of law in this judgment which would entitle the Plaintiff to dispute the existence or validity of an arbitration agreement by way of a suit before a Civil Court.

15. For the reasons given in the preceding paragraphs, prima facie, I am of the view that this Court cannot go into existence or validity of the arbitration clause invoked by Defendant No. 1, nor can an injunction be granted by it restraining Defendant No. 1 from continuing with the arbitration proceedings initiated by it before American Arbitration Association.

d. The Handicrafts & Handlooms Exports Corporation of India Ltd. v. Ashok Metal Corporation & Anr. 2010 (117) DRJ 370 passed in RFA No. 219/2009, dated 25.05.2010. Relevant para 28 and 29 are reproduced as under :

28. There is yet another reason which weighs with me in holding that the instant suit is not maintainable. The relief of declaration and injunction as prayed for in the plaint falls within the Specific Relief Act and the settled position of law is that such relief can be availed of by a party only when there is no other equally efficacious alternative remedy available to the said party. Indubitably, in the instant case, the appellant can avail itself of the remedy of taking the pleas taken by it in the instant case before the Arbitral Tribunal and this, in my view, must be termed an efficacious alternative remedy.

29. To conclude, the Arbitral Tribunal, as held by the Supreme Court in KV Aerner Cementation India Ltd. (supra), is endowed with ample power and jurisdiction to

rule on its own jurisdiction and it would not, therefore, be open to the Civil Court to pass an injunction against an arbitral proceeding in the teeth of the provisions of Section 5 of the Arbitration and Conciliation Act, 1996 and Section 16 thereof. To hold otherwise, would be to render otiose the provisions of Section 5 and Section 16 of the Act and to defeat the purpose of the enactment itself. Civil Courts would, therefore, be well advised to steer clear of the arbitral process, leaving only their door ajar to the aggrieved party for the purpose of interim orders, appeals, etc. Any other view, in my opinion, would through open the flood gates of pre-arbitral litigation, and in each and every case the party interested in delaying the arbitration proceedings would effectively resort to a civil suit as an adjudicatory mechanism for adjudging the existence and validity of the arbitration agreement and the jurisdiction of the Arbitral Tribunal. Needless to say, appeals and counter-appeals there from would effectively ensure that the entire alternate dispute resolution system of arbitration is rendered inefficacious, cumbersome, expensive and dilatory.

e. Oval Investment P. Ltd. & Ors v. India bulls Financial Services Ltd. & Ors. 165 (2009) DLT 230 (DB). Relevant paras 8, 11, 12 and 13 are reproduced as under :

8. It is a moot question whether despite the pronouncement in Secur Industries Ltd. if a claimant neglects altogether to issue a notice invoking the arbitration clause the jurisdiction of the Civil Court would be barred on the contention that such a notice was the springboard or sine qua non for commencement of arbitration proceedings. In Secur Industries Ltd., as well as before us, the Defendant asserts that notices were dispatched and despite the attempts of the plaintiff to avoid service (Respondent in the Claim raised before the Arbitral Tribunal) it had been served. It is indeed remarkable that this contention has been raised by learned Senior Counsel despite being unsuccessful in Secur Industries Ltd., the facts of which are strikingly similar to the one which obtains in the case in hand.

11. It needs to be reiterated that SBP & Company is not a precedent for the proposition that the Court must be fully satisfied on the existence of an arbitration clause etc. What the Seven-Judge Constitution Bench has observed is that before issuing interims orders u/s 9 of the A&C Act the Court should be fully satisfied that the A&C Act applies to the parties. This is obviously because a reckless exercise of powers u/s 9 would work incalculable injustice when it is subsequently found that the A&C Act was not applicable to the parties at all.

12. The Judgment of the learned Single Judge has taken into consideration the relevant pronouncements on this subject and has articulated in detail the arguments which have persuaded him to dismiss the Plaintiff.

13. We are also satisfied that the learned Single Judge has rightly concluded that the suit is barred u/s 34 of the Specific Relief Act, 1963. It has noted that the consequential relief that would flow from the first prayer, viz. for the declaration that the letter dated 17.7.2009 invoking arbitration proceedings was invalid,

would be that proceedings based thereon would also be invalid. Such a relief could not be granted as that would tantamount to restraint of arbitral proceedings, which is precisely what should be assiduously avoided where the existence of an arbitration clause is not in dispute. The consequential relief of injunction was, therefore, deliberately drafted in the manner so as to claim what was essentially and logically the consequential relief. We are reminded of the observations in *T. Arivandandam Vs. T.V. Satyapal and Another*, , which are to the effect that the Court should not fall prey to clever drafting. This case has recently been adverted to in *Abdul Gafur and Another Vs. State of Uttarakhand and Others*, where his Lordship D.K. Jain, speaking for the Bench, had recommended that wherever "the High Court is convinced that the plaint read as a whole does not disclose any cause of action, it may reject the plaint in terms of Order 7 Rule 11 of the Code. As a matter of fact, as observed by V.R. Krishna Iyer, J., in *T. Arivandandam Vs. T.V. Satyapal and Another*, , if on a meaningful - not formal - reading of the plaint, it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, the court should exercise its power under the said provision. And if clever drafting has created an illusion of a cause of action, it should be nipped in the bud....

43. In view of the facts in the present case and for the aforesaid reasons given in earlier paras of my order, it is clear that the suit filed by the plaintiff is merely to circumvent the arbitration proceedings particularly when the application u/s 16 of the Act filed by the plaintiff before the learned Arbitrator was dismissed. It is admitted case of the plaintiff that there is an arbitration agreement between the parties in respect of Franchise as well as Hotel Operation Agreement and hence, all dispute relating to or arising out of or in relation to the Franchise Agreement or Hotel Operation agreement are required to be mandatorily referred to arbitration. The dispute as sought to be raised by the plaintiff in the present case was raised through letter dated 20.10.2010 issued by the plaintiff for reference of all disputes between the parties to the arbitral tribunal. The statement of claim was also filed by the plaintiff before the learned Arbitrator.

44. Therefore, the present suit is not maintainable specifically in view of Section 5 read with Section 8 of Arbitration and Conciliation Act, 1996. The applications filed by the defendant Nos. 2 and 3 are allowed.

45. Accordingly, the plaint is rejected. No costs.