World Sport Group (Mauritius) Ltd vs Msm Satellite(Singapore) Pte. Ltd on 24 January, 2014

Equivalent citations: AIR 2014 SUPREME COURT 968

Author: A. K. Patnaik

Bench: Fakkir Mohamed Ibrahim Kalifulla, A. K. Patnaik

Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No. 895 OF 2014
(Arising out of S.L.P. (C) No. 34978 of 2010)

World Sport Group (Mauritius) Ltd. … Appellants

Versus

MSM Satellite (Singapore) Pte. Ltd. … Respondent

J U D G M E N T

A. K. PATNAIK, J.

Leave granted.

2. This is an appeal against the order dated 17.09.2010 of the Division Bench of the Bombay High Court in Appeal (Lodging) No.534 of 2010.

Facts:

3. The facts very briefly are that on 30.11.2007 the Board of Control for Cricket in India (for short 'BCCI') invited tenders for IPL (Indian Premier League) Media Rights for a period of ten years from 2008 to 2017 on a worldwide basis. Amongst the tenders submitted, the bid of World Sports Group India (for short 'WSG India') was accepted by BCCI. By a pre-bid arrangement, however, the respondent was to get the media rights for the sub-continent for the period from 2008 to 2010. Accordingly, on 21.01.2008 BCCI and the respondent entered into a Media Rights License

Agreement for the period from 2008 to 2012 for a sum of US$274.50 million. After the first IPL season, the BCCI terminated the agreement dated 21.01.2008 between BCCI and the respondent for the Indian sub-continent and commenced negotiations with WSG India. On 14.03.2009, the respondent filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') against the BCCI before the Bombay High Court praying for injunction against the BCCI from acting on the termination letter dated 14.03.2009 and for preventing BCCI from granting the rights under the agreement dated 21.01.2008 to any third party. Pursuant to the negotiations between BCCI and WSG India, BCCI entered into an agreement with the appellant whereunder the media rights for the Indian sub-continent for the period 2009 to 2017 was awarded to the appellant for a value of Rs.4,791.08 crores. To operate the media rights in India, the appellant was required to seek a sub-licensee within seventy two hours. Though, this time period was extended twice, the appellant was not able to get a sub-licensee. Thereafter, the appellant claimed to have allowed media rights in India to have lapsed and then facilitated on 25.03.2009, a new Media Rights License Agreement between the BCCI and the respondent for the Indian sub- continent for the same contract value of Rs.4,791.08 crores. BCCI and WSG India, however, were to continue with the Rest of the World media rights.

4. On 25.03.2009, the appellant and the respondent also executed the Deed for Provision of Facilitation Services (hereinafter referred to as 'the Facilitation Deed') whereunder the respondent was to pay a sum of Rs.425 crores to the appellant as facilitation fees. Clause 9 of the Facilitation Deed dated 25.03.2009 between the appellant and the respondent was titled 'Governing Law' and read as follows:

> "9. GOVERNING LAW This Deed shall be governed by and construed in accordance with the laws of England and Wales, without regard to choice of law principles. All actions or proceedings arising in connection with, touching upon or relating to this Deed, the breach thereof and/or the scope of the provisions of this Section shall be submitted to the International Chamber of Commerce (the "Chamber") for final and binding arbitration under its Rules of Arbitration, to be held in Singapore, in the English language before a single arbitrator who shall be a retired judge with at least ten years of commercial experience. The arbitrator shall be selected by mutual agreement of the Parties, or, if the Parties cannot agree, then by striking from a list of arbitrators supplied by the Chamber. If the Parties are unable to agree on the arbitrator, the Chamber shall choose one for them. The arbitration shall be a confidential proceeding, closed to the general public. The arbitrator shall assess the cost of the arbitration against the losing party. In addition, the prevailing party in any arbitration or legal proceeding relating to this Deed shall be entitled to all reasonable expenses (including, without limitation, reasonable attorney's fees). Notwithstanding the foregoing, the arbitrator may require that such fees be borne in such other manner as the arbitrator determines is required in order for this arbitration provision to be enforceable under applicable law. The arbitrator shall issue a written opinion stating the essential findings and conclusions upon which the arbitrator's award is based. The arbitrator shall have the power to enter temporary restraining orders and preliminary and permanent injunctions. No party shall be entitled or permitted to

> commence or maintain any action in a court of law with respect to any matter in dispute until such matter shall have been submitted to arbitration as herein provided and then only for the enforcement of the arbitrator's award; provided, however, that prior to the appointment of the arbitrator or for remedies beyond the jurisdiction of an arbitrator, at any time, any party may seek equitable relief in a court of competent jurisdiction in Singapore, or such other court that may have jurisdiction over the Parties, without thereby waiving its right to arbitration of the dispute or controversy under this section. THE PARTIES HEREBY WAIVE THEIR RIGHT TO JURY TRIAL WITH RESPECT TO ALL CLAIMS AND ISSUES ARISING UNDER, IN CONNECTION WITH, TOUCHING UPON OR RELATING TO THIS DEED, THE BREACH THEREOF AND/OR THE SCOPE OF THE PROVISIONS OF THIS SECTION, WHETHER SOUNDING IN CONTRACT OR TORT, AND INCLUDING ANY CLAIM FOR FRAUDULENT INDUCEMENT THEREOF."

5. The respondent made three payments totaling Rs.125 crores to the appellant under the Facilitation Deed during 2009 and did not make the balance payment. Instead, on 25.06.2010, the respondent wrote to the appellant rescinding the Facilitation Deed on the ground that it was voidable on account of misrepresentation and fraud. On 25.06.2010, the respondent also filed Suit No.1869 of 2010 for inter alia a declaration that the Facilitation Deed was void and for recovery of Rs.125 crores already paid to the appellant. On 28.06.2010, the appellant acting under Clause 9 of the Facilitation Deed sent a request for arbitration to ICC Singapore and the ICC issued a notice to the respondent to file its answer to the request for arbitration. In the meanwhile, on 30.06.2010, the respondent filed a second suit, Suit No.1828 of 2010, before the Bombay High Court against the appellant for inter alia a declaration that as the Facilitation Deed stood rescinded, the appellant was not entitled to invoke the arbitration clause in the Facilitation Deed. The respondent also filed an application for temporary injunction against the appellant from continuing with the arbitration proceedings commenced by the appellant under the aegis of ICC.

6. On 09.08.2010, the learned Single Judge of the Bombay High Court dismissed the application for temporary injunction of the respondent saying that it would be for the arbitrator to consider whether the Facilitation Deed was void on account of fraud and misrepresentation and that the arbitration must, therefore, proceed and the Court could not intervene in matters governed by the arbitration clause. The respondent challenged the order of the learned Single Judge before the Division Bench of the Bombay High Court and by the impugned order, the Division Bench of the Bombay High Court allowed the appeal, set aside the order of the learned Single Judge and passed an order of temporary injunction restraining the arbitration by ICC. Aggrieved, the appellant has filed this appeal.

Contentions on behalf of the appellant:

7. Mr. K.K. Venugopal, learned senior counsel for the appellant, submitted that the Division Bench of the High Court failed to appreciate that the Bombay High Court had no jurisdiction to pass an order of injunction restraining a foreign seated international arbitration at Singapore between the parties, who were not residents of India. In this context, he referred to Clause 9 of the Facilitation

Deed which stipulated that any party may seek equitable relief in a court of competent jurisdiction in Singapore, or such other court that may have jurisdiction over the parties. He submitted that on the principle of Comity of Courts, the Bombay High Court should have refused to interfere in the matter and should have allowed the parties to resolve their dispute through ICC arbitration, subject to the jurisdiction of the Singapore courts in accordance with Clause 9 of the Facilitation Deed.

8. Mr. Venugopal next submitted that the Division Bench of the High Court failed to appreciate that under Section 45 of the Act, the Court seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44 has to refer the parties to arbitration, unless it finds that the agreement referred to in Section 44 is null and void, inoperative or incapable of being performed. He submitted that the agreement referred to in Section 44 of the Act is 'an agreement in writing for arbitration' and, therefore, unless the Court finds that the agreement in writing for arbitration is null and void, inoperative or incapable of being performed, the Court will not entertain a dispute covered by the arbitration agreement and refer the parties to the arbitration. In support of this submission, he relied on the decision of this Court in Chloro Controls India Private Limited v. Seven Trent Water Purification Inc. & Ors. [(2013) 1 SCC 641].

9. Mr. Venugopal submitted that the Division Bench of the High Court, instead of examining whether the agreement in writing for arbitration was null and void, inoperative or incapable of being performed, has held that the entire Facilitation Deed was vitiated by fraud and misrepresentation and was, therefore, void. He vehemently submitted that it was for the arbitrator to decide whether the Facilitation Deed was void on account of fraud and misrepresentation as has been rightly held by the learned Single Judge and it was not for the Court to pronounce on whether the Facilitation Deed was void on account of fraud and misrepresentation. He referred to Article 6(4) of the ICC Rules of Arbitration which permits the Arbitral Tribunal to continue to exercise jurisdiction and adjudicate the claims even if the main contract is alleged to be null and void or non-existent because the arbitration clause is an independent and distinct agreement. He submitted that this principle of Kompetenz Kompetenz has been recognized in Section 16 of the Act under which the Arbitral Tribunal has the competence to rule on its own jurisdiction and on this point relied on National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd. [(2009) 1 SCC 267] and Reva Electric Car Company Private Ltd. v. Green Mobil [(2012) 2 SCC 93]. He submitted that as a corollary to this principle, Courts have also held that unless the arbitration clause itself, apart from the underlying contract, is assailed as vitiated by fraud or misrepresentation, the Arbitral Tribunal will have jurisdiction to decide all issues including the validity and scope of the arbitration agreement. He submitted that in the present case, the arbitration clause itself was not assailed as vitiated by fraud or misrepresentation. In support of this argument, he relied on the decision of the House of Lords in Premium Nafta Products Ltd. v. Fili Shipping Company Ltd. & Ors. [2007] UKHL 40], the decision of the Supreme Court of United States in Buckeye Check Cashing, Inc. v. John Cardegna et al [546 US 440 (2006)] and the decision of this Court in Branch Manager, Magma Leasing and Finance Ltd. & Anr. v. Potluri Madhavilata & Anr. [(2009) 10 SCC 103].

10. Mr. Venugopal submitted that the Division Bench of the High Court relied on the decision in N. Radhakrishnan v. Maestro Engineers & Ors. [(2010) 1 SCC 72] to hold that serious allegations of fraud can only be enquired by a Court and not by an arbitrator, but the Division Bench failed to

appreciate that in N. Radhakrishnan v. Maestro Engineers & Ors. (supra) this Court relied on Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak [AIR 1962 SC 406] in which it was observed that it is only a party against whom a fraud is alleged who can request the Court to inquire into the allegations of fraud instead of allowing the arbitrator to decide on the allegations of fraud. In the present case, the respondent has alleged fraud against the appellant and thus it was for the appellant to make a request to the Court to decide on the allegations of fraud instead of referring the same to the arbitrator, and no such request has been made by the appellant. He further submitted that in any case the judgment of this Court in N. Radhakrishnan v. Maestro Engineers & Ors. (supra) was rendered in the context of domestic arbitration in reference to the provisions of Section 8 of the Act. He submitted that the language of Section 45 of the Act, which applies to an international arbitration, is substantially different from the language of Section 8 of the Act and it will be clear from the language of Section 45 of the Act that unless the arbitration agreement is null and void, inoperative or incapable of being performed, the parties will have to be referred to arbitration by the Court. In the present case, the respondent has not made out that the arbitration agreement is null and void, inoperative or incapable of being performed.

11. Mr. Venugopal submitted that the High Court has taken a view that Clause 9 forecloses an open trial in a court of law except to the extent permitted therein and the parties have to necessarily submit themselves to a confidential proceeding which is closed to the general public. He submitted that the Bombay High Court thus appears to have held that Clause 9 is opposed to public policy and, in particular, Sections 23 and 28 of the Indian Contract Act, 1872. He submitted that in any case the arbitration agreement contained in Clause 9 of the Facilitation Deed cannot be held to be opposed to public policy and void under Sections 23 and 28 of the Indian Contract Act, 1872. This will be clear from Exception 1 of Section 28 of the Indian Contract Act, 1872, which says that the section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred. He explained that under the American Law, in a suit for common law where the value of claim is more than US$20, the right to jury trial is preserved and this applies even in relation to claims for breach of contract and for this reason, the parties made a provision in Clause 9 of the Facilitation Deed waiving their right to jury trial with respect to all claims and issues arising under, in connection with, touching upon or relating to the Facilitation Deed. He submitted that this provision in Clause 9 of the Facilitation Deed cannot, therefore, be held to be opposed to public policy.

12. Mr. Venugopal next submitted that the crux of the case of the respondent is set out in its letter dated 25.06.2010 to the appellant in which it was alleged that 'in view of the false misrepresentations and fraud played by WSGM the deed is voidable at the option of our client and thus our client rescinds the deed with immediate effect'. In other words, the respondent's case is that it was induced to enter into the Facilitation Deed on account of the misrepresentation by the appellant and was led to believe that it was paying the facilitation fees to the appellant to allow the rights of the appellant under an alleged agreement dated 23.03.2009 to lapse, but the respondent subsequently discovered that there was no agreement dated 23.03.2009 and the rights of the appellant had come to an end on 24.03.2009. He submitted that the appellant has denied these

allegations of the respondent in its affidavit-in-reply filed before the Bombay High Court and that there was no false representation and fraud as alleged by the respondent. He submitted that the Facilitation Deed was executed by the senior executives of the parties and in the case of respondent, it was signed by Michael Grindon, President, International, Sony Picture Television, and the appellant and the respondent had entered into the Facilitation Deed after consulting their sports media experts and after a lot of negotiations. He submitted that in fact a Press Release was issued by the respondent on 23.04.2010, which will go to show that there was no misrepresentation and fraud by the appellant before the Facilitation Deed was signed by the parties, and thus the entire case of the respondent that the Facilitation Deed was vitiated by misrepresentation and fraud is false.

13. Mr. Venugopal finally submitted that it will be clear from the language of the letter dated 25.06.2010 of the respondent to the appellant that according to the respondent the Facilitation Deed was voidable at the option of the respondent. He submitted that under Section 45 of the Act, the Court will have to refer the parties to the arbitration unless it finds that the arbitration agreement is 'null and void'. He argued that an agreement which is voidable at the option of one of the parties is not the same as the agreement which is void and, therefore, the Division Bench of the High Court should have referred the parties to arbitration instead of restraining the arbitration. According to Mr. Venugopal, this is a fit case in which this Court should set aside the impugned order of the Division bench of the High Court and restore the order of the learned Single Judge of the High Court.

Contentions on behalf of the respondent:

14. In reply, Mr. Gopal Subramanium, learned senior counsel appearing for the respondent, submitted that the Division Bench of the Bombay High Court has rightly restrained the arbitration proceedings under the aegis of ICC as the Facilitation Deed, which also contains the arbitration agreement in Clause 9, is void because of fraud and misrepresentation by the appellant. He submitted that Section 45 of the Act makes it clear that the Court will not refer the parties to arbitration if the arbitration agreement is null and void, inoperative or incapable of being performed and as the respondent has taken the plea that the Facilitation Deed, which contained the arbitration agreement, is null and void on account of misrepresentation and fraud, the Court will have to decide whether the Facilitation Deed including the arbitration agreement in Clause 9 was void on account of fraud and misrepresentation by the appellant. He submitted that the respondent filed the first suit in the Bombay High Court (Suit No.1869 of 2010) for declaring the Facilitation Deed as null and void but in the said suit, the appellant did not file a written statement and instead issued the notice for arbitration only to frustrate the first suit and in the circumstances the respondent was compelled to file the second suit (Suit No.1828 of 2010) for an injunction restraining the arbitration.

15. Mr. Subramanium submitted that Section 9 of the Code of Civil Procedure, 1908 (for short 'the CPC') confers upon the court jurisdiction to try all civil suits except suits which are either expressly or impliedly barred. He submitted that the Bombay High Court, therefore, had the jurisdiction to try both the first suit and the second suit and there was no express or implied bar in Section 45 of the Act restraining the Bombay High Court to try the first suit and the second suit. He submitted that in India as well as in England, Courts have power to issue injunctions to restrain parties from

proceeding with arbitration proceedings in foreign countries. In support of this submission, he relied on V.O. Tractoroexport, Moscow v. Tarapore & Company and Anr. [(1969) 3 SCC 562] and Oil and Natural Gas Commission v. Western Company of North America [(1987) 1 SCC 496]. He also relied on Russel on Arbitration, para 7-056, 7-058, and Claxton Engineering v. Txm olaj – es gaz Kutao Ktf [2011] EWHC 345 (COMM.).

16. Mr. Subramanium relying on the decision of this Court in Chloro Controls India Private Limited v. Seven Trent Water Purification Inc. & Ors. (supra) submitted that Section 45 of the Act casts an obligation on the court to determine the validity of the agreement at the threshold itself because this is an issue which goes to the root of the matter and a decision on this issue will prevent a futile exercise of proceedings before the arbitrator. He submitted that under Section 45 of the Act the Court is required to consider not only a challenge to the arbitration agreement but also a serious challenge to the substantive contract containing the arbitration agreement. He cited the decision of this Court in SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd. [(2011) 14 SCC 66] in support of this argument. He submitted that the contention on behalf of the appellant that the Court has to determine only whether the arbitration agreement contained in the main agreement is void is, therefore, not correct.

17. Mr. Subramanium next submitted that in cases where allegations of fraud are prima facie made out, the judicial trend in India has been to have them adjudicated by the Court. In this context, he referred to the decisions of this Court in Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak (supra), Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd. [(1999) 5 SCC 688] and N. Radhakrishnan v. Maestro Engineers & Ors. (supra). In reply to the submission of Mr. Venugopal that it was only the parties against whom the allegations are made who can insist on the allegations being decided by the Court, Mr. Subramanium submitted that in the decision of the Madras High Court in H.G. Oomor Sait v. O Aslam Sait [(2001) 3 CTC 269 (Mad)] referred to in N. Radhakrishnan v. Maestro Engineers & Ors. (supra) the situation was reverse.

18. Mr. Subramanium next submitted that the facts in this case prima facie establish that a grave fraud was played by the appellant not only upon the respondent but also on the BCCI. He argued that the Facilitation Deed ultimately deals with media rights belonging to the BCCI and it has been held by this Court in M/s Zee Tele Films Ltd. & Anr. v. Union of India & Ors. [AIR 2005 SC 2677] that BCCI is a public body. He submitted that the Division Bench of the Bombay High Court has, therefore, rightly taken the view that the disputes in this case cannot be kept outside the purview of the Indian Courts and if arbitration is allowed to go on without BCCI, the interest of BCCI will be adversely affected. He submitted that having regard to the magnitude of fraud alleged in the present case, the disputes were incapable of being arbitrated. Relying on Booz Allen & Hamilton v. SBI Home Finance [(2011) 5 SCC 532], Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd. (Supra), India Household and Healthcare Ltd. v. LG Household and Healthcare Ltd. [(2007) 5 SCC 510] and N. Radhakrishnan v. Maestro Engineers & Ors. (supra), he submitted that such allegations of fraud can only be inquired into by the court and not by the arbitrator.

Findings of the Court:

19. The question that we have to decide is whether the Division Bench of the Bombay High Court could have passed the order of injunction restraining the arbitration at Singapore between the parties. As various contentions have been raised by Mr. Venugopal, learned counsel for the appellant, in support of the case of the appellant that the Division Bench of the Bombay High Court could not have passed the order of injunction restraining the arbitration at Singapore, we may deal with each of these contentions separately and record our findings. While recording our findings, we will also deal with the submissions made by Mr. Gopal Subramanium on behalf of respondent in reply to the contentions of Mr. Venugopal. We will also consider the correctness of the findings of the Division Bench of the Bombay High Court separately.

20. We are unable to accept the first contention of Mr. Venugopal that as Clause 9 of the Facilitation Deed provides that any party may seek equitable relief in a court of competent jurisdiction in Singapore, or such other court that may have jurisdiction over the parties, the Bombay High Court had no jurisdiction to entertain the suit and restrain the arbitration proceedings at Singapore because of the principle of Comity of Courts. In Black's Law Dictionary, 5th Edition, Judicial Comity, has been explained in the following words:

> "Judicial comity. The principle in accordance with which the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect." Thus, what is meant by the principle of "comity" is that courts of one state or jurisdiction will give effect to the laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect. In the present case no decision of a court of foreign country or no law of a foreign country has been cited on behalf of the appellant to contend that the courts in India out of deference to such decision of the foreign court or foreign law must not assume jurisdiction to restrain arbitration proceedings at Singapore. On the other hand, as has been rightly submitted by Mr. Subramanium, under Section 9 of the CPC, the courts in India have jurisdiction to try all suits of a civil nature excepting suits of which cognizance is either expressly or impliedly barred. Thus, the appropriate civil court in India has jurisdiction to entertain the suit and pass appropriate orders in the suit by virtue of Section 9 of the CPC and Clause 9 of the Facilitation Deed providing that courts in Singapore or any other court having jurisdiction over the parties can be approached for equitable relief could not oust the jurisdiction of the appropriate civil court conferred by Section 9 of the CPC. We find that in para 64 of the plaint in Suit No.1828 of 2010 filed before the Bombay High Court by the respondent, it is stated that the Facilitation Deed in which the arbitration clause is incorporated came to be executed by the defendant at Mumbai and the fraudulent inducement on the part of the defendant resulting in the plaintiff entering into the Facilitation Deed took place in Mumbai and the rescission of the Facilitation Deed on the ground that it was induced by fraud of defendant has also been issued from Mumbai. Thus, the cause of action for filing the suit arose within the jurisdiction of the Bombay High Court and the Bombay High Court had territorial jurisdiction to entertain the suit under Section 20 of the CPC.

21. Any civil court in India which entertains a suit, however, has to follow the mandate of the legislature in Sections 44 and 45 in Chapter I of Part II of the Act, which are quoted hereinbelow:

"CHAPTER I NEW YORK CONVENTION AWARDS

44. Definition. In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960 -

(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and

(b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

45. Power of judicial authority to refer parties to arbitration.- Notwithstanding anything contained in Part I or in the Code of Civil Procedure, a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." The language of Section 45 of the Act quoted above makes it clear that notwithstanding anything contained in Part I or in the Code of Civil Procedure, a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. Thus, even if, under Section 9 read with Section 20 of the CPC, the Bombay High Court had the jurisdiction to entertain the suit, once a request is made by one of the parties or any person claiming through or under him to refer the parties to arbitration, the Bombay High Court was obliged to refer the parties to arbitration unless it found that the agreement referred to in Section 44 of the Act was null and void, inoperative or incapable of being performed. In the present case, the appellant may not have made an application to refer the parties to arbitration, but Section 45 of the Act does not refer to any application as such. Instead, it refers to the request of one of the parties or any person claiming through or under him to refer the parties to arbitration. In this case, the appellant may not have made an application to refer the parties to arbitration at Singapore but has filed an affidavit in reply to the notice of motion and has stated in paragraphs 3, 4 and 5 of this affidavit that the defendant had already invoked the arbitration agreement in the Facilitation Deed and the arbitration proceedings have commenced and that the suit was an abuse of the process of court. The appellant had thus made a request to refer the parties to arbitration at Singapore which had already commenced.

22. Section 45 of the Act quoted above also makes it clear that even where such request is made by a party, it will not refer the parties to arbitration, if it finds that the agreement is null and void, inoperative or incapable of being performed. As the very language of Section 45 of the Act clarifies the word "agreement" would mean the agreement referred to in Section 44 of the Act. Clause (a) of Section 44 of the Act refers to "an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies." The First Schedule of the Act sets out the different Articles of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958. Article II of the New York Convention is extracted hereinbelow:

> "1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration.
>
> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
>
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." It will be clear from clauses 1, 2 and 3 of the New York Convention as set out in the First Schedule of the Act that the agreement referred to in Section 44 of the Act is an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them. Thus, the court will decline to refer the parties to arbitration only if it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

23. According to Mr. Subramanium, however, as the main agreement is voidable on account of fraud and misrepresentation by the appellant, clause 9 of the main agreement which contains the arbitration agreement in writing is also null and void. In support of his submission, he cited the decision of this Court in SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd. (supra). Paragraphs 12 and 13 of the judgment of this Court in SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd. (supra) are quoted hereinbelow:

> "12. When a contract contains an arbitration agreement, it is a collateral term relating to the resolution of disputes, unrelated to the performance of the contract. It is as if two contracts—one in regard to the substantive terms of the main contract and the other relating to resolution of disputes—had been rolled into one, for purposes of convenience. An arbitration clause is therefore an agreement independent of the other terms of the contract or the instrument. Resultantly, even if the contract or its performance is terminated or comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of

> resolution of disputes arising under or in connection with the contract.
>
> 13. Similarly, when an instrument or deed of transfer (or a document affecting immovable property) contains an arbitration agreement, it is a collateral term relating to resolution of disputes, unrelated to the transfer or transaction affecting the immovable property. It is as if two documents—one affecting the immovable property requiring registration and the other relating to resolution of disputes which is not compulsorily registerable—are rolled into a single instrument.

Therefore, even if a deed of transfer of immovable property is challenged as not valid or enforceable, the arbitration agreement would remain unaffected for the purpose of resolution of disputes arising with reference to the deed of transfer." In the aforesaid case, this Court has held that if the document containing the main agreement is not found to be duly stamped, even if it contains arbitration clause, it cannot be acted upon because Section 35 of the Stamp Act bars the said document from being acted upon, but if the document is found to be duly stamped but not registered though required to be compulsorily registered, the court can act upon the arbitration agreement which is a collateral term of the main agreement and is saved by the proviso to Section 49 of the Registration Act. Thus, as per the aforesaid decision of this Court in SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd. (supra), the court will have to see in each case whether the arbitration agreement is also void, unenforceable or inoperative along with the main agreement or whether the arbitration agreement stands apart from the main agreement and is not null and void.

24. The House of Lords has explained this principle of separability in Premium Nafta Products Ltd. v. Fili Shipping Company Ltd. & Ors. (supra) thus:

> "17. The principle of separability enacted in section 7 means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a "distinct agreement" and can be void or voidable only on grounds which relate directly to the arbitration agreement. Of course there may be cases in which the ground upon which the main agreement is invalid is identical with the ground upon which the arbitration agreement is invalid. For example, if the main agreement and the arbitration agreement are contained in the same document and one of the parties claims that he never agreed to anything in the document and that his signature was forged, that will be an attack on the validity of the arbitration agreement. But the ground of attack is not that the main agreement was invalid. It is that the signature to the arbitration agreement, as a "distinct agreement", was forged. Similarly, if a party alleges that someone who purported to sign as agent on his behalf had no authority whatever to conclude any agreement on his behalf, that is an attack on both the main agreement and the arbitration agreement.
>
> 18. On the other hand, if (as in this case) the allegation is that the agent exceeded his authority by entering into a main agreement in terms which were not authorized or for improper reasons, that is not necessarily an attack on the arbitration agreement.

> It would have to be shown that whatever the terms of the main agreement or the reasons for which the agent concluded it, he would have had no authority to enter into an arbitration agreement. Even if the allegation is that there was no concluded agreement (for example, that terms of the main agreement remained to be agreed) that is not necessarily an attack on the arbitration agreement. If the arbitration clause has been agreed, the patties will be presumed to have intended the question of whether there was a concluded main agreement to be decided by arbitration."

25. Applying the principle of separability to the facts of this case, the respondent rescinded the Facilitation Deed by notice dated 25.06.2010 to the appellant on the following grounds stated in the said notice by its lawyers:

> "1. Reference is made to the Deed for the Provison of Facilitation Services dated March 25, 2009 (the "Deed") between World Sport Group (Mauritius) Limited ("WSGM") and our client. Under the Deed, which is styled as a facilitation agreement, our client agreed to pay WSGM "facilitation" fees for the "facilitation" services stated thereunder to have been provided by WSGM. The underlying consideration for the payments by our client to WSGM, in fact were the representation made by WSGM that : (a) WSGM, had executed in India ("BCCI") whereunder WSGM had been unfettered Global Media Rights ("the said rights"), including the Indian Subcontinent (implying thereby as natural corollary that the earlier Media Rights agreement dated March 15, 2009 between WSGM and BCCI along with its restrictive conditions had been mutually terminated); (b) WSGM could thereafter relinquish the Media Rights for the Indian Subcontinent in favour of our client for said valuable consideration to enable our client to enter into a direct agreement with BCCI; (c) the said rights were subsisting with WSGM at the time of execution of the Deed, i.e, March 25, 2009; and (d) WSGM had relinquished those rights in favour of BCCI to enable BCCI and our client to execute a direct Media Rights License Agreement for the Indian Subcontinent.
>
> 2. BCCI has recently brought to the attention of our client that the Global Media Rights agreement between WSGM and BCCI dated March 23, 2009 does not exist and in terms of Clause 13.5 of the agreement dated March 15, 2009, after expiry of the 2nd extension the media rights had automatically reverted to BCCI at 3 a.m. on March 24, 2009 and thus at the time of execution of the Deed, WSGM did not have any rights to relinquish and/or to facilitate the procurement of India Subcontinent media rights for the IPL from BCCI and thus no facilitation services could have been provided by WSGM.
>
> 3. In view of the above, it is evident that the representation by WSGM that WSGM relinquished its Indian Subcontinent media rights for the IPL in favour of our client to pay the "facilitation" fees under the Deed.

> 4. Taking cognizance of the same, BCCI's Governing council at its meeting held at Mumbai, India on June 25, 2010 appropriately executed an amendment to Media Rights License Agreement dated March 25, 2009 between BCCI and our client by deleting, inter alia, clause 10.4 thereof.
>
> 5. On its part, and in view of the false representations and fraud played by WSGM, the Deed is voidable at the option of our client and thus our client rescinds the Deed with immediate effect." The ground taken by respondent to rescind the Facilitation Deed thus is that the appellant did not have any right to relinquish and/or to facilitate the procurement of Indian subcontinent media rights for the IPL from BCCI and no facilitation services could have been provided by the appellant and therefore the representation by the appellant that the appellant relinquished its Indian subcontinent media rights for the IPL in favour of the respondent for which the appellant had to be paid the facilitation fee under the deed was false and accordingly the Facilitation Deed was voidable at the option of the respondent on account of false representation and fraud. This ground of challenge to the Facilitation Deed does not in any manner affect the arbitration agreement contained in Clause 9 of the Facilitation Deed, which is independent of and separate from the main Facilitation Deed and does not get rescinded as void by the letter dated 25.06.2010 of the respondent. The Division Bench of the Bombay High Court, therefore, could not have refused to refer the parties to arbitration on the ground that the arbitration agreement was also void along with the main agreement.

26. Mr. Gopal Subramanium's contention, however, is also that the arbitration agreement was inoperative or incapable of being performed as allegations of fraud could be enquired into by the court and not by the arbitrator. The authorities on the meaning of the words "inoperative or incapable of being performed" do not support this contention of Mr. Subramanium. The words "inoperative or incapable of being performed" in Section 45 of the Act have been taken from Article II (3) of the New York Convention as set out in para 22 of this judgment. Redfern and Hunter on International Arbitration (Fifth Edition) published by the Oxford University Press has explained the meaning of these words "inoperative or incapable of being performed" used in the New York Convention at page 148, thus:

> "At first sight it is difficult to see a distinction between the terms 'inoperative' and 'incapable of being performed'. However, an arbitration clause is inoperative where it has ceased to have effect as a result, for example, of a failure by the parties to comply with a time limit, or where the parties have by their conduct impliedly revoked the arbitration agreement. By contrast, the expression 'incapable of being performed' appears to refer to more practical aspects of the prospective arbitration proceedings. It applies, for example, if for some reason it is impossible to establish the arbitral tribunal."

27. Albert Jan Van Den Berg in an article titled "The New York Convention, 1958 – An Overview" published in the website of ICCA

[www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of-1958_overview.pdf], referring to Article II(3) of the New York Convention, states:

> "The words "null and void" may be interpreted as referring to those cases where the arbitration agreement is affected by some invalidity right from the beginning, such as lack of consent due to misrepresentation, duress, fraud or undue influence.
>
> The word "inoperative" can be said to cover those cases where the arbitration agreement has ceased to have effect, such as revocation by the parties.
>
> The words "incapable of being performed" would seem to apply to those cases where the arbitration cannot be effectively set into motion. This may happen where the arbitration clause is too vaguely worded, or other terms of the contract contradict the parties' intention to arbitrate, as in the case of the so-called co-equal forum selection clauses. Even in these cases, the courts interpret the contract provisions in favour of arbitration."

28. The book 'Recognition and Conferment of Foreign Arbitral Awards: A Global Commentary on the New York Convention' by Kronke, Nacimiento, et al.(ed.) (2010) at page 82 says:

> "Most authorities hold that the same schools of thought and approaches regarding the term null and void also apply to the terms inoperative and incapable of being performed. Consequently, the majority of authorities do not interpret these terms uniformly, resulting in an unfortunate lack of uniformity. With that caveat, we shall give an overview of typical examples where arbitration agreements were held to be (or not to be) inoperative or incapable of being performed.
>
> The terms inoperative refers to cases where the arbitration agreement has ceased to have effect by the time the court is asked to refer the parties to arbitration. For example, the arbitration agreement ceases to have effect if there has already been an arbitral award or a court decision with res judicata effect concerning the same subject matter and parties. However, the mere existence of multiple proceedings is not sufficient to render the arbitration agreement inoperative. Additionally, the arbitration agreement can cease to have effect if the time limit for initiating the arbitration or rendering the award has expired, provided that it was the parties' intent no longer to be bound by the arbitration agreement due to the expiration of this time limit.
>
> Finally, several authorities have held that the arbitration agreement ceases to have effect if the parties waive arbitration. There are many possible ways of waiving a right to arbitrate. Most commonly, a party will waive the right to arbitrate if, in a court proceeding, it fails to properly invoke the arbitration agreement or if it actively pursues claims covered by the arbitration agreement."

29. Thus, the arbitration agreement does not become "inoperative or incapable of being performed" where allegations of fraud have to be inquired into and the court cannot refuse to refer the parties to arbitration as provided in Section 45 of the Act on the ground that allegations of fraud have been made by the party which can only be inquired into by the court and not by the arbitrator. N. Radhakrishnan v. Maestro Engineers & Ors. (supra) and Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak (supra) were decisions rendered in the context of domestic arbitration and not in the context of arbitrations under the New York Convention to which Section 45 of the Act applies. In the case of such arbitrations covered by the New York Convention, the Court can decline to make a reference of a dispute covered by the arbitration agreement only if it comes to the conclusion that the arbitration agreement is null and void, inoperative or incapable of being performed, and not on the ground that allegations of fraud or misrepresentation have to be inquired into while deciding the disputes between the parties.

30. We may now consider the correctness of the findings of the Division Bench of the High Court in the impugned judgment. The Division Bench of the High Court has held that the Facilitation Deed was part of several agreements entered into amongst different parties commencing from 25.03.2009 and, therefore, cannot be considered as stand apart agreement between the appellant and the respondent and so considered the Facilitation Deed as contrary to public policy of India because it is linked with the finances, funds and rights of the BCCI, which is a public body. This approach of the Division Bench of the High Court is not in consonance with the provisions of Section 45 of the Act, which mandates that in the case of arbitration agreements covered by the New York Convention, the Court which is seized of the matter will refer the parties to arbitration unless the arbitration agreement is null and void, inoperative or incapable of being performed. In view of the provisions of Section 45 of the Act, the Division Bench of the High Court was required to only consider in this case whether Clause 9 of the Facilitation Deed which contained the arbitration agreement was null and void, inoperative or incapable of being performed.

31. The Division Bench of the High Court has further held that Clause 9 of the Facilitation Deed insofar as it restricted the right of the parties to move the courts for appropriate relief and also barred the right to trial by a jury was void for being opposed to public policy as provided in Section 23 of the Indian Contract Act, 1872 and was also void for being an agreement in restraint of the legal proceedings in view of Section 28 of the said Act. Parliament has made the Arbitration and Conciliation Act, 1996 providing domestic arbitration and international arbitration as a mode of resolution of disputes between the parties and Exception 1 to Section 28 of the Indian Contract Act, 1872 clearly states that Section 28 shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred. Clause 9 of the Facilitation Deed is consistent with this policy of the legislature as reflected in the Arbitration and Conciliation Act, 1996 and is saved by Exception 1 to Section 28 of the Indian Contract Act, 1872. The right to jury trial is not available under Indian laws. The finding of the Division Bench of the High Court, therefore, that Clause 9 of the Facilitation Deed is opposed to public policy and is void under Sections 23 and 28 of the Indian Contract Act, 1872 is clearly erroneous.

32. The Division Bench of the High Court has also held that as allegations of fraud and serious malpractices on the part of the appellant are in issue, it is only the court which can decide these issues through furtherance of judicial evidence by either party and these issues cannot be properly gone into by the arbitrator. As we have already held, Section 45 of the Act does not provide that the court will not refer the parties to arbitration if the allegations of fraud have to be inquired into. Section 45 provides that only if the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed, it will decline to refer the parties to arbitration.

33. The Division Bench of the High court has further held that since the earlier suit (Suit No.1869 of 2010) was pending in court since 25.06.2010 and that suit was inter-connected and inter-related with the second suit (Suit No.1828 of 2010), the court could not allow splitting of the matters and disputes to be decided by the court in India in the first suit and by arbitration abroad in regard to the second suit and invite conflicting verdicts on the issues which are inter-related. This reasoning adopted by the Division Bench of the Bombay High Court in the impugned judgment is alien to the provisions of Section 45 of the Act which does not empower the court to decline a reference to arbitration on the ground that another suit on the same issue is pending in the Indian court.

34. We make it clear that we have not expressed any opinion on the dispute between the appellant and the respondent as to whether the Facilitation Deed was voidable or not on account of fraud and misrepresentation. Clause 9 of the Facilitation Deed states inter alia that all actions or proceedings arising in connection with, touching upon or relating to the Facilitation Deed, the breach thereof and/or the scope of the provisions of the Section shall be submitted to the ICC for final and binding arbitration under its Rules of Arbitration. This arbitration agreement in Clause 9 is wide enough to bring this dispute within the scope of arbitration. To quote Redfern And Hunter On International Arbitration (Fifth Edition page 134 para 2.141) “Where allegations of fraud in the procurement or performance of a contract are alleged, there appears to be no reason for the arbitral tribunal to decline jurisdiction.” Hence, it has been rightly held by the learned Single Judge of the Bombay High Court that it is for the arbitrator to decide this dispute in accordance with the arbitration agreement.

35. For the aforesaid reasons, we allow the appeal, set aside the impugned judgment of the Division Bench of the High Court and restore the order of the learned Single Judge. The parties shall bear their own costs.

.....J. (A. K. Patnaik) .....J. (Fakkir Mohamed Ibrahim Kalifulla) New Delhi, January 24, 2014.
