M/S. Tata Industries Ltd. & Anr vs M/S. Grasim Industries Ltd on 9 July, 2008

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Bench: V.S. Sirpurkar

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"REPORTABLE"

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

ARBITRATION PETITION NO. 5 OF 2007

M/s.Tata Industries Ltd. & Anr. .... Applicants

Versus

M/s.Grasim Industries Ltd. .... Respondent

JUDGMENT

V.S. SIRPURKAR, J

1. Two companies, first being M/s.Tata Industries Ltd., and the second being M/s. Apex Investments (Mauritius) Holding Private Limited (hereinafter referred to Applicant Nos.1 and 2 respectively) have approached this Court under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") for appointment of the Arbitrator in a commercial dispute which has arisen between them and Grasim Industries Limited (hereinafter referred to as "the non-applicant"). Initially the applicants had approached Bombay High Court by way of an application under Section 11(6) of the Act, however, a stand was taken by the non-applicant that this would amount to an international commercial arbitration and, therefore, it would be the Chief Justice of India alone who would have the powers to constitute the Arbitral Tribunal under Section 11(12) of the Act. It is, therefore, that the matter has come before this Court. The parties are ad idem on this

jurisdictional issue that the jurisdiction to appoint the Arbitrator lies with the Chief Justice of India or as the case may be, his nominee.

2. There is no dispute between the parties that there is an arbitration agreement between the parties vide Clause 12.04 of the Shareholders Agreement dated 15.12.2000 and Clause 9 of the Share Transfer Agreement dated 1.6.2006. That issue need not, therefore, be dilated upon.

3. The parties are also ad idem that the claims are within limitation.

4. The only question to be decided, on which the parties have extensively argued, is whether there is a live arbitrable issue.

5. Following background facts would help to understand the controversy between the parties.

6. M/s.Tata Industries Limited (hereinafter referred to as "TIL") is a company incorporated under the Indian Companies Act, 1956 (Applicant No.1) while Apex Investments (Mauritius) Holding Private Limited (Applicant No.2) is a company incorporated under the Laws of Mauritius. The Applicant No.2 has its registered office at Mauritius while non-applicant M/s.Grasim is also a company incorporated under the Indian Companies Act, 1956.

7. Tata Cellular Limited (hereinafter called the "TCL") had obtained a CMTS licence for Andhra Pradesh Circle on 19.12.2005. Similarly, Birla AT &T Communications Ltd. (hereinafter referred to as "BACL") which was a joint venture undertaking of A.V. Birla Group and AT&T Wireless Group held CMTS licences for Maharashtra and Gujarat Circles since 15.12.1995. Tata Teleservices Limited (hereinafter referred to as "TTSL") was granted a basic service licence for Andhra Pradesh Circle on 4.11.1997. A Memorandum of Understanding was arrived at between AT&T Wireless Inc., AV Birla Group and Tata Industries Limited on 1st March, 2000 whereby they agreed to provide CMTS service through a single entity. As per this Memorandum of Understanding AT&T Wireless Inc., AV Birla Group and TIL agreed to provide services through a single entity or an alliance of entities and agreed to merge themselves to form IDEA Cellular Limited (hereinafter referred to as "IDEA"). The Memorandum of Understanding was entered into on 13.11.2000 by merging TCL with BACL.

8. A Shareholders Agreement came into existence on 15.12.2000 between AT&T Wireless Inc., AV Birla Group (through Grasim Industries Limited) and Tata Group through TIL. In this Agreement respective rights and obligations of the parties for the merger/amalgamation of the TCL into BACL and modalities and functions of merged entities were recorded. Under that Agreement, the applicants, the non-applicant and AT&T Wireless Services Inc., were to hold 44,72,35,136 shares being one-third of the subscribed and paid up Equity Share Capital of the merged entity, i.e., IDEA. Article 3.04(b) of the Shareholders Agreement provides as under:

> "Each founder covenants and agrees that except as set out in Section 3.04(c) and Section 3.04(d), it will not engage in, either directly or indirectly though an affiliate, (i) any activity that would constitute the business of the merged company within the territorial telecom circles covered by the licences; or

(ii) any opportunity outside the territorial telecom circles covered by the licences that would constitute the business or the merged company in India and the neighbouring territories unless the opportunity has been first offered to the merged company to undertake such new business by placing the same before the Board of Directors of the merged company. The Board of Directors shall deliberate, without the participation of the India placing the opportunity before the Board (the Opportunity Shareholder") on whether to avail of such an opportunity. If the Board decides not to avail itself of such opportunity or does not convey the decision in respect thereto within a period of 120 days (or such shorter period as may be necessary in the context of the nature of the opportunity) from the date of receipt of such offer by the merged company then;

(i) the Opportunity Shareholder shall invite the other Founders for discussions on whether a joint venture for availing the opportunity may be undertaken;

(ii) If the other Founders do not wish to participate in a joint venture the Opportunity Shareholder shall be free to avail of the opportunity on its own."

Article 8 is the Confidentiality Clause which reads as under:

"8.01 Confidential Information Defined:

For the purposes of this Agreement, "confidential information"

shall mean all oral, written and/or tangible information created by the merged company or disclosed by a Founder (in either case "owner") to the receiving Founder ("Recipient") which is confidential, proprietary and/or not generally available to the public, including but not limited to information relating in whole or in part to present and future products, services, business plans and strategies, marketing ideas and concepts, especially with respect of unannounced products and services, present and future product plans, pricing, volume estimates, financial data, product enhancement information, business plans, marketing plans, sales strategies, customer information (including customer's applications and environment), market testing information, development plans, specifications, customer requirements, configurations, designs, plans, drawings, apparatus, sketches, software, hardware data, prototypes or other technical and business information. Notwithstanding the foregoing, information shall not be deemed confidential and Recipient shall have no obligation with respect to any such information which:

(a) is already known to Recipient, or

(b) is or becomes publicly known, through any means

including publication, inspection of a product, or otherwise, and through no negligence or other wrongful act of Recipient, or

(c) is received by recipient from a third party without similar restriction and without breach of this Agreement, or

(d) is independently develop by Recipient, or

(e) is furnished to a third party by owner without a similar restriction on the third party's rights.

8.02 Treatment of Confidential Information From the execution of this Agreement until three (3) years after the Recipient ceases to be a shareholder, Recipient shall, and shall cause its affiliates to, keep confidential and will not disclose, and will cause its affiliates not to disclose, to third parties, the confidential information receive from, or made available by owner in the course of the transactions contemplated hereby and will use and cause its affiliates to use, the same level of care with respect to the confidential information as Recipient employees with respect to its own proprietary and confidential information of like importance, and will not use and will cause its affiliates not to use such confidential information for any purpose other than the performance of its obligations under this Agreement. Promptly upon the Recipient ceasing to be a shareholder, written confidential information will be returned to Owner or destroyed immediately upon the request of owner, and no copies, extracts or other reproductions shall be retained by the Recipient. All documents memoranda, notes and other writings whatsoever prepared by recipient which contain the confidential information shall be returned to owner or destroyed at owner's request. Confidential information provided by owner shall remain the property of owner. For the avoidance of doubt, the merged company shall not be deemed to be a Recipient for purposes of this Section.

8.03 Notice prior to disclosure:

> If Recipient (or its affiliate) is requested or required (by oral questions, interrogatories, requests for information or documents, subpoena, civil investigative demand or similar process) to disclose any confidential information, Recipient will promptly notify owner of such request or requirement so that owner may seek an appropriate protective order or waive compliance with the provisions of this Section 8.03. If, in the absence of a protective order or the receipt of a waiver hereunder, Recipient (or any of its affiliates) is in the written opinion of Recipient's counsel compelled to disclose the confidential information or else stand liable for contempt or suffer other censure or significant penalty, Recipient (or its affiliates) may disclose only so much of the confidential information to the party compelling disclosure as is required by law. Recipient will exercise (and will cause its affiliate to exercise) reasonable efforts to obtain a protective order or other reliable assurance and confidential treatment will be accorded to confidential information."
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> Article 9 of the Agreement deals with the effectiveness and termination.
>
> Article 9.02 relates to right to terminate for cause. It specifically provides that in the event of occurrence of a material breach on the part of the Defaulting Founder, each Founder shall have right to make the election as provided in Clause 9.02(b). However, for that purpose the electioning Founder should have given written notice of the alleged breach to Defaulting Founder and in terms of that notice the Defaulting Founder has not cured, within 60 days, the said breach, if the said breach is capable

of being cured within such period, or the Defaulting Founder has not taken substantial and appropriate steps to cure the breach. The "material breach" is defined in this Clause as:

(i) a breach of confidentiality provisions set forth in Article VIII of the Agreement;

(ii) breach of the provisions of Section 3.04(b) relating to non-

competition;

(iii) the failure to contribute capital as required under Section 2.04

(a);

(iv) a breach of provisions relating to election of Directors, filling of Board vacancies, removal of Directors and election of Chairman of the Board;

(v) a breach of the provisions under Article 10 relating to transfer of equity, capital or voting interest;

(vi) a breach by a party of the provisions under Section 6.02. Article 10.06 provides that if any party receives from or otherwise negotiates with third parties a bonafide offer to purchase any of the equity capital owned or held by such party and intends to make sale of its shares to such third party, such founder must notify the other two parties of the Shareholders Agreement by way of a notice mentioning offer price, the third parties making the offer and the number of shares that such third party wants to purchase on which the offeree would have option to purchase such amount of shares at the offer price within 45 days of the offer notice.

9. The Arbitration clause worded in Article 12.04 and Article 12.04(a),

(b), (c), (d) and (e) are as under:

"12.04 Governing law and consent to Jurisdiction:

Arbitration:

(a) This Agreement and all questions of its interpretation shall be construed in accordance with the laws of the Republic of India without regard to its principles of conflict of laws.

(b) The parties agree that they shall attempt to resole through good faith consultation in their behalf, disputes arising in connection with this Agreement and such consultation shall begin promptly after a party has delivered to another party a written request for such consultation.

(c) In the event that, after exhausting the efforts for resolution of dispute described in paragraph (b), the parties have been unable to resolve a dispute, and if the dispute is one which relates to an alleged breach of any representation, warranty, covenant or agreement under or the validity or termination of, covenant or agreement under or the validity of termination of this agreements, such dispute shall be finally settled according to the procedure set forth in paragraph (d).

(d) A dispute subject to resolution under this paragraph (d) shall be finally settled by binding arbitration in Mumbai, India before and pursuant to the Indian Arbitration and Conciliation Act, 1996. Each party shall select an arbitrator within fifteen (15) days from the initial arbitration request.

Promptly upon their selection, such arbitrators shall agree upon and select a third arbitrator from the panel of arbitrators UNCITRAL. The parties shall agree in advance as to manner in which the arbitration panel shall promptly hear witnesses and arguments, review documents and otherwise conduct the arbitration proceedings. Should the parties fail to reach an agreement as to the conduct of the arbitration proceeding within twenty (20) days from the selection of the third arbitrator, the arbitration panel shall formulate its own procedural rules and promptly commence the arbitration proceedings. The arbitration proceedings shall be conducted as expeditiously as possible with due consideration for the complexity of the dispute in question. The arbitration panel shall issue its decision in writing within thirty (30) days from the hearing of final arguments by the parties. The parties agree that the arbitrators will have the power to rule on questions of its own jurisdiction over any dispute, to award damages and, in appropriate circumstances, to award equitable relief but shall not be authorized to award punitive or exemplary damages to any party. The parties specifically agree to be bound by the decisions rendered by the arbitration panel provided for herein and agree not to submit a dispute subject to this Section 12.04

(d) to any federal, State or local court or arbitration association except as may be necessary to enforce the procedures of this Section 12.04(d) or to enforce the decision rendered by the arbitrators. The parties to any dispute submitted to arbitration hereunder shall share equally the costs of the arbitral panel and shall each bear their own attorneys' fees and other expenses incurred in connection with any arbitration proceedings. If court proceedings to stay litigation or compel arbitration are necessary, the party who unsuccessfully opposes such proceedings shall pay all associated costs, expenses and attorneys' fees which are reasonably incurred by the other party.

(e) During the pendency of a dispute/arbitration proceedings the parties shall be bound by the terms of this Agreement."

The parties point out that in 2004 AT&T Wireless Services Inc., which was the holding company of AT&T Cellular Private Limited (Mauritius), merged with New Cingular Wireless Services Inc. (hereinafter referred to as "NCW") pursuant to a global restructure cum merger. Subsequently in September, 2005 TIL acquired the entire shareholding of AT&T Cellular Pvt. Ltd. from NCW and the Birla Group acting through Aditya Birla Nuvo Ltd. (hereinafter referred to as "ABNL") acquired 16.45% shares in IDEA from AT&T Cellular Private Limited. AT&T Cellular Private Limited was

subsequently renamed as Apex Investments (Mauritius) Limited. As a result of this, the shareholding of Birla Group in IDEA increased to 50.14% while TIL continued to have 31.69% of the issued share capital. The balance 1.70% of IDEA was held by AIG (Mauritius) LLC.

10. On 31.1.2006, the Applicant No.1 served a notice on the non- applicant under Article 9.02 of the Shareholders Agreement in which it was stated that pursuant to an e-mail communication received by it from one Mr.Sanjeev Aga, it was clear that Aditya Birla Telecom Limited (hereinafter referred to "ABTL"), a subsidiary of ABNL had applied to the Department of Telecommunication for grant of UAS license for the Mumbai Metro Circle. It was further stated in that notice that vide Board Circular dated 29.7.2005, the Board of Directors of IDEA had accepted proposal to apply for UAS licence for the Mumbai Metro Circle and consequently the said application was filed on 3.8.2005. The Applicant No.1 thus asserted that the filing of the application for UAS licence by ABTL for the Mumbai circle was in clear violation of Article 3.04(b) of the Shareholders Agreement and amounting to a material breach by Aditya Birla Group under Article 9.02 of the Shareholders Agreement and accordingly it was requested to cure the said material breach within 60 days of the receipt of the said letter by withdrawing the said application made by ABTL for grant of UAS licence for Mumbai Circle.

11. On 27.2.2006, Applicant No.1 sent the Termination Notice under Article 9.02 (b) of the Shareholders Agreement that ABNL, which was an affiliate company of Aditya Birla Group, for the purposes of Shareholders Agreement had displayed confidential financial data of IDEA including particulars of revenue, PBDIT, OPM%, PBIT, Net profit/loss, capital employed, ROCE (annualized)% and projections, on its website. It was asserted that this information displayed on the website was confidential information within the meaning assigned to the said term in Article 8.01 of Shareholders Agreement. Since such confidential information was not in the public domain and since none of the exceptions to the protection of confidential information contained in Section 8.01 of the Shareholders Agreement were available to ABNL, the disclosure of confidential information was a clear breach of Article 8.02 of the Shareholders Agreement. It was also asserted that such material breach was not capable of being cured and, therefore, the said letter was to be treated as the Termination Notice in accordance with Article 9 of the Shareholders Agreement and the Applicant No.1 was proceeding to purchase the shareholding of AV Birla Group within 90 days of the receipt of the said notice. A copy of the notice was also endorsed to IDEA in order to take steps to facilitate access to an international firm of auditors appointed by Applicant No.1 for computing the fair market value of the IDEA shares. 12.

These letters dated 20.2.2006 and 1.3.2006 were disputed by letters dated 31.1.2006 and 27.2.2006 respectively wherein a clear cut denial was asserted to the effect that there was no violation of the provisions of the Shareholders Agreement relating to non-competition and confidentiality. Then vide the subsequent correspondences dated 16.3.2006 and 27.3.2006, Applicant No.1 reaffirmed all its stand and its entitlement to purchase the entire equity share capital of the non-applicant in IDEA in accordance with the provisions of Shareholders Agreement. There was a further denial on the part of the non-applicant by its letters dated 17.3.2006 and 3.4.2006.

13. However, in the meantime, the applicant received an offer for purchasing its stake as well as the stake of M/s. Apex Investments (Mauritius) Holding Private Limited in IDEA from Global Communication Services Holding Limited. In such an eventuality, in terms of Clause 10.06, the applicants were bound to offer the shares at the same price to the non- applicant. Accordingly, a notice dated 5.4.2006 came to be served by Applicant No. 1 on its behalf and on behalf of its subsidiary M/s. Apex Investments (Mauritius) Holding Private Limited, offering the said shares to the non-applicant. In this notice, the material terms and conditions of the offer were specified vide para 3. It was stated:

> "By this letter, TIL and Apex are intimating the AV Birla Group of their having received a bonafide offer for purchase of the Sale Shares and of TIL and Apex having accepted the offer made to them, subject to this prior offer being made to the AV Birla Group. Without prejudice to the notices of termination dated January 31, 2005 and February 27, 2006 issued by TIL to the AV Birla Group, TIL and Apex are hereby making the first offer for purchase of the Sale Shares to the AV Birla Group at the price and on the material terms and conditions mentioned above. This Offer Notice shall remain irrevocable for a period of 45 days after the Notice Date (i.e., 45 days after the receipt of this Offer Notice by yourselves).
>
> On the very next day of this Offer, the non-applicant vide its communication dated 6.4.2006 accepted the Offer of Purchase. However, it was specified in that reply that their acceptance of the Offer was without prejudice to their contentions that the notices of termination referred to in the said Offer Notice were not tenable. The applicant TIL on the very next day, i.e. 7.4.2006, conveyed that they would be shortly forwarding two Draft Share Purchase Agreements for the sale of IDEA shares held by Tata Industries Limited and Apex Investments (Mauritius) Holding Private Limited. However, in the second para of this Notice, it was reiterated as under:
>
> "We reiterate that our offer and your acceptance thereof, is without prejudice to the notices of termination dated January 31, 2006 and February 27, 2006 issued by us, and your rival contentions which we have not accepted."

14. On 10.4.2006, the letter dated 7.4.2006 was replied to. There again, it was reiterated:

> "As regards our position regarding the notices of termination, we wish to reiterate your position already communicated."

On 19.4.2006, by the even dated letter, the applicant reiterated that the non-applicant had breached the Confidentiality Clause and that the claim of the non-applicant that the data displayed on the website was not confidential under the Shareholders Agreement, is misplaced. It was asserted in para 6 of the letter that non-applicant No. 1 was making contradictory statements. It was lastly asserted:

> "As already explained above, since the AV Birla Group is in violation of the provisions of the Shareholders Agreement, the First Notice and the Second Notice issued by us cannot be withdrawn. Since you have failed in agreeing upon the name of the international firm of auditors we shall therefore proceed in accordance with the Shareholders Agreement to do the needful in connection with determining the Fair Market Value of IDEA shares."

Again on 19.4.2006 by the letter of even date, the applicants reaffirmed the contents of Notices of Termination dated 31.1.2006 and 27.2.2006.

15. On 24.4.2006 the Non-applicant replied to the letter dated 19.4.2006 and intimated the applicants their readiness to make full and final payment against the delivery of shares by TIL and the Apex. On 24.4.2006 the applicants issued a notice requesting to commence the process of consultation with respect to the dispute which had arisen between the parties and which was more particularly highlighted in their earlier notices. In that notice it was said:

> "We note that vide your letters dated February 28, 2006, March 1, 2006, March 17, 2006, April 3, 2006 and April 24, 2006, you have disputed the contents of the said Notices and have also disputed the fact of commitment of "material breaches" of Section 3.04 and 9 of the Shareholders Agreement by you.
>
> It is, therefore, apparent that a dispute has arisen between us in connection with the terms of the Shareholders Agreement."

A further reference was given to Clause 12.04 (b) of the Shareholders Agreement which provided for consultation and, therefore, by the same notice the process of consultation was called upon by the applicants. Lastly it was straightaway suggested that:

> "In case you are not interested in exploring the process of consultation as aforesaid, and would like to proceed with arbitral proceedings straight away, we would be agreeable to that procedure also."

On 27.4.2006 the non-applicant responded to the applicants consultation notice and asserted that there was no arbitral dispute surviving between the parties and, therefore, there was no longer a basis for arbitration regarding the issues set forth in the termination notices. The non-applicant also requested the applicants to withdraw the consultation notice. It was, therefore, pointed out through the notice dated 5.5.2006 by the applicants that the termination of the agreement on their part was made without prejudice to the pendency of the dispute and/or arbitration proceedings and the position was clarified from time to time. On 5.5.2006 the applicants formally served a letter by way of formal notice for arbitration. This notice was contested by the non-applicant by its letter dated 17.5.2006 again reiterating its position that there was no arbitrable dispute surviving between the parties. Hence on 19.5.2006, the applicants communicated to the non-applicant that they had appointed their nominee Arbitrator under Clause 12.04 (d) of the Shareholders Agreement.

16. So far so good. Thereafter two share purchase agreements were entered into between the applicants and the non-applicant. There was a specific reference made to the claim of arbitration made on behalf of the TIL in Clause (d) which runs as under:

> "In relation to the notices dated January 31, 2006 and February 27, 2006 issued by TIL (as a founder under the Shareholders Agreement as hereinafter defined) to the AV Birla Group, TIL has pending arbitration disputes with the AV Birla Group, TIL has not accepted the rival contentions of the AV Birla Group in respect of the said notices nor has the AV Birla Group accepted, TIL's claim pending Arbitration. As such, the execution of and consummation of the transaction contemplated by this Agreement shall not prejudice or affect the pendency of continuation of the arbitration proceedings between TIL and AV Birla Group."

In Clause 2.3 it was further specified in this Agreement that:

> "TIL for itself and Apex has issued the Termination Notices. The offer made by TIL to the AV Birla Groupa pursuant to the offer notice, was made without prejudice to he said Termination Notices, Grasim Industries Limited, as part of the AV Birla Group has refuted the Termination Notices. Further, in order to enforce the rights accrued to TIL and Apex on account of the Termination Notices, TIL, for itself and Apex has pursuant to clause 12.04(d) of the Shareholders Agreement on May 5, 2006 issued a notice to arbitrate to the AV Birla Group. Accordingly, this Agreement is being executed without prejudice to the rival contentions of either party with reference to the Termination Notices and the legal rights which have accrued to each party (including Apex acting through TIL as founder) under the Shareholders Agreement."

In pursuance of this an application was filed before the Bombay High Court and as has been stated earlier, the said application came to be withdrawn and a fresh application came to be made before this Court for the appointment of Arbitrator.

17. Mr.Harish N. Salve, Mr.R.F. Nariman and Mr.Mukul Rohtagi, Senior Counsel on behalf of the applicants painstakingly took the court through the Shareholders Agreement as well as the Share Purchase Agreement. The Court was taken through the whole history along with necessary documents and it was reiterated that the appointment of Arbitral Tribunal was a must for resolving the live issues between the parties. Learned counsel firstly urged that there was no dispute about there being Shareholders Agreement to which contesting entities were the parties and further that the applicants held shares in IDEA subject to discipline of Shareholders Agreement. Learned counsel thereafter relied upon the Notice dated 31.1.2006 whereby a material breach was alleged on the part of the non-applicant, i.e., to secure the licences which would necessarily involve business in competition with IDEA. The attention of the Court was also drawn to the second notice dated 27.2.2006 by which the confidentiality clause was alleged to have been breached, which breach was an incurable breach. Thus the applicants asserted that under the terms of the Shareholders Agreement, the applicants were entitled to purchase the shares of the non-applicant in the event of the breach at a price that was heavily discounted price, i.e., at 25% less than the market price as per

clause 9.02(b)&(c) of the Shareholders Agreement. It was, therefore, urged that the dispute had arisen which has been shown in the Termination Notices dated 31.1.2006 and 27.2.2006, which has been disputed by the non-applicant's reply dated 28.2.2006 and 1.3.2006. It was, therefore, urged that such dispute clearly fell within the Arbitration Clause.

18. It was further urged that there was a live issue between the parties and that there was a difference between a live issue and a live claim. It was urged that whether the claim had any merit or not was a matter which could be considered at the stage of appointing an Arbitrator and an issue which has never been closed or treated to have been closed remains a live issue. Heavy reliance was placed on the judgment of this Court reported in Shree Ram Mills Ltd. v. Utility Premises (P) Ltd. [(2007) 4 SCC 599 at p.607]. It was, therefore, urged that as per the principles laid down, the initial notices of termination were disputed by the non-applicant; that on 27th March, 2006 an international firm of auditors was appointed by the applicants to determine the fair value of shares; that on 5th April, 2006, the applicant had received an offer for selling these shares to a third party and on that very date the applicant had raised the dispute although the arbitration proceedings had by then not yet commenced. It was pointed out by the learned counsel that the non-applicant in its reply dated 28.2.2006 had very clearly understood this position and has reiterated therein as under:

> "Your Second Notice is wrongful, illegal, malafide, non est factum and designed to take advantage of your own wrongs. The Shareholders Agreement continues to subsist under law and contract, despite the second notice. Such notice is of no consequence under the Shareholders Agreement or in the eyes of law. You are not entitled to rely upon or take any advantage based upon the Second Notice."

Learned counsel pointed out that in the first notice there was no termination of contract but it was a notice to correct the material breach while the second notice purported to terminate the Agreement. Learned counsel also pointed out that in the reply dated 28.2.2006 there was a tacit agreement that the Shareholders Agreement remained in existence inasmuch as it was stated in its notice that:

> Any breach by you of the provisions of the Shareholders Agreement relating to transfer of shares will result in an invalid and illegal transfer, which will not be binding on either Idea or the Birla Group. Also, such breach will be a material breach under Section 9.02 of the Shareholders Agreement. Please be advised that the Birla Group is committed to asserting its rights in respect of any attempted breach in accordance with law. Please also note that any third party participating in any sale of the shares of Idea held or controlled by the Tata Group will also be liable to the Birla Group. We also hereby put all such third parties on notice of your obligations towards the Birla Group, and the Birla Group's potential claims against them for inducing the breach of the Shareholders Agreement."
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> Learned counsel further argues that the offer which was made on 5th April, 2006 was a "without prejudice" offer which was accepted by non-applicant on "without prejudice" basis on 6th April, 2006 and therefore, when on 24th April, 2006 the non applicant informed the applicants that they were ready to make full and final

> payment on the same day, the applicants requested to commence the process of consultation to resolve the dispute which had arisen. Learned counsel also pointed out that subsequently when the Share Purchase Agreement was executed on 1st June, 2006, it contained clauses which made it clear that the disputes were being kept outside this arrangement and they would be resolved separately and thus the live issue remained to be alive.

19. It was further argued that though the non-applicant had contested the notices of termination suggesting that there was no arbitrable issue, still an agreement was entered into on 1st June, 2006 wherein there was clear reference to the clauses keeping the disputes arising out of the live issues alive. Learned counsel relied upon the following observations made in Heyman & Anr. v. Darwins Ltd. [(1942) 1 All E.R. 337]:

> "Repudiation, then, in the sense of a refusal by one of the parties to a contract to perform his applications, thereunder, does not of itself abrogate the contract. The contract is not rescinded. It obviously cannot be rescinded by the action of one of the parties alone. Even if the so-called repudiation is acquiesced in or accepted by the other party, that does not end the contract. The wronged party has still his right of action for damages under the contract which has been broken, and the contract provides the measures of those damages. It is inaccurate to speak in such cases of repudiation of the contract. The contract stands, but one of the parties has declined to fulfil his part of it. There has been what is called a total breach or a breach going to the root of the contract, and this relieves the other party of any further obligation to perform what he for his part has undertaken."
>
> "I am accordingly of opinion that what is commonly called repudiation or total breach of a contract, whether acquiesced in by the other party or not, does not abrogate a contract, though it may relieve the injured party of the duty of further fulfilling the obligations which he has by a contract undertaken to the repudiating party. The contract is not put out of existence, though all further performance of the obligations undertaken by each party in favour of the other may cease. It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purpose of the contract have failed, but the arbitration clause is not one of the purposes of the contract."

Similarly other observations by House of Lords reported in the above case were also heavily relied upon to the effect:

> "To say that the contract is rescinded or has come to an end or ceased to exit may in individual cases convey the truth with sufficient accuracy, but the fuller expression that the injured party is thereby absolved from future performance of his obligations under the contract is a more exact description of the position. Strictly speaking, to say that, upon acceptance of the renunciation of a contract, the contract is rescinded is

> incorrect. In such a case the injured party may accept the renunciation as a breach going to the root of the whole of the consideration. By that acceptance he is discharged from further performance and may bring an action for damages, but the contract itself is not rescinded.
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> The injured party may therefore rely upon the contract and apply to have the action stayed if he desires to do so."
>
> "The same observations as apply to accepted repudiation apply, I think to frustration. The phrase `frustration of the contract' is as inaccurate in expression as is the phrase `rescission of the contract by repudiation'. The contract is not frustrated. Its future performance or the adventure is frustrated. The damages are still at large and so is the question whether, having regard to the terms of the contract express or implied, there has been frustration or not. This appears to have been recognized in Scott & Sons v. Del Sel [(1923) S.C. (H.L.) 37) which though a Scottish case was decided on the same principles as apply in English law, and is binding upon your Lordships' House. So far as the case of Hirji Mulji [(1926) AC 497], which is not binding, lays down a different principle, I do not think it should be followed, despite the authority which is undoubtedly possesses."

Shortly stated the claim of the applicants is for the profits they had become entitled to by the breach of confidentiality clause on the part of the non- applicant which profit was on account of applicant's entitlement to purchase the shares of non-applicant at the rate 25% less than the market price. Its reiteration is that though subsequently it agreed to sell all its shares to the non-applicant on account of the offer having been made to it by Global Communication Services and though subsequently the Share Purchase Agreement dated 1.6.2006 was executed between the applicants and the non-applicant, since the said agreement was subject to the disputes raised earlier and without prejudice to its rights it could still lay its hand on its claim.

20. As against this Shri K.K. Venugopal, Dr. Abhishek Manu Singhvi and Shri Shyam Diwan, learned senior counsel for the Non-applicant opposed the appointment of Arbitral Tribunal on various grounds and basically on the ground that there was no live issue remaining pending between the parties. The major contention is that by Share Purchase Agreement, the applicants had made an exit from the company and, therefore, they were left with no rights under the Shareholders Agreement. A very heavy reliance was placed by Shri Venugopal on Clauses 7.01 (a) and (b) which are as under:

> "7.01 (a) For a founder to exercise its rights under this Agreement, the Founder must hold 15% of the issued, subscribed and paid up Equity Capital (the "Threshold Limit").
>
> (b) Should the shareholding of any Founder fall below the Threshold Limit;
>
> i) Such Founder shall not be entitled to exercise any rights under this Agreement;

ii) Such Founder shall comply with all obligations set forth in this Agreement;

iii) Such Founder shall act in accordance with the instructions of the other founders;

iv) any disposal by such Founder of any shares held by it shall be in accordance with Article X."

Heavily relying on this clause, the learned Senior Counsel argued that once by a Share Purchase Agreement, the applicants agreed to sell their shares to the non-applicant and due to such act once the shareholding of the applicants fell below 15%, it had no right to assert more particularly under the Shareholders Agreement. Learned counsel argues that there were two options to the applicants when they received an offer from Global Communications Services, a third party, for the sale of their shares if the applicant had accepted the offer. First option was to sell the entire shareholding to Global Communications and exit IDEA in which case the non-applicant could also choose to sell its entire shareholding in IDEA to Global Communications by giving a Special Disposal Notice and once the Tata Group allowed the Birla Group to sell all its shares to Global Communications, it could no longer require the Birla Group to then sell the same shares to the Tata Group for the reason that Birla Group would no longer have those shares. The second option, according to the learned counsel was to sell the entire shareholding in IDEA to the non-applicant and exit IDEA. According to the learned counsel in both these cases on acceptance of the offer by the applicants from Global Communications, there would be an inevitable result of voluntary effacement of all rights that the applicants claim on the Birla Group shareholding in IDEA. It was pointed out that the applicants had accepted this offer from the Global Communications much before it attempted to reserve any rights against the non-applicant and, therefore, had irrevocably elected to exit IDEA, electing for second option. It was, therefore, urged that there was a concluded contract between Global Communications and the applicants even before a letter dated 5.4.2006 was sent by the applicants to Birla Group to purchase their shareholding in IDEA and hence the applicants had elected to exit IDEA themselves. In support of this proposition, the learned counsel relied on three cases:

(i) Sargent and ASL Developments Limited, reported at (1974) 4 Australian Law Reports (A.L.R.) 257.

(ii) Jai Narain Parasrampuria (Dead) and others Vs. Pushpa Devi Saraf and others, reported at 2006 7 SCC 756.

(iii) National Insurance Company Limited Vs. Mastan and another, reported at 2006 2 SCC 641.

21. In short, it was contended that by accepting the offer of Global Communications the claim made by the applicants under Termination Notices for purchase of Birla Group shareholding in IDEA at a defaulting price got necessarily effaced with the subsequent option given in the offer notice to Birla Group to sell their entire shareholding to Global Communications. It was further urged that with the offer of sale to Global Communications, the applicants recognized and acquiesced that the Birla Group's shareholding in IDEA was not subject to any encumbrance or reservations and the applicants, therefore, necessarily abandoned all purported claims for the purchase of Birla Group's shareholding and there was nothing left with the applicants to reserve in the offer notice or any documents executed thereafter. It is pointed out that the Agreement to Sell to Global Communications took place without any notice to the Birla Group and contrary to the alleged right of applicants to buy out Birla Group and remain invested in IDEA with increased shareholding, the applicants themselves exited IDEA by selling their shares to Birla Group companies and thereby reducing the Tata Group's shareholding in IDEA to Nil. It is accordingly suggested that as a result all rights of Tata Group pursuant to Termination Notices were effaced and there was no arbitrable dispute surviving between the parties. It is pointed out that there was no claim for damages in the Termination Notice and in fact such a claim was not even possible because it was excluded by the decision to seek a buy out under Section 9.02 of the Shareholders Agreement. It was then stated that the claim by the applicants was frivolous and unsustainable because of the alleged loss of an opportunity to buy out Birla Group's shareholding in IDEA was not caused by any breach of contract by any Birla Group company but it was by applicants' own voluntary decision to exit the company and thereby lost the right to acquire Birla Group's shareholding in IDEA. It is pointed that the purported rights of the applicants under the Termination Notice is not possible in law also particularly because the Tata Group's election to exit IDEA and to let Birla Group remain invested in IDEA and as such all their claims were erased. Learned counsel also relied on Clause 7.01(b)(i) of the Shareholders Agreement which is as under:

> i) Such Founder shall not be entitled to exercise any rights under this Agreement;

It was suggested that even if the Arbitration clause remains inspite of the termination of the Shareholders Agreement, because of the above mentioned clause, there is complete bar created on the exercise by the applicants of the substantive right to seek a buy out. A live procedural mechanism of dispute resolutions through arbitration cannot be set in motion to enforce a dead claim and, therefore, there would be no question of starting an arbitration proceeding.

22. As to what should be the approach of the Court in an application under Section 11(6) was explained by this Court in SBP Co. Vs. Patel Engineering Ltd. and Another reported in 2005 8 SCC 618. This was a decision to resolve as to whether the Chief Justice of India or his nominee, while dealing with the matters under Section 11(6) acts in his administrative capacity or his judicial capacity. The Court ultimately, held that the Chief Justice of India acts in his judicial capacity. Hon. P.K. Balasubramanyan, J., who authored the judgment on behalf of the majority, in his conclusions, pointed out clearly in point iv (points i, ii and iii not relevant) that:-

> "(iv) The Chief Justice or the designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be his

> own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators....."

The law, thus, stands crystalised by this judgment indicating the exact scope of the Judge in dealing with an application under Section 11(6) of the Act. The judgment was thereafter considered in number of cases. In Shree Ram Mills Ltd. Vs. Utility Premises (P) Ltd. reported in 2007 4 SCC 599, it was observed relying on observations made in paragraph 39 of SBP Co. Vs. Patel Engineering Ltd. and Another reported in 2005 8 SCC 618 (cited supra):

> "A glance on this para would suggest the scope of the order under Section 11 to be passed by the Chief Justice or his designate. Insofar as the issues regarding territorial jurisdiction and the existence of the arbitration agreement are concerned, the Chief Justice or his designate has to decide those issues because otherwise the arbitration can never proceed. Thus, the Chief Justice has to decide about the territorial jurisdiction and also whether there exists an arbitration agreement between the parties and whether such party has approached the court for appointment of the arbitrator. The Chief Justice has to examine as to whether the claim is a dead one or in the sense whether the parties have already concluded the transaction and have recorded satisfaction of their mutual rights and obligations or whether the parties concerned have recorded their satisfaction regarding the financial claims. In examining this if the parties have recorded their satisfaction regarding the financial claims, there will be no question of any issue remaining. It is in this sense that the Chief Justice has to examine as to whether there remains anything to be decided between the parties in respect of the agreement and whether the parties are still at issue on any such matter. If the chief Justice does not, in the strict sense, decide the issue, in that event it is for him to locate such issue and record his satisfaction that such issue exists between the parties. It is only in that sense that the finding on a live issue is given. Even at the cost of repetition we must state that it is only for the purpose of finding out whether the arbitral procedure has to be started that the Chief Justice has to record satisfaction that there remains a live issue in between the parties....."
>
> "It is for this reason that it was pointed out in the above para that it would be appropriate sometimes to leave the question regarding the live claim to be decided by the Arbitral Tribunal. All that he has to do is to record his satisfaction that the parties have not closed their rights and the matter has not been barred by limitation."

In the wake of above decision, it will be now necessary to see whether a live claim or a live issue exists in between the parties.

23. As has already been clarified in the earlier part of the judgment that there is jurisdiction in this Court to decide the application, secondly, there is arbitration agreement between the parties, and

thirdly, the claim is not barred by limitation, the only issue which has to be decided is whether there is a live issue in the sense as to whether the parties have already concluded or recorded their satisfaction regarding the issues or whether the parties are still in contest regarding certain issues.

24. In the backdrop of what has been asserted by the applicant and the stands taken by the non-applicant, it would be first better to note certain dates, which are of extreme importance. It will be seen there as below:

> 15.12.2000: A Shareholders Agreement (SHA) came into effect between AT&T Group, Birla Group and Tata Group.
>
> 9.11.2005: The name of AT&T Cellular Pvt. Ltd., Mauritius was changed to M/s. Apex Investments (Mauritius) Holding Private Limited (APEX).
>
> 31.1.2006: The first termination notice was served by the applicant on the non-applicant, alleging breach of Shareholders Agreement on account of the non-

applicant Company having applied for Unified Access Service Licenses (UAS Licenses), enabling license holder to provide any kind of telecommunication service for Mumbai Metro circle and thereby committing breach of Article 3.04 (b) of the Shareholders Agreement and asking the non-applicant to remedy the breach within 60 days.

27.2.2006: A second termination notice was sent by the applicant to the non-applicant claiming that there was a breach of confidentiality clause committed by the non-applicant and since this breach was incapable of being cured, the applicant demanded to purchase the shareholding of the Birla Group within 90 days of the said notice at a default price.

28.2.2006: The non-applicant disputed the first termination notice dated 31.1.2006, while on 1.3.2006, the non-applicant replied to the second termination notice dated 27.2.2006.

16.3.2006: The applicants reiterated both the termination notices.

17.3.2006: The non-applicant wrote a letter observing therein:

> "..... Based upon your above-
>
> referenced two letters, we conclude the Shareholders Agreement continued to remain valid, subsisting and enforceable."
>
> 27.3.2006: The applicants reiterated the second notice of termination insisting that they were entitled to acquire shares and shown their readiness to appoint international firm of auditors to determine the fair market value of the shares to be purchased by them.

3.4.2006: The non-applicant refused the claim once again.

5.4.2006: The applicant received the offer from Global Communication Services for purchasing its stake in IDEA and hence, it makes offer for the sale of its shareholding under clause 10.06 to the non-

applicant. This offer notice was expressly "without prejudice" to both the termination notices.

6.4.2006: This offer was accepted by the non-applicant.

However, it was clarified that the acceptance of this offer was without prejudice to the contention that the notices of termination were not tenable.

7.4.2006: The applicant sent the letter stating therein that it would be shortly forwarding two Draft Share Purchase Agreement for the sale of IDEA shares held by it and M/s. Apex Investments (Mauritius) Holding Private Limited. There was again a reiteration that the offer made by it and the acceptance thereof was without prejudice to the termination notices dt. 31.1.2006 and 27.2.2006.

10.4.2006: The non-applicant submitted the particulars of the Birla Group Companies, which would be purchasing the shares of the applicant and M/s.

Apex Investments (Mauritius) Holding Private Limited under the two Share Purchase Agreements with the percentage of shares to be purchased by such companies.

19.4.2006: The applicant reaffirmed its termination notices dt.

31.1.2006 and 27.2.2006 and also informed that it would proceed to appoint an international firm of auditors for determining the fair market value of IDEA shares.

24.4.2006: The non-applicant replied and informed that they were ready to make full and final payment against the delivery of shares held by TIL and M/s. Apex Investments (Mauritius) Holding Private Limited in IDEA Cellular Ltd.

24.4.2006: The applicant made a request to commence the process of consultation with respect to disputes which have arisen between the parties on account of breach of Shareholders Agreement.

27.4.2006: A letter was sent by the non-applicant that in view of the agreement between the parties for purchase of the shares of applicant by the non-

applicant and the further stands having been

taken by the parties, there was no arbitrable dispute survived between the parties and requested the applicants to withdraw the consultation notice.

5.5.2006: A formal notice was issued for arbitration.

17.5.2006: The non-applicant reiterated that there was no arbitrable dispute survived.

19.5.2006: The applicant conveyed the appointment of nominee arbitrator under Clause 12.04(d).

1.6.2006: Two formal Share Purchase Agreements came into existence. A clause 2(D) was inserted:

"2(D) In relation to the notices dated January 31, 2006 and February 27, 2006 issued by TIL (as a founder under the Shareholders Agreement as hereinafter defined) to the A.V. Birla Group, TIL has pending arbitration disputes with the AV Birla Group, TIL has not accepted the rival contentions of the AV Birla Group in respect of the said notices nor has the AV Birla Group accepted, TIL's claims pending arbitration. As such, the execution of and consummation of the transaction contemplated by this Agreement shall not prejudice or affect the pendency or continuation of the arbitration proceeding between TIL and the AV Birla Group."

Another Clause 2.3 was inserted:

"2.3 TIL, for itself and Apex has issued the Termination Notices. The offer made by TIL to the AV Birla Group pursuant to the Offer Notice, was made without prejudice to the said Termination Notices, Grasim Industries Limited, as part of the AV Birla Group has refuted the Termination Notices. Further, in order to enforce the rights accrued to TIL and Apex on account of the Termination Notices, TIL, for itself and Apex has pursuant to clause 12.04(d) of the Shareholders Agreement on May 5, 2006 issued a notice to arbitrate to the AV Birla Group. Accordingly, this Agreement is being executed without prejudice to the rival contentions of either party with reference to the Termination Notices and the legal rights which have accrued to each party (including Apex acting through TIL as founder) under the Shareholders Agreement."

25. A glance on these dates would clearly suggest that the first salvo was fired by the applicant when it first sent the notice dated 31.1.2006. In this way, the only complaint made was that ABTL, which

was a subsidiary of ABNL, had made an application on 3.1.2006 to the Department of Telecommunication for grant of Unified Access Services License (UASL) for Mumbai Metro circle. It was complained that this amounted to the breach of clause 3.04(b) of the Shareholders Agreement as the Aditya Birla Group could not be permitted to engage in, directly or indirectly through an Affiliate, (i) any activity that would constitute the Business of the IDEA Cellular Ltd. without complying with the provisions of Clause 3.04(b). Noticee then was to remedy the breach within 60 days as per the Shareholders Agreement. It is only to that extent that the dispute arose.

It would be remembered that there is a provision in the Shareholders Agreement, by which even if the breach is committed by one party, the other party could ask for remedying the same within 60 days. This was not a termination of the Agreement. However, the second salvo came to be fired on 27.2.2006, which was on account of the breach of the Confidentiality clause. A position was taken that this breach was not such as could be remedied and on that account, the applicants claimed all the shareholding of Birla Group at the price, which would be 25% less than the fair market price of the shares. In the subsequent correspondences, they also offered to appoint a firm of Chartered Accountants for assessing the fair market value of the shares.

26. The non-applicant was not to be left behind in disputing this claim by its reply dated 1.3.2006. In this reply, it was suggested that the termination notice was only by way of a counter action to the Birla Group's recent letters to the Department of Telecommunications, Ministry of Communication and Information & Technology (DoT), complaining against Tata Group's continuing breach of the relevant telecom licenses. It was thereafter denied that the investor presentations made by ABNL, and the further presentation dated 12.9.2005 posted on the website of ABNL could constitute a breach on the part of Birla Group of the restrictions contained in Section 8.01 of the Shareholders Agreement. It was further reiterated that the said presentation could not be deemed to be confidential under the Shareholders Agreement, and that information conveyed in those presentations was not confidential information at all. A further stand was taken that since ABNL was a publicly listed company, any consolidated accounts prepared by ABNL had to be disclosed to the investors, which was consistent with its disclosure obligations and a good corporate governance practice, and that the Tata Group was fully aware that ABNL would be disclosing such information to the investors and the analysts. It was further reiterated that since the information was received from IDEA regarding consolidation and disclosure, such information was used for that purpose and there was no impropriety or breach of Shareholders Agreement by these disclosures, and that information was not at all confidential. An allegation was made that the Tata Group was trying to sell its shares to the third party and that it could not do so unless the obligations in favour of Birla Group, as contemplated in the Shareholders Agreement, were not met.

27. In short, till this reply was given, the only defense that was raised by the non-applicant was that there was no breach of the Confidentiality clause, as the information itself was not confidential. There was probably an inkling to the non-applicant that the Tata Group was interested in disposing of its shareholding in favour of some third party and, therefore, it merely asserted it rights in case such sale to the third party of the shareholding materializes. Therefore, at least up to this date, there was a live issue as to whether there had been a breach of Confidentiality clause on the part of the non-applicant.

28. However, that is not where the things stopped as merely a few weeks thereafter, the applicants having received the offer from Global Communication Services, offered their own shareholding to the non- applicant on 5.4.2006, reiterating therein, that this offer was without prejudice to the dispute which has arisen between the parties. The offer so made, was accepted by the non-applicant, however, with a caveat in the following words:

> "This is without prejudice to our contentions that the notices of termination referred to in the said Offer Notice, are not tenable."

Therefore, even at this point of time, when the offer was accepted, the issue was very much there as to whether there was a breach of Confidentiality clause on the part of the non-applicant. On 7.4.2006, the applicants offered to send two Draft Share Purchase Agreements for the sale and again reiterated that the offer and the acceptance by the non- applicant was without prejudice to the notices of termination dated 31.1.2006 and 27.2.2006. On 10.4.2006, again the non-applicant wrote back giving the details regarding the shares and the percentages, where again they disputed the question of termination. There was a further reiteration on 19.4.2006, of its stand, in details, and it was specifically reiterated in the letter dated 19.4.2006:

> "As already explained above, since the AV Birla Group is in violation of the provisions of the Shareholders Agreement, the First Notice and the Second Notice issued by us cannot be withdrawn. Since you have failed in agreeing upon the name of the international firm of auditors we shall therefore proceed in accordance with the Shareholders Agreement to do the needful in connection with determining the Fair Market Value of Idea Shares."

By their letter dated 24.4.2006, the applicants again showed their readiness to purchase the shares. However, the earlier position was reiterated by them to the effect that the stand taken by Tata Group was not correct. On 24.4.2006, the applicants clearly reiterated that a dispute had arisen between the applicants and the non-applicant in connection with the terms of Shareholders Agreement and that for that purpose, they were ready to start the process of consolidation as an initial step. It was also conveyed that in case the non-applicant was not interested in process of consolidation, the applicants would like to proceed with the arbitral proceedings straight away. Lastly, the non-applicant wrote a letter dated 27.4.2006 in which for the first time, the position was taken that the Agreement which was concluded between the parties consequent to the offer notice and acceptance notice, and the further steps taken by both would be that there was no arbitrable dispute surviving pursuant to the notices.

29. It is here for the first time, that a stand was shifted by the non- applicant from its earlier stand. Earlier, the contention was that there was no breach of Confidentiality clause. The shifted stand was that because of the subsequent Agreement, the earlier issue was already obliterated. It is on this background that ultimately the formal Agreements dated 1.6.2006 came to be entered into by the parties. But before that, a notice for the Arbitration was already issued by the applicants by their letter dated 5.5.2006. Even on this backdrop, the only position taken by the non- applicant by its letter dated 17.5.2006 was that Tata Group was estopped from asserting its alleged claims against

the Birla Group. In view of the election made by Tata Group by giving the offer notice dated 5.4.2006 to the Birla Group and the acceptance by Birla Group dated 6.4.2006. Therefore, it was concluded that there was no arbitrable dispute surviving and yet in the Agreement dated 1.6.2006, the non-applicant again allowed to insert the clauses regarding the Agreements being without prejudice to the earlier rights. In fact, if the stand taken was that there was no arbitrable issue because the offer concluded sale, there was no question of any such "without prejudice" clause being inserted in the Agreement dated 1.6.2006. It must be remembered that on the date when the formal Agreements were signed on 1.6.2006, the non-applicant was already facing an arbitral notice and yet the two clauses, viz., 2(D) and 2.3 (which we have mentioned earlier in this judgment), came to be inserted. All this would suggest that there indeed was an issue and a live one in between the parties till then as described in (See Chairman and MD, NTPC Ltd. Vs. Reshmi Constructions, Builders & Contractors reported in 2004 2 SCC 663 (Paras 35 and 36).

30. On the other hand, Shri Venugopal, learned counsel invited my attention to a decision of High Court of Australia in Sargent and ASL Developments Limited, reported at (1974) 4 Australian Law Reports (A.L.R.) 257 (cited supra). The decision of the Australian High Court is on the question of Doctrine of election. In my opinion, the decision is not applicable to the present controversy as there was no question of election on the part of the applicant herein. It is merely basing its claim on account of the alleged clear breach of Shareholders Agreement in respect of the Confidentiality clause. Even the second decision in Jai Narain Parasrampuria (Dead) and others Vs. Pushpa Devi Saraf and others, reported in 2006 7 SCC 756(cited supra) has no application. That is a case where this Court explained the principles of estoppel and waiver and whether a party could be permitted to take a different stand and the duty of the court in such matters. No such questions arise in the present matter. The third decision in National Insurance Company Limited Vs. Mastan and another, reported in 2006 2 SCC 641, is again on the question of Doctrine of election, where this Court has observed that the Doctrine of election postulates that when two remedies are available for the same relief, the aggrieved party has an option to elect either of them, but not both. The fact situation is not like that in the present case. This case, therefore, has no application.

31. The other major limb of the argument was, however, that this issue could not arise and became a dead issue at least after the applicants sold out all their shares and their shareholding fell below 15%. The aforementioned clause on which Shri Venugopal, Dr. Singhvi and Shri Shyam Diwan, Advocates for the non-applicant heavily relied, being clause No. 7.01(a) and 7.01(b), as also 7.02 (b) provided that in case the shareholding falls below 15%, and in this case it has actually fallen below 15%, such party would not have any rights left with it under the Agreement (Shareholders Agreement). The argument is obviously incorrect, as the Arbitration Agreement under clause 12.04 would be clearly autonomous of the Shareholders Agreement. Law is settled on this point that even if the whole Agreement is terminated, the Arbitration Agreement would still remain (See Chairman and MD, NTPC Ltd. Vs. Reshmi Constructions, Builders & Contractors reported in 2004 2 SCC 663 (Para 39). It was argued that clause 7.01 (b) operates as a complete bar on the exercise by the applicants of the substantive right to seek a buy-out. That may be so, however, that is only an eventuality subsequent to the crystalisation of the live issue between the parties for which the arbitration clause would come handy to the applicants.

32. The learned counsels for the non-applicant very vehemently argued that the issue had become dead. The issue cannot be held to be dead for the simple reason that even in the subsequent Agreements (Shares Purchase Agreements), there is a "without prejudice" clause and that too despite the vehement claims and refusals of those claims on the part of the parties.

33. Whether there was a breach of Confidentiality clause and whether the applicants were entitled to any damages on account of that clause in favour of the applicants, would be a matter in the helm of arbitration and this Court would not go into that question.

34. It was tried to be argued that the cause of action for the arbitration was based entirely on the offer notice, which was given by the applicants to the non-applicant on account of the applicants having received the offer from Global Communication Services. It is, therefore, argued by the learned counsel that since the cause of action was on the offer notice and since the Share Purchase Agreements were concluded on account of that offer notice, any disputes arising would be solved in accordance with the Share Purchase Agreement and not with the Shareholders Agreement and, therefore, they would be resolved under English Law and LCIA Arbitration Rules. These clauses are to be found at pages 286-288 as also on pages 328-332 of the main Paper Book vide clauses 9.1, 9.4 and 9.5 in the First Agreement dated 31.1.2006, as also 9.2.1 to 9.2.5 on pages 330 and 331 of the main Paper Book.

35. The contention is clearly incorrect, as the present dispute is not based on the notice of offer dated 5.4.2006. The contention raised by the learned counsels that the cause of action arose only from that notice, is obviously incorrect, as has been shown in the earlier parts of the judgment. The live issue was clearly there, much before the notice was given on 05- 04-2006 and the second agreement was even contemplated. That was the issue whether there was a breach of Confidentiality clause on the part of the non-applicant and what are the effects thereof. That issue continued to be in existence and was never given up by the applicants. Therefore, that contention is rejected.

36. By way of last argument, it was argued that M/s. Apex Investments (Mauritius) Holding Private Limited was never a party to the Shareholders Agreement. It was suggested that M/s. Apex Investments (Mauritius) Holding Private Limited was originally a member of the AT&T Wireless Group and held 32.9% shares in IDEA. It was then known as AT&T Cellular Pvt. Ltd. It was then argued that it was required under Article 4.01

(a) of the Shareholders Agreement to execute a Deed of Adherence as provided in "Annex C" to the Shareholders Agreement in order to (i) designate AT&T Inc. as its representative to exercise all rights and perform all obligations under the Shareholders Agreement; (ii) agree to be bound by all the provisions of the Shareholders Agreement; (iii) agree not to revoke the designation of the representative without prior written consent of the AV Birla Group and the Tata Group. It was also required that the counter-part of the executed Deed of Adherence should have been delivered to Grasim Industries Ltd. and TIL. It was then pointed out that after TIL acquired AT&T Cellular Pvt. Ltd. itself which held the remaining 16.45% shares in IDEA, M/s. Apex Investments (Mauritius) Holding Private Limited became a wholly owned subsidiary of TIL. It was then pointed out that on 28.09.2005, AT&T Cellular Pvt. Ltd., New Cingular Wireless Service Inc. (successor-in-interest to

AT&T Inc.) entered into a Sale and Purchase Agreement with Indian Rayon and Industries Ltd. (now called ABNL), whereby the Shareholders Agreement was specifically terminated as between the Birla Group and the AT&T Wireless Group and all pre- existing rights/liabilities, if any, were specifically extinguished and waived. So also on the same date, the AT&T Wireless Group (of which AT&T Cellular Pvt. Ltd. was a part), executed a similar Sale and Purchase Agreement with the Tata Group, whereby the Shareholders Agreement was terminated between the Tata Group and the AT&T Wireless Group, and thus the Apex Investments (Mauritius) Holding Private Limited (which is a fall out from the AT&T Cellular Pvt. Ltd.) had terminated the Shareholders Agreement and extinguished and waived all accrued rights and obligations against the Birla Group and, therefore, Apex Investments (Mauritius) Holding Private Limited ceases to be a party to the Shareholders Agreement and to any arbitration clause contained therein. Apex Investments (Mauritius) Holding Private Limited, therefore, could no longer have any claim for arbitration or assert any rights or liabilities under the Shareholders Agreement. It was further pointed out that on 15.12.2000, when the Shareholders Agreement was executed, there were only three parties, viz., (i) AT&T Inc., which was acting on behalf of itself and AT&T Wireless Group; (ii) Grasim, acting on behalf of itself and the Birla Group (iii) TIL, acting on behalf of itself and the Tata Group. The argument, therefore, is that since Apex Investments (Mauritius) Holding Private Limited was not a party then, there could be no privity of contract between Apex Investments (Mauritius) Holding Private Limited and the non-applicant Birla Group. It was pointed out that since the modality drafted by clause 4.02 of Shareholders Agreement was not followed, Apex Investments (Mauritius) Holding Private Limited could not join the Shareholders Agreement and as such, Apex Investments (Mauritius) Holding Private Limited not being a party to the Shareholders Agreement, it cannot demand an arbitration through the arbitration clause. This argument is obviously incorrect for the following reasons:

(i) It must be seen that after the offer was received from Global Communications, both TIL on its behalf and on behalf of the Apex Investments (Mauritius) Holding Private Limited, offered to sell their entire shareholding in IDEA in terms of the right of first refusal, which offer has been accepted by the non-applicant.

(ii) Apex Investments (Mauritius) Holding Private Limited is now a part and parcel of the Tata Group and is its subsidiary. Further, its interests are bound to be affected.

(iii) In raising this issue, the non-applicant is making a complete volte face, inasmuch as, when the application had been filed before the Bombay High Court, an objection was taken by the non-applicant that Apex Investments (Mauritius) Holding Private Limited being a foreign company and claiming an arbitration along with Tata Group, the Bombay High Court had no jurisdiction to entertain the application under Section 11 (6). It was in pursuance of that objection only that the Bombay High Court did not proceed further to decide the application under Section 11 (6). The learned counsel argues that this objection regarding the Apex Investments (Mauritius) Holding Private Limited being foreign party, arose on the face of it, but the merits of the case did not fall for consideration in Bombay High Court and as such the issue of Apex Investments (Mauritius) Holding Private Ltd. not being a party to shareholder agreement can still be raised. The contention is not correct. The non-applicant having

raised an objection on the ground that the applicant Apex Investments (Mauritius) Holding Private Limited was a foreign company, and, therefore, could not have filed an application before Bombay High Court, cannot now turn around and say that Apex Investments (Mauritius) Holding Private Limited was not a party to the Arbitration Agreement. That will not be permissible. The learned counsel points out that this objection was raised without prejudice, would also be of no consequence, as having succeeded in stalling the decision of the application under Section 11(6), it cannot now raise the argument before this Court that Apex Investments (Mauritius) Holding Private Limited was never a party. This argument should have been addressed to the Bombay High Court, at least in the alternative form. If in the affidavit before the Bombay High Court filed on their behalf of the non-applicant had raised the issue and still chose not to go into the issue whether Apex Investments (Mauritius) Holding Private Limited was or was not a party to the Shareholders Agreement, that will not be permitted to be raised before this Court. In fact, in restricting to the jurisdictional issue and in not perusing the issue of Apex Investments (Mauritius) Holding Private Limited not being a party to the Shareholders Agreement before Bombay High Court, the non-applicant abandoned that issue. The argument is, therefore, rejected.

37. Ultimately, considering the overall situation, it is held that the application under Section 11(6) is liable to be allowed. In that view, the following order is passed:

Hon'ble Dr. Justice A.S. Anand, former Chief Justice of India, Hon'ble Mr. Justice Arun Kumar and Hon'ble Mr. Justice P.K. Balasubramanyan, former Judges of the Supreme Court of India are appointed as the Arbitrators. Their terms shall be decided by themselves.

.....J. (V.S. Sirpurkar) New Delhi;

July 09, 2008.

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Case No. : Arbitration Petition No. 5 of 2007

Date of Decision : 09.7.2008

Cause Title : M/s Tata Industries Ltd. & Anr.

Versus

M/s. Grasim Industries Ltd.

Coram : Hon'ble Mr. Justice V.S. Sirpurkar

Judgment delivered by : Hon'ble Mr. Justice V.S. Sirpurkar Nature of Judgment : Reportable