Hsbc Pi Holdings (Mauritius) Limited vs Avitel Post Studioz Limited on 22 January, 2014

Author: R.D. Dhanuka

Bench: R.D. Dhanuka

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ARBP1062

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 1062 OF 2012

HSBC PI Holdings (Mauritius) Limited)
(previously named HPEIF Holdings 1)

Limited), a company incorporated under)
the provisions of the law of Mauritius and)
having its registered office at)
c/o. Multiconsult Limited, Rogers House,)
5 President John Kennedy Street, Port)

Louis, Mauritius) ..... Petitioner

VERSUS

1. Avitel Post Studioz Limited,)
a company incorporated under the)
provisions of the Companies Act, 1956)
and having its registered office at A-7,)
Vimal Udyog Bhavan, Taikal Wadi Road,)

Opposite Starcity Cinema, Mahim (West))

Mumbai - 400 016)

2. Pradeep Shantipershad Jain)
being a citizen of India, carrying out)

business at A-7, Vimal Udyog Bhavan,)
Taikal Wadi Road, Opposite Starcity)
Cinema, Mahim (West) Mumbai - 400 016)

3. Siddhartha Pradeep Jain)

being a citizen of India, carrying out)
business at A-7, Vimal Udyog Bhavan,)
Taikal Wadi Road, Opposite Starcity)
Cinema, Mahim (West) Mumbai - 400 016)

4. Hrishi Pradeep Jain)
being a citizen of India, carrying out)
business at A-7, Vimal Udyog Bhavan,)

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Taikal Wadi Road, Opposite Starcity)
Cinema, Mahim (West) Mumbai - 400 016) ..... Respondents

Dr. Virendra Tulzapurkar, Senior Advocate, a/w. Mr.N.H.Seervai, Senior Advocate, Mr.Nikhil Sakhardande, Mr.Rohan Rajadhakshya, Mr.Adip Iyer, Mr.Ankur Kashyap, Mr.Ayush Agarwala, i/b. AZB & Partners for the Petitioner.

Mr.Mukul Rohatgi, Senior Advocate, a/w. Mr.Zuben Behramkamdin, Mr.Sujay Kantawala, Mr.Sanjay Agarwal, Mr.Niranjan Waghela, Mr.Saurav Kripal, Mr.H.Sudhakar, i/b. Pandya & Co. for the Respondents.

Mr.Sunil Chavan, i/b. M/s.Mulla & Mulla & Craigie Blunt and Caroe for the Corporation Bank.

CORAM : R.D. DHANUKA, J.

RESERVED ON : 06th DECEMBER, 2013

PRONOUNCED ON : 22nd JANUARY, 2014

JUDGMENT :

By this petition filed under section 9 of the Arbitration and Conciliation Act, 1996, petitioner seeks an order and direction against respondents to deposit monies to the extent of the claims of the petitioner under Share Subscription Agreement and Share Holders Agreement including the investment of approximately US$ 60 million and cost and/or in the alternative to provide adequate and satisfactory security in regard to the claims of the petitioner. Petitioner also claims disclosure of all the assets, moneys, bank deposits and accounts held by the respondents singly or jointly and/or severally including but not limited to the accounts with Corporation Bank by an affidavit. Petitioner seeks injunction restraining the respondents from dealing with their assets including bank accounts with Corporation Bank. Some of the relevant facts for the purpose of deciding this petition are as under :-

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2 (a) Petitioner is a company incorporated under the laws of Mauritius and has its registered office at Mauritius. Petitioner is a investment holding company for the principal investments Asia Division of HSBC. Respondent no.1 is a company incorporated under the provisions of Companies Act, 1956 and has its registered office at Mumbai. Avitel India is a parent company in the Avitel Group and hold 100% share in Avitel Holdings Limited. Avitel Holdings Limited in turn hold 100% Avitel Post

Studioz FZ LLC.

(b) It is the case of the petitioner that the said Avitel Group represented to the HSBC and the petitioner that it was the entity responsible for 95% of the Avitel Group's post firm services and operations. The respondents represented to the petitioner that the Avitel Group was at a very advanced stage of finalising a contract with the British Broadcasting Corporation (BBC) and had in fact already signed a MOU with the BBC to convert the BBC's film library from 2D to 3D which contract was accepted to generate a revenue of US$ 300 million in the first phase. Avitel Group required an investment of US$ 60 million to purchase the equipment for Avitel Post Studioz FZ LLC specially to enable Avitel Dubai to service the BBC Contract, which was required to be in place before execution of the contract.

(c) On 12th December, 2010, Avitel India through Mr.Yogesh Garodia sent a e-mail to Mr.Prateek Garg, former employee of HSBC and attached preliminary due diligence report completed by Avitel India. It was stated that the Avitel kvm ARBP1062.12 was in advanced stages of negotiations with the BBC for the conversion of its existing 2D library to 3D. It was stated that the total size of the said opportunity was estimated between US $ 1 to US $ 1.3 billion, the first phase of conversion was expected to yield revenues of approximately US $ 300 million followed by a second phase of further US $ 300 million.

(d) On 10th January, 2011 respondent no.3 sent an e-mail to Heath Zarin, Managing Director, Head of Principal Investments, Asia-Pacific, Director Avitel India, Director Avitel Mauritius, stating that as far as BBC MoU and e-mail correspondence, he had asked his Dubai office to scan and e-

mail it to him so that when he meets the Managing Director of HSBC, he could show it to him on hard copy.

(e) On 11th January, 2011 respondent no.3 sent e-mail to Mr.Zarin of HSBC stating that he had MOU with the BBC and few e-mail correspondence with them and enquired as to when Mr.Zarin would like to see those documents. There were meetings held on 19th April, 2011 between respondent and HSBC and a person claimed to be Mr.John Linwood, BBC's Chief Technology Officer. It is the case of the petitioner that it was subsequently discovered that a person who was introduced to Mr.Anthony Bernbaum of HSBC as Mr.John Linwood of BBC was not with him. According to the petitioner in the said meeting, it was Mr.Anthony Bernbaum concluded that on the basis of the meeting, he approved the deal and recommended his HSBC team to do so as well.

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(f) On 21st April, 2011, petitioner, respondent no.1 and promoters including respondent nos. 2 to 4 entered into a Share Subscription Agreement (hereinafter referred to as the said 'SSA'). Some of the relevant clauses of the said shares subscription agreement are extracted as under :-

Clause 15

15. GOVERNING LAW This Agreement shall be governed by and construed in accordance with the laws of the Republic of India without regard to applicable conflict of Laws principles.

Clause 16

16. DISPUTE RESOLUTION 16.1 Arbitration 16.1.1Any dispute, controversy or claim arising out of or in connection with this Agreement, including any question regarding its existence, validity, interpretation, breach or termination shall be referred to and finally resolved by binding arbitration at the Singapore International Arbitration Centre ("SIAC") in accordance with the Singapore International Arbitration Rules in force at the date of this Agreement ("Rules"), which Rules are deemed to be incorporated by reference into this clause and as may be amended by the rest of this clause.

16.1.2The seat of arbitration shall be Singapore ...

16.1.6The parties waive any right to apply to any court of law and/or other judicial authority to determine any preliminary point of law and/or review any question of law and/or the merits, in so far as such waiver may be validly made. The parties shall not be deemed, however, to have waived any right to challenge any award on the ground that the tribunal lacked substantive jurisdiction and/or the ground of serious irregularity affecting the tribunal, the proceedings or the award to the extent allowed by the law of the seat of the arbitration.

kvm ARBP1062.12 16.1.7Nothing, in this Clause 16.1 shall be construed as preventing any party from seeking conservatory or interim relief in any court of competent jurisdiction ...

16.4 Application of Arbitration Act Save for section 9, Part I of the Indian Arbitration and Conciliation Act, 1996 ("the Arbitration Act"), the provisions of Part I of the Arbitration Act shall not apply to the terms of this Agreement."

" 6. Representations, Warranties and Undertakings.

6.2 The Promoters hereby jointly and severally represent , warrant and undertake to the Investor that :

6.2.1 The information provided to the Investor prior to and during the preparation and negotiation of this Agreement was provided by the Company and the Promoters and its and/or representatives and advisors in good faith and is true, accurate and not misleading, ... "

(g) On 10th May, 2011, the entire investment proceeds of US $ 60 million was received from the petitioner by respondent no.1 which was routed to Avitel Dubai through Avitel Mauritius. On 11th

May, 2011 petitioner, respondent no.1 and their promoters and HAV3 Holdings (Mauritius) and their investor entered into a Share Holders Agreement (hereinafter referred to as the said 'SHA').

(h) Clause 18.1 of the said agreement provides that the same shall be governed by and construed in accordance with the laws of Republic of India without regard to applicable conflict Laws principles. Clause 19.1 provides for arbitration at Singapore International Arbitration Centre in accordance kvm ARBP1062.12 with SIAC Administered Arbitration Rules in force. Clause 19.4 provided that save for section 9 of Part 1 of the Indian Arbitration and Conciliation Act, 1996, the provisions of Part I of the Arbitration Act shall not apply to the terms of that agreement..

(i) On 1st June, 2011, respondent no.3 sent an e-mail to Mr.Zarin, Investor director of respondent no.1 who was appointed by the petitioner stating that respondent no.3 was in London with BBC person and they were scheduled to come to Dubai in the third week of June for inspection and it was hopeful that they would sign the contract and start the production by end of June for sure, plus minus one week. It was informed that he was heading back to London for three days for signing his side of the BBC contract.

(j) On 3rd June, 2011, Mr.Yogesh Garodia sent e-mail to Pratik Garg and informed that Siddhartha had visited BBC and informed that the machinery would be in place by mid of June.

BBC officials were schedule to come and visit Dubai facility post 15th of June and thereon the contract would be signed. They expected to have the production up and running by 15 th July. On 2nd August, 2011, respondent no.3 informed the petitioner that the BBC contract had been concluded.

(k) It is case of the petitioner that on 8 th February, 2012, the auditors of Avitel Dubai PWC resigned since Jains promoters of Avitel Dubai refused to allow Mr.Viren Lodha of PWC to kvm ARBP1062.12 report the status of the PwC cited serious concerns over the authenticity of Avitel Dubai's key customers and suppliers and PwC had insufficient information to verify the financial record of Avitel Dubai. In the said letter, the auditor concluded that it was resigning because it had insufficient evidence to obtain comfort on Avitel Dubai's financial statement and they were also unable to place any reliance on management's representations which form a key element of the audit process.

(l) On 9th April, 2012, the nominee director of the petitioner Mr.Zarin engaged E & Y and KPMG Dubai on behalf of Avitel Mauritius to conduct an independent investigation into the circumstances surrounding PwC's resignation of the auditor's of Avitel Dubai. Such appointment was resisted by respondent no.3. It is the case of the petitioner that on 10 th April, 2012, respondents unilaterally produced a report of KMPG India to try to prevent an investigation into PwC's resignation and the reasons for it.

(m) On 12th April, 2012 Board meeting of respondent no.1 and respondent no.2 in which respondent no.2 informed the board of respondent no.1 that there was no further work being done for BBC. Respondent no.2 denied the request of the director of the petitioner for a full and proper investigation to be carried out into the resignation of PwC's , the auditor of respondent no.1 and

passed a resolution to that effect.

(n) On 12th - 15th April, 2012, E&Y's and KPMG Dubai's kvm ARBP1062.12 submitted a report giving preliminary findings which supported the concerns raised by PwC and showed that there were real concerns over the legitimacy of the Avitel Group's business. Avitel Dubai's offices appeared to be closed. Avitel Dubai's key suppliers Highend and Digital Fusion and atleast one Kinden out of two not including the BBC key customers did not seem to be legitimate or independent. Attempts to locate the purported business premises of Highend and Digital Fusion had failed. According to the petitioner, in the said report various other misrepresentations of the Avitel Group were pointed out.

(o) On 1st May, 2012 Ms.Sarah Jones, General Counsel at BBC by her e-mail to the petitioner confirmed that BBC had not entered into a contract with Avitel for the conversion of 2D archive to 3D archive and confirmed that Mr.Linwood did not attend any meeting of any kind and had no knowledge of any such proposal with the nominee director of the petitioner and with the respondents. It is stated that on 19 th April, 2011 from 4.30 p.m. Mr.Linwood was in meetings with members of BBC Staff.

(p) It is the case of the petitioner that in the month of April

- May, 2012 petitioner realised that the purported BBC contract was a sham and was set up by the respondents to induce the petitioner into investing into respondent no.1. Petitioner also came to know that Purple Passion represented kvm ARBP1062.12 by the Jains to be a key customer of Avitel India appeared to be a fake customer which company was dissolved on 23 rd November, 2010 and was not in existence at the time the petitioner invested in Avitel India. The Jains represented, warranted and undertook that Purple Passion was the sole material customer of Avitel India with business worth approximately US $ 187 million. It is the case of the petitioner that out of the amount received by Avitel Dubai from the petitioner, atleast about US $ 51 million were not used for purchase of equipment to support the BBC Contract or in any way to support any other legitimate business operations. Remaining US $ 9 million could not be traced.

Those amounts were credited to the account of Jains and/or their family concern.

(q) On 11th May, 2012, the petitioner invoked two arbitrations under the SSA and the SHA, being SIAC Arbitration No. 088 and 099 and sought emergency reliefs under the emergency arbitration provisions of SIAC 2010 Rules. On 14th May, 2012, SIAC appointed Mr.Thio Shen Yi S.C. as emergency arbitrator.

(r) On 15th May, 2012, respondents raised objection before the learned arbitrator that the joinder of SHA and SSA was not possible under law, common application for interim relief was not valid, the appointment of the emergency arbitrator was objectionable and alleged that he had a direct conflict of kvm ARBP1062.12 interest as he had made up his mind regarding the urgency of reliefs. On 17th May, 2012 respondents filed 61 pages witness statement of Mr.Yogesh Garodia in the emergency arbitration but did not dispute the challenge on merits. On 17 th May, 2012, SIAC rejected the challenge of the respondents to the appointment of the emergency arbitrator.

(s) On 28th and 29th May, 2012, the respondents appeared under protest. The learned emergency arbitrator made interim award on 28th May, 2012 in SSA arbitration and on 29 th May, 2012 in SHA Arbitration inter alia freezing the accounts of the respondents, to require them to disclose to HSBC Mauritius information of their assets, and to deliver up the requested information. In the said interim award of SSA, the learned emergency arbitrator has provided for various expenses allowed to be spent by the respondents. On 29 th May, 2012 the advocates of the petitioner forwarded the photo copy of the SSA interim award requesting Corporation Bank, Mangalore to freeze the bank accounts of the respondents in term of the SSA interim award.

(t) On 31st May, 2012, the Singapore International Arbitration Centre (SIAC) informed the respondent no.1 that the total estimated costs of the SSA Emergency Arbitration was at Singapore Dollar 11,75,533/- and the provisional estimate cost of the SHA Emergency Arbitration was at Singapore Dollar 7,39,394.13 and called upon respondent no.1 kvm ARBP1062.12 to make their share of payment towards the first tranche of deposit being Singapore Dollar 2,05,718.28 and Singapore dollar 1,29,393.97 and informed that in the event the petitioner and respondent nos. 2 to 4 failed to pay their share of the advances, the respondent no.1 would be required to pay the whole of the advances.

(u) On 18th June, 2012, respondents filed two applications before the emergency arbitrator to vacate and/or modify the interim awards. On 22nd June, 2012 and 27th June, 2012, Shivaji Park and Mandvi Branch of the Corporation Bank wrote a letter to each of the respondents freezing the bank accounts of the respondents. On 3rd July, 2012, upon an application by the petitioner, leave was granted of the Singapore High Court to enforce the interim award passed in the SSA and SHA arbitrations as if it was an order of the Singapore High Court. No one appeared for the respondents before the Singapore High Court. On 12th , 16th and 17th July, 2012, the orders passed by Singapore High Court enforcing the interim awards were served on the respondents. On 16 th July, 2012, respondents filed a writ petition against Corporation Bank in this court (1500 of 2012) inter alia praying for de-freezing of the accounts of the respondents with the Corporation Bank.

(v) On 17th July, 2012, the counsel of the respondents sent a letter to the emergency arbitrator seeking withdrawal of the kvm ARBP1062.12 application to vacate and/or modify the interim award. The emergency arbitrator gave direction that the hearing would proceed as scheduled. On 27th July, 2012, the emergency arbitrator passed amendment to the interim award SHA and SSA award based on subsequent events and granted further reliefs to the petitioner.

(w) On 30th July, 2012, the petitioner intervened in the Writ Petition No. 1500 of 2012. The Division Bench of this court directed that freeze of the accounts to continue till 3rd August, 2012 5 p.m. or till an earlier vacation of the freeze by the Single Judge in the section 9 petition filed by the petitioner and disposed of the said writ petition. Petitioner filed this petition on the same day. On 3rd August, 2012, the learned Single Judge of this court directed the Corporation Bank to allow the withdrawal of Rs.1 crores by the respondents on or before 9th August, 2012 and directed the respondents not to withdraw further amount from the Corporation Bank until further orders.

(x) Respondents submitted two affidavits in this proceedings seeking to offer security to the petitioner alleging that subsidiary of respondent no.1 in Dubai had plant and machinery of US $ 103 million and submitted valuation report of one M/s.S.K.Singh and Associates. The list of alleged plant and machinery in the valuation in the valuation report however disclosed only moveable computer equipment. The kvm ARBP1062.12 respondents withdraw the said affidavits.

(y) Pursuant to various interim orders passed by this court from time to time, respondent no.1 has been allowed to withdraw various amounts from the Corporation Bank subject to their furnishing accounts and subject to their undertaking that they would bring back the amount withdrawn in the event this court directs them to do so. In the meanwhile SIAC sent reminders to make payment towards the first tranche deposit for both the SSA emergency arbitration and SHA emergency arbitration to the respondents.

(z) On 17th December, 2012, the Arbitral Tribunal passed a unanimous final partial award in the SSA arbitration dismissing the jurisdictional challenge of respondents. In the said SSA jurisdiction award, the Tribunal inter alia declared that (a) Indian law was not the governing law of the arbitration agreement and it was Singapore Law that governs the arbitration agreement, (b) under Singapore Law, allegations of fraud and/or complicated isues of fact and law are arbitrable and (c) the Arbitral Tribunal has jurisdiction to adjudicate the disputes arising under the SSA between the petitioner and the respondents. The respondents have not challenged the said jurisdictional award so far. On 15th January, 2013, petitioner filed an additional affidavit bringing on record the SSA jurisdiction award dated 17th December, 2012 in this proceedings.

kvm ARBP1062.12 (aa) By an order dated 23rd January, 2013, passed by the Single Judge of this court, this court directed the Corporation Bank to remit a sum of Singapore Dollars 335,000/- to SIAC towards arrears of contribution of arbitration fees of the respondents. On 30th January, 2013, Division Bench of this court accepted the undertaking of respondent no.1 and directed respondent no.1 to deposit a sum of Rs.1.40 crores equivalent to 3,35,000 Singapore Dollars with the Corporation Bank in a separate fixed deposit towards arrears of contribution of arbitration fees to be paid by respondent no.1 to SIAC and directed that the said amount shall not be remitted to SIAC till final disposal of the arbitration petition. The said order is passed without prejudice to the rights and contentions of parties keeping all contentions open.

(bb) On 15th March, 2013, the Arbitral Tribunal passed a unanimous partial award in SHA arbitration dismissing the jurisdictional challenge of the respondents and declared that Singapore law determines the jurisdiction of the Tribunal and based on section 11 of the Singapore International Arbitration Act read with Article 34 of the Model Law, Singapore Law governs the arbitrability of disputes, issues of fraud are arbitrable under Singapore Law and arbitration of the petitioner's claims are not contrary to Singapore public policy and that the petitioner's claims are arbitrable. It is also held that the respondents had not proved their allegation of kvm ARBP1062.12 illegality of the SHA and even if the SHA was illegal, it would be insufficient to deprive the Tribunal of jurisdiction owing to the principle of separability enshrined in Article 16 of the Model Law.

(cc) On 22nd July, 2013, petitioner received a letter from Economic Offence Wing (EOW) informing them that a "C" Summary Report with respect to the complaint filed by it against the respondents was filed with the Additional Metropolitan Magistrate 47th Court, Mumbai. On 1st August, 2013, respondent no.1 filed additional affidavit bringing on record the final report filed by the EOW with the Magistrate Court.

(dd) On 3rd November, 2013, the Arbitral Tribunal passed a unanimous final award (excluding courts) in the SHA arbitration awarding all the claims of the petitioner. In so far as SSA arbitration is concerned, final hearing before the Arbitral Tribunal took place on 4th to 6th November, 2013.

3. Mr.Rohatgi, learned senior counsel appearing on behalf of the respondents raised preliminary objections about the maintainability of this petition filed under section 9 of the Arbitration and Conciliation Act, 1996. It is submitted that the petitioner has made serious allegations of fraud and fraudulent representation against respondents in the arbitration proceedings before the Arbitral Tribunal and also in this proceedings. Since serious allegations of fraud and fraudulent representation cannot be decided by Arbitral Tribunal and such allegations are incapable of settlement by arbitration under law of India, under section 48 (2) (a) kvm ARBP1062.12 of the Arbitration and Conciliation Act, 1996, such award adjudicating upon such allegations is not enforceable under the Law of India. Interim measures applied under section 9 is in aid of final relief. Since award itself cannot be enforced under section 48(2) (a) of the Act, this petition for interim measures thus is not maintainable.

Submissions of Dr.Tulzapurkar, learned senior counsel appearing on behalf of the petitioner on the preliminary objections raised by Mr.Rohatgi, learned senior counsel appearing for the respondents and also on merits of petition :-

4. It is the case of the petitioner that respondents had represented to the petitioner that the Avitel Group was at a very advanced stage of finalizing a contract with the British Broadcasting Corporation (BBC) and had signed MOU with the said company to convert the BBC's film library from 2D to 3D which contract was expected to generate a revenue of US$ 300 million in the first phase and ultimately over US $ 1 Billion. The respondents required an investment of US$ 60 million to purchase the equipments for Avitel Post Studioz FZ LLC specifically to enable Avitel Dubai to service the BBC Contract which was required to be in place before execution of the contract. Respondent also represented that the Avitel Group had the benefit of number of material contracts with three main customers who were worth in total approximately US $ 658 million to Avitel Group. The petitioner invested US $ 60 million accordingly which investment was received from the petitioner and was routed to Avitel Dubai through Avitel Mauritius. On 21 st April, 2011 petitioner and respondent no.1 entered into share subscription agreement. The petitioner subscribed 7.8% of equity capital of respondent no.1.

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5. On 11th May, 2011, petitioner and 1st respondent signed Shareholders Agreement. On 2nd August, 2011, 3rd respondent informed the petitioner that BBC contract had been concluded.

Petitioner subsequently came to know that the amount invested by the petitioner was credited to the account of the respondent. The said BBC had not entered into any contract with Avitel for the conversion of 2D archive to 3D archive.

6. On 11th May, 2012, petitioner invoked two arbitration agreements under the said two agreements being SIAC agreement no. 088 and 099 and sought emergency reliefs under the provisions of SIAC Rules, 2010. SIAC appointed Mr.Thio Shen Yi S.C. as emergency arbitrator. The respondents protested against the arbitration on 5th May, 2012 on various grounds without giving any answer on the merits of the charges of the petitioner. Before the Arbitral Tribunal, the respondents also raised a plea of allegations of fraud and/or complicated issue of fact and laws and of arbitrability under Indian law and that the Arbitral Tribunal did not have jurisdiction to decide such allegations. It was also pleaded that the parties were governed by Indian law and not Singapore Law.

7. On 17th December, 2012, the Arbitral Tribunal passed unanimous final partial award in the SSA Arbitration (SSA jurisdictional award) dismissing the jurisdictional challenge of the respondents. The Arbitral Tribunal declared that (a) Indian law was not the governing law of the arbitration agreement, it was Singapore Laws that governs the arbitration agreement (b) under Singapore Law, allegations of fraud and/or complicated issues of fact and law are arbitrable and (c) the Arbitral Tribunal has jurisdiction to adjudicate the disputes arising under the SSA between the petitioner and the respondents.

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8. On 15th March, 2013, Arbitral Tribunal passed unanimous partial award in the SHA arbitration ("SHA jurisdictional award") and took similar view dismissing the jurisdictional challenge of the respondents.

9. On 3rd November, 2013, Arbitral Tribunal passed a unanimous final award excluding cost in the SHA arbitration awarding of the claim of the petitioner. On 4- 6th November, 2013, final hearing in the SSA arbitration before the Arbitral Tribunal took place at Singapore. Award is awaited. Respondents have not challenged any of the jurisdictional awards referred to aforesaid. The Arbitral Tribunal has also granted interim measures in favour of the petitioner and against the respondents on 28th and 29th May, 2012.

10. It is submitted that the issue as to whether allegation of fraud or fraudulent representation can be referred to Arbitral Tribunal or not has been already decided by the Arbitral Tribunal in the arbitral proceedings between the same parties in the same matter by declaring so in jurisdictional award dated 17 th December, 2012. The Arbitral Tribunal has also held that Law of Singapore will apply and not Indian Law. Preliminary objections raised by the respondents in this proceedings was specifically raised before the Arbitral Tribunal which objections has been specifically negatived by the Arbitral Tribunal on the issue of arbitrability as well as jurisdiction and cannot be agitated in this proceedings. Respondents not having challenged jurisdictional award rendered by the Arbitral Tribunal which is binding on the parties and are thus estopped from raising such plea in this proceedings filed by the petitioner under section 9 of the Act.

11. Dr.Tulzapurkar placed reliance on the judgment of this court in case of kvm ARBP1062.12 Indo-Pharma Pharmaceutical Works Private Limited vs. Pharmaceutical Company of India reported in 1977 (80) Bom.L.R. 73 in support of his submission that issue of arbitrability and jurisdiction raised by the respondents before the Arbitral Tribunal having been rejected and concluded cannot be agitated in this proceedings being barred by law of estoppel. The Learned Single Judge in the aforesaid case held that if the Learned Judge himself was entitled to decide the issue of prior continuous user, the Learned Judge would have come to a contrary decision. However, the Learned Judge held that since the said issue had already been decided by the Registrar of Trade Marks in a previous lis between the parties which decision had become final, the said issue could not be raised in the suit and the said decision was required to be respected.

12. Learned senior counsel placed reliance on the judgment of the Supreme Court in case of Hope Plantations Ltd. vs. Taluk Land Board, Peermade and another reported in (1999) 5 SCC 590 and in particular paragraph (26) in support of his submission that the principles of estoppel and res judicata are based on public policy and justice. When the proceedings between the parties have attained finality on certain issues, parties are bound by the judgment and are estopped from questioning it. Paragraph (26) of the said judgment reads thus :-

> 26. It is settled law that principles of estoppel and res judicata are based on public policy and justice. Doctrine of res judicata is often treated as a branch of the law of estoppel though these two doctrines differ in some essential particulars.

Rule of res judicata prevents the parties to a judicial determination from litigating the same question over again even though the determination may even be demonstrated wrong. When the proceedings have attained finality, parties are bound by the judgment and are estopped from questioning it. They cannot litigate again on the same cause of action nor can they litigate any issue which was necessary for decision in the earlier litigation. These two aspects are 'cause of action kvm ARBP1062.12 estoppel' and 'issue estoppel'. These two terms are of common law origin. Again once an issue has been finally determined, parties cannot subsequently in the same suit advance arguments or adduce further evidence directed to showing that issue was wrongly determined. Their only remedy is to approach the higher forum if available. The determination of the issue between the parties gives rise to, as noted above, an issue estoppel. It operates in any subsequent proceedings in the same suit in which the issue had been determined. It also operates in subsequent suits between the same parties in which the same issue arises. Section 11 of the CPC contains provisions of res judicata but these are not exhaustive of the general doctrine of res judicata. Legal principles of estoppel and res judicata are equally applicable in proceedings before administrative authorities as they are based on public policy and justice.

13. Learned senior counsel placed reliance on the judgment of the Supreme Court in case of Bhanu Kumar Jain vs. Archana Kumar and another reported in (2005) 1 SCC 787 in support of his submission that there is absolute bar in relation to issues which are already decided between the parties from agitating the same in the later proceedings between the same parties. Paragraphs 29 to 32 of the said judgment reads thus :-

29.There is a distinction between 'issue estoppel' and 'res judicata' [See Thoday v. Thoday,

30. Res judicata debars a court from exercising its jurisdiction to determine the lis if it has attained finality between the parties whereas the doctrine issue estoppel is invoked against the party. If such an issue is decided against him, he would be estopped from raising the same in the latter proceeding. The doctrine of res-judicata creates a different kind of estoppel viz Estopper By Accord.

31. In a case of this nature, however, the doctrine of 'issue estoppel' as also 'cause of action estoppel' may arise. In kvm ARBP1062.12 Thoday (supra) Lord Diplock held :

"...."cause of action estoppel" is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, i.e., judgment was given on it, it is said to be merged in the judgment....If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam."

32. The said dicta was followed in Barber v. Staffordshire Country Council, . A cause of action estoppel arises where in two different proceedings identical issues are raised, in which event, the latter proceedings between the same parties shall be dealt with similarly as was done in the previous proceedings.

In such an event the bar is absolute in relation to all points decided save and except allegation of fraud and collusion. [See C. (a minor) v. Hackney London Borough Council, .

14. Dr. Tulzapurkar placed reliance on the judgment of the Supreme Court in case of Ishwar Dutt vs. Land Acquisition Collector and another reported in (2005) 7 SCC 190 on the issue of estoppel raised by the petitioner. Paragraphs 18 to 21 of the said judgment reads thus :-

18. In the Reference Court or for that matter the High Court exercising its appellate jurisdiction under Section 54 of the Act could not have dealt with the said question. The principle of res judicata is species of the principle of estoppel. When a proceeding based on a particular cause of action has attained finality, the principle of res judicata shall fully apply.

19. Reference in this regard may be made to Wade and Forsyth on Administrative Law, 9th Ed., pg. 243, wherein it is stated:

"One special variety of estoppel is res judicata. This kvm ARBP1062.12 results from the rule, which prevents the parties to a judicial determination from litigating the same question over again even though the determination is demonstrably wrong.

> Except in proceedings by way of appeal, the parties bound by the judgment are estopped from questioning it. As between one another they may neither pursue the same cause of action again, nor may they again litigate any issue which was an essential element in the decision. These two aspects are sometimes distinguished as 'cause of action estoppel' and 'issue estoppel.'
>
> 20. In Hope Plantations Ltd. v. Taluk Land Board, this Court observed (SCC p.611, para 31) "31. Law on res judicata and estoppel is well understood in India and there are ample authoritative pronouncements by various courts on these subjects. As noted above, the plea of res judicata, though technical, is based on public policy in order to put an end to litigation. It is, however, different if an issue which had been decided in an earlier litigation again arises for determination between the same parties in a suit based on a fresh cause of action or where there is continuous cause of action. The parties then may not be bound by the determination made earlier if in the meanwhile, law has changed or has been interpreted differently by a higher forum."

21. In 'The Doctrine of Res Judicata' 2 nd Edition by George Spencer Bower and Turner, it is stated :

> "A judicial decision is deemed final, when it leaves nothing to be judicially determined or ascertained thereafter, in order to render it effective and capable of execution, and is absolute, complete, and certain, and when it is not lawfully subject to subsequent rescission, review, or modification by the tribunal which pronounced it..."

15. Learned senior counsel placed reliance on the judgment of the Supreme kvm ARBP1062.12 Court in case of Arjun Singh vs. Mohindra Kumar and others reported in AIR 1964 SC 993 on the issue of estoppel/res judicata. Paragraph (11) of the said judgment reads thus :-

> 11. That the question of fact which arose in the two proceedings was identical would not be in doubt. Of course, they were not in successive suits so as to make the provisions of s. 11 of the Civil Procedure Code applicable in terms. That the scope of the principle of res judicata is not confined to what is contained in s. 11 but is of more general application is also not in dispute. Again, res judicata could be as much applicable to different stages of the same suit as to findings on issues in different suits. In this connection we were referred to what this Court said in Satyadhyan Ghosal v. Sm. Deorajin Debi where Das Gupta, J. speaking for the Court expressed himself thus :
>
> "The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again.
>
> Primarily it applies as between past litigation and future litigation. When a matter - whether on a question of fact or on a question of law - has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal

> was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again..... The principle of res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings."

16. Dr.Tulzapurkar, learned senior counsel then submits that the issue of arbitrability has to be decided by the law, governing arbitration agreement and not kvm ARBP1062.12 the law governing the main contract. Reliance is placed on the judgment of the Supreme Court in case of Sumitomo Heavy Industries Ltd. vs. ONGC Ltd. and others reported in (1998) 1 SCC 305. Paragraphs 4, 5, 8 to 11 are relevant which reads thus :-

> 4. On 26th July, 1995, the first respondent filed in the High Court at Bombay a petition praying that the second respondent be directed, under Section 14 of the Indian Arbitration Act, 1940, to file the award in that court. The first respondent submitted that the award was invalid, unenforceable and liable to be set aside under the provisions of the said Act. The learned Judge, as aforestated, allowed the petition.
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> 5. The decision rendered by Potter, J. in the Commercial Court is of some importance because the jurisdiction of the English courts was discussed. The learned Judge said :
>
> "Before stating my reasons for that conclusion and then turning to the "frustration" argument, and because questions have arisen as to whether English law or Indian law is appropriate to be applied at various stages of this application, I propose briefly to advert to the various laws potentially applicable to the various aspects of the arbitral relationship which may fall for consideration in cases of this kind.
>
> (1) The proper law of the underlying contract, i.e. the law governing the contract which creates the substantive rights and obligations of the parties out of which the dispute has arisen.
>
> (2) The proper law of the arbitration agreement, i.e. the law governing rights and obligations of the parties arising from their agreement to arbitrate and, in particular, their obligation to submit their disputes to arbitration and to honour an award. This includes inter alia questions as to the validity of the arbitration agreement, the validity of the notice of arbitration, the Constitution of the tribunal and the question whether an award lies within the jurisdiction of the arbitrator.

kvm ARBP1062.12 (3) The proper law of the reference, i.e. the law governing the contract which regulates the individual reference to arbitration. This is an agreement subsidiary to but separate from the arbitration agreement itself, coming into effect by the giving of a notice of arbitration from which point a new set of mutual obligations in relation to the conduct of the reference arise upon

lines canvassed in the Bremer Vulcan Schiffbau and Maschinenfabrik v. South India Shipping Corporation at p. 263 and developed by Mr. Justice Mustill (as he then was) in Black Clawson International Ltd. v. Paperwork Waldhof-Aschaffenburg . That law governs the question whether by reason of subsequent circumstance the parties have been discharged (whether by repudiation or frustration) from their obligation to continue with the reference of the individual dispute, while leaving intact the continuous agreement to refer future disputes pursuant to the arbitration agreement.

(4) The curial law, i.e. the law governing the arbitration proceedings themselves, the manner in which the reference is to be conducted. It governs the procedural powers and duties of the arbitrators, questions of evidence and the determination of the proper law of the contract.

In respect of many arbitrations, the applicable law will be the same in all four cases. (1) will usually be decisive as to (2), in the absence of an express contrary choice; (2) and (3) will very rarely differ. However, as to (4), it is not uncommon to encounter the incidence of a different curial law in cases where the parties have made an express choice for arbitration (frequently in London) in a jurisdiction divorced from the jurisdiction with which the contract in (1) has most real connection.

In this case, as to (1), the parties have made an express choice of Indian law as the proper law of the contract. As to (2), it seems to me likely (although it is not necessary finally to decide) that the proper law of the arbitration kvm ARBP1062.12 agreement is similarly Indian law, since the arbitration agreement is part of the substance of the underlying contract and the terms of Clause 17.1 are clear in that respect. As to (3), it matters not for the purposes of this application whether the governing law is English or Indian law, because Mr. Dunning has conceded before me that there is no material difference between the two so far as applicable to the doctrine of frustration upon which he relies (see also par. 7 of the affidavit of Mr. Majumdar to that effect.) As to (4), the curial law, it seems to me plain that it is the law of England. There is, it is true, no express choice of curial law. However, there is a clear requirement that the arbitration proceedings be held in London. In the absence of express agreement, there is a strong prima facie presumption that the parties intend the curial law to be the law of the "seat" of the arbitration, i.e. the place at which the arbitration is to be conducted, on the ground that is the country most closely connected with the proceedings - see Mustill and Boyd, 2nd ed., p. 64."

8. In Bank Mellat v. Helliniki Techniki S.A. , the Court of Appeal said that the fundamental principle was that in the absence of any contractual provision to the contrary, "the procedural (or curial) law governing arbitrations"

> was that of the forum of the arbitration, since this was the system of law with which the agreement to arbitrate in the particular forum would have its closest connection. Parties to international arbitrations might well choose London as a convenient neutral forum and "English law will, as the curial law, apply to the conduct of the arbitration; and the parties will, by holding their arbitration here, subject themselves for that purpose to English law...." (Emphasis supplied.)

9. In Naviera Amazonica Peruana S.A. v. Compania International De Seguros Del Pent , Lord Justice Kerr summarised the state of the relevant jurisprudence thus :

> kvm ARBP1062.12 "A. All contracts which provide for arbitration and contain a foreign element may involve three potentially relevant systems of law. (1) The law governing the substantive contract. (2) The law governing the agreement to arbitrate and the performance of that agreement. (3) The law governing the conduct of the arbitration. In the majority of cases all three will be the same. But (1) will often be different from (2) and (3). And occasionally, but rarely, (2) may also differ from (3)."
>
> He said, "Prima facie, i.e. in the absence of some express and clear provision to the contrary, it must follow that an agreement that the curial or procedural law of an arbitration is to be the law of X has the consequence that X is also to be the "seat" of the arbitration. The lex fori is then the law of X, and accordingly X is the agreed forum of the arbitration. A further consequence is then that the Courts which are competent to control or assist the arbitration are the Courts exercising jurisdiction at X". The learned Judge observed that there was no reason in theory which precluded "parties to agree that an arbitration shall be held at a place or in country X but subject to the procedural laws of Y" (Emphasis supplied.)

10. In the Law and Practice of Commercial Arbitration in England, Second Edition by Mustill and Boyd, there is a chapter on "The applicable law and the jurisdiction of the court". Under the subtitle, "Laws Governing The Arbitration", it is said, "An agreed reference to arbitration involves two groups of obligations. The first concerns the mutual obligations of the parties to submit future disputes, or an existing dispute to arbitration, and to abide by the award of a tribunal constituted in accordance with the agreement. It is now firmly established that the arbitration agreement which creates these obligations is a separate contract, distinct from the substantive agreement in which it is usually embedded, capable of surviving the termination of the substantive agreement and susceptible of premature termination by express or implied consent, or by kvm ARBP1062.12 repudiation or frustration, in much the same manner as in more ordinary forms of contract. Since this agreement has a distinct life of its own, it may in principle be governed by a proper law of its own, which need not be the same as the law governing the substantive contract.

The second group of obligations, consisting of what is generally referred to as the 'curial law' of the arbitration, concerns the manner in which the parties and the arbitrator are required to conduct the reference of a particular dispute. According to the English theory of arbitration, these rules are to be ascertained by reference to the express or implied terms of the agreement to arbitrate. This being so, it will be found in the great majority of cases that the curial law, i.e. the law governing the conduct, of the reference, is the same as the law governing the obligation to arbitrate. It is, however, open to the parties to submit, expressly or by implication, the conduct of the reference to a different law from the one governing the underlying arbitration agreement. In such a case, the court looks first at the arbitration agreement to see whether the dispute is one which should be arbitrated, and which has validly been made the subject of the reference; it then looks to the curial law to see, how that reference should be conducted; and then returns to the first law in order to give effect to the

resulting award.

xxxxx xxxxx xxxxx It may therefore be seen that problems arising out of an arbitration may, at least in theory, call for the application of any one or more of the following laws -

1. The proper law of the contract, i.e. the law governing the contract which creates the substantive rights of the parties, in respect of which the dispute has arisen.

2. The proper law of the arbitration agreement, i.e. the law governing the obligation of the parties to submit the disputes to arbitration, and to honour an award.

kvm ARBP1062.12

3. The curial law, i.e. the law governing the conduct of the individual reference.

xxxxx xxxxx xxxxx (1) The proper law of the arbitration agreement governs the validity of the arbitration agreement, the question whether a dispute lies within the scope of the arbitration agreement; the validity of the notice of arbitration; the Constitution of the tribunal; the question whether an award lies within the jurisdiction of the arbitrator; the formal validity of the award; the question whether the parties have been discharged from any obligation to arbitrate future disputes.

2. The curial law governs; the manner in which the reference is to be conducted; the procedural powers and duties of the arbitrator; questions of evidence; the determination of the proper law of the contract.

3. The proper law of the reference governs: the question whether the parties have been discharged from their obligation to continue with the reference of the individual dispute.

xxxxx xxxxx xxxxx In the absence of express agreement, there is a strong prima facie presumption that the parties intend the curial law to be the law of the 'seat' of the arbitration, i.e. the place at which the arbitration is to be conducted, on the ground that that is the country most closely connected with the proceedings. So in order to determine the curial law in the absence of an express choice by the parties it is first necessary to determine the seat of the arbitration, by construing the agreement to arbitrate.

(Emphasis supplied.)

11. The conclusion that we reach is that the curial law operates during the continuance of the proceedings before the kvm ARBP1062.12 arbitrator to govern the procedure and conduct thereof. The courts administering the curial law have the authority to entertain applications by parties to arbitrations being conducted within their jurisdiction for the purpose of ensuring that the procedure that is adopted in the proceedings before the arbitrator conforms to the requirements of the curial law and for reliefs incidental thereto. Such authority of the courts administering the curial law ceases when the proceedings before the arbitrator are concluded.

17. It is submitted that the law governing the arbitration agreement is the law of Singapore both because the parties have chosen Singapore as the seat of arbitration and because the parties have expressly excluded the applicability of Indian law as the governing law of the Arbitration Agreement. Since the agreement to arbitrate has a closer and more real connection with the place where the parties have chosen to arbitrate than the place of the law of the underlying contract. The arbitration agreement is governed by the law of that place. This position is clear from the decision of the Supreme Court in Bharat Aluminium Co. Ltd. Vs. Kaiser Aluminium Technical Services Inc, reported in 2012 (9) SCC 552, paragraphs 111 to 117. In paragraph 114, the Supreme Court relied on the decision of the Queen's Bench Division, Commercial Court (England) in SulameRica CIT Nacional De Seguros SA v. Enesa Engenharia SA - Enesa reported in [2013] 1 W.L.R. 102 in which case it was observed that since the seat of the arbitration is London, England, it necessarily carried with it the English Court's supervisory jurisdiction over the arbitration process. This was observed to immediately establish a strong connection between the arbitration agreement itself and the law of England, and that it was for this reason that recent authorities had laid stress upon the locations of the seat of the arbitration as an important factor in determining the proper law of the arbitration agreement. Further, In Bharat Aluminium (supra), it is made clear that the Indian Arbitration Act is 'seat centric'. It is therefore submitted that by kvm ARBP1062.12 reason of specific exclusion of the application of the Indian Arbitration Act except Section 9, and in view of the seat of the arbitration being Singapore, there is a clear contrary intention to apply the law for the main contract to the arbitration agreement, and the law governing the arbitration agreement is therefore the law of Singapore. The contention of the Respondents that by reason of what is stated in paragraph 197 in the BALCO judgment, the law declared therein is prospective is untenable. What is made prospective is the law laid down therein by which the earlier decisions of the Supreme Court in Bhatia International (2002) 4 SC 105 and Venture Global Engineering (2008) 4 SCC 190, are over ruled. The BALCO judgment also declares the law (other than the law set out in the said two over ruled judgments) viz. in the absence of any express choice as to the law governing the arbitration agreement, the law of the seat will be the governing law of the arbitration agreement. It is submitted that this declaration of law is not made prospective and cannot be prospective. What is made prospective is the decision that Part I of the Arbitration Act, including Section 9 thereof, does not apply to arbitrations held outside India. The declaration of the Supreme Court of law on all other aspects is not prospective. The aforesaid position is clear from the interpretation of the BALCO judgment by the Division Bench of this Hon'ble Court in the case of Konkola Copper Mines (PLC) Vs. Stewarts & Lloyds of India reported in 2013 (5) Bom CR 29.

18. Learned senior counsel placed reliance on the judgment of the Supreme Court in case of National Thermal Power Corporation vs. Singer Company and others reported in (1992) 3 SCC 551 in support of the submission that since there was no express choice of law governing the contract as a whole or the arbitration agreement as such, a presumption may arise that the law of country where the arbitration is agreed to be held is the proper law of the arbitration agreement. It is kvm ARBP1062.12 submitted that since parties have expressly excluded provisions of India excluding section 9 of the Arbitration and Conciliation Act, 1996, law of Singapore would apply to the arbitration agreement and not law of India. Paragraphs 23 to 26 of the said judgment reads thus :-

23. The proper law of the arbitration agreement is normally the same as the proper law of the contract. It is only in exceptional cases that it is not so even where the proper law of the contract is expressly chosen by the parties. Where, however, there is no express choice of the law governing the contract as a whole, or the arbitration agreement as such, a presumption may arise that the law of the country where the arbitration is agreed to be held is the proper law of the arbitration agreement. But that is only a rebuttable presumption. See Dicey, Vol I, p.539; see the observation in Whitworth Street Estates Manchester) Ltd. v. James Miller & Partners Ltd. .

24. The validity, effect and interpretation of the arbitration agreement are governed by its proper law. Such law will decide whether the arbitration clause is wide enough to cover the dispute between the parties. Such law will, also ordinarily decide whether the arbitration clause binds the parties even when one of them alleges that the contract is void, or voidable or illegal or that such contract has been discharged by breach or frustration. See Heyman and Anr. v. Darwins, Ltd. . The proper law of arbitration will also decide whether the arbitration clause would equally apply to a different contract between the same parties or betwen one of those parties and a third party.

25. The parties have the freedom to choose the law governing an international commercial arbitration agreement.

They may choose the substantive law governing the arbitration agreement as well as the procedural law governing the conduct of the arbitration. Such choice is exercised either expressly or by implication. Where there is no express choice of the law kvm ARBP1062.12 governing the contract as a whole, or the arbitration agreement in particular, there is, in the absence of any contrary indication, a presumption that the parties have intended that the proper law of the contract as well as the law governing the arbitration agreement are the same as the law of the country in which the arbitration is agreed to be held. On the other hand, where the proper law of the contract is expressly chosen by the parties, as in the present case, such law must, in the absence of an unmistakable intention to the contrary, govern the arbitration agreement which, though collateral or ancillary to the main contract, is nevertheless a part of such contract.

26. Whereas, as stated above, the proper law of arbitration (i.e., the substantive law governing arbitration) determines the validity, effect and interpretation of the arbitration agreement, the arbitration proceedings are conducted, in the absence of any agreement to the contrary, in accordance with the law of the country in which the arbitration is held. On the other hand, if the parties have specifically chosen the law governing the conduct and procedure of arbitration, the arbitration proceedings will be conducted in accordance with that law so long as it is not contrary to the public policy or the mandatory requirements of the law of the country in which the arbitration is held. If no such choice has been made by the parties, expressly or by necessary implication, the procedural aspect of the conduct of arbitration (as distinguished from the substantive agreement to arbitrate) will be determined by the law of the place or seat of arbitration. Where, however, the parties have, as in the instant case, stipulated that the arbitration between them will be conducted in

accordance with the ICC Rules, those rules, being in many respects self-

contained or self-regulating and constituting a contractual code of procedure, will govern the conduct of the arbitration, except insofar as they conflict with the mandatory requirements of the proper law of arbitration, or of the procedural law of the seat of arbitration. See the observation of Kerr, LJ. in Bank Mellat v. Helliniki Techniki SA. . See also Craig, Park and Paulsson, International Chamber of Commerce Arbitration, 2nd ed. (1990). To such an extent the kvm ARBP1062.12 appropriate courts of the seat of arbitration, which in the present case are the competent English courts, will have jurisdiction in respect of procedural matters concerning the conduct of arbitration. But the overriding principle is that the courts of the country whose substantive laws govern the arbitration agreement are the competent courts in respect of all matters arising under the arbitration agreement, and the jurisdiction exercised by the courts of the seat of arbitration is merely concurrent and not exclusive and strictly limited to matters of procedure. All other matters in respect of the arbitration agreement fall within the exclusive competence of the courts of the country whose laws govern the arbitration agreement. See Mustil & Boyd, Commercial Arbitration, 2nd ed.; Allen Red fern and Martin Hunter, Law & Practice of International Commercial Arbitration, 1986; Russel on Arbitration, Twentieth ed., 1982; Cheshire & North's Private International Law, eleventh ed. (1987).

19. Learned senior counsel placed reliance on clause 16.4 of the share subscription agreement and submits that part I is thus explicitly excluded except section 9 and thus the law governing the arbitration in no case would be Indian Arbitration Act except section 9. It is submitted that judgment of Supreme Court in case of National Thermal Power Corporation (supra) would squarely apply to the facts of this case. My attetnion is invited to the submissions made by parties before the Arbitral Tribunal on the issue of arbitrability and jurisdiction and the findings rendered thereof by the Arbitral Tribunal.

20. Dr.Tulzapurkar placed reliance on the judgment of the Division Bench of this Court in case of Konkola Copper Mines (PLC) vs. Stewarts and Lloyds of India Limited reported in (2013) 5 BCR 29 support of his submission that though seat of arbitration was at Singapore, however in view of the parties having agreed to apply section 9 of the Arbitration and Conciliation Act, 1996, this petition filed kvm ARBP1062.12 in this court under section 9 is maintainable. It is submitted that this court has interpreted the judgment of the Supreme Court in case of Bharat Aluminium Company (supra) and has held that the entire judgment of the Supreme Court would not apply with prospective effect. In so far as applicability of the governing law of arbitration agreement based on seat of the arbitration is concerned, it is held by the Supreme Court that seat of the arbitration would determine the governing law of the arbitration agreement. It is submitted that the law is declared by the Supreme Court in the said judgment as it stood. In this case, express choice is made, seat of the arbitration would govern the law of arbitration agreement.

21. It is therefore submitted that the law governing the arbitration agreement between the parties in the present case is the law of Singapore and it is an admitted position that under the Singapore law the Arbitral Tribunal can decide claims involving allegations of fraud. It is therefore submitted that the contention of the Respondents that the petition under Section 9 is not maintainable is not

correct and is liable to be rejected.

22. As regards the Petitioner's right to obtain reliefs under Section 9 in the present case, the same is based on two premises. First, the emergency arbitrator has passed an interim award dated 28th May 2012 holding that protective orders are required to be passed. The said interim award has not been challenged by the Respondents. The issue therefore has been decided by a competent forum and this decision has become final and binding on the parties. On the basis of the principles of issue estoppel the said decision is binding and the Respondents are not entitled to re-agitate the question as to whether the Petitioner is entitled to any protective order. The second premise is that independently of the interim award passed by the Arbitral forum, the Petitioner has made out a case for grant of reliefs under Section kvm ARBP1062.12 9 of the Indian Arbitration Act.

23. Dr.Tulzapurkar, then submits that section 46 read with section 48(2) (a) of the Arbitration and Conciliation Act, 1996 clearly indicates that the foreign award would not be enforceable if subject matter of arbitration was incapable of decision of arbitrator. It is submitted that some of the disputes which can be exclusively tried only by courts or by certain authority, even by agreement such disputes can't be referred to arbitration and/or are incapable of decision by arbitration. If the Arbitral Tribunal has decided any issues which are incapable of decision of arbitrator, such foreign award would not be enforceable under section 48(2) (a) read with section 46 of the Arbitration Act. It is submitted by the learned senior counsel that section 48 (2) (a) does not refer to the proceedings which can be decided in better way by civil court. It is submitted that in a given case, court may come to a conclusion while appointing arbitrator or referring parties to arbitration that though dispute is capable of arbitration, in the facts of a particular case, it would be more appropriate or proper if the subject matter of the arbitration agreement is decided by the civil court and not by an arbitrator. It is submitted that section 48(2) (a) does not contemplate a situation whether it would be less competent or less effective to decide the matter though subject matter of arbitration by a civil court or by an arbitrator.

24. Dr.Tulzapurkar submits that it was the case of the petitioner before the Arbitral Tribunal and in this proceedings that consent of the petitioner was obtained by mis-representation by the respondents which amounted to fraud and on that ground the petitioner applied for refund of the money invested. Claim of the petitioner was by way of damages. It is submitted that it is not the objection of the respondents that such claim of damages arises out of arbitration agreement is incapable of adjudication by arbitrator. It is submitted that subject matter of kvm ARBP1062.12 arbitration is relevant and not allegations made by parties against each other. If subject matter is incapable of arbitration, matter cannot be referred to arbitration even by consent of parties. Even if allegation of fraud or fraudulent representation are made such allegations can still be decided by the Arbitral Tribunal. There is difference between the subject matter in capable of adjudication by arbitration and allegations made by parties against each other relating to fraud or fraudulent representation. It is submitted that such allegations would not decide the applicability of section 48 (2) (a). Even in Indian Law, there is no absolute rule that if allegations of fraud are made, arbitrator ceased to be capable of adjudicating such claim based on such allegations and thus such case would not fall under section 48(2) (a).

25. Dr.Tulzapurkar invited my attention to judgment of the Supreme Court in case of N.Radhakrishnan vs. Maestro Engineers and others reported in (2010) 1 SCC 72 in support of his submission that under section 8 of the Arbitration and Conciliation Act, 1996, a court or judicial authority has discretion to refer or not to refer the parties to arbitration even if subject matter of the suit was within the jurisdiction of arbitration if court comes to the conclusion that considering the allegations made by the parties or the issue which could be properly dealt with by the civil court and not by an arbitrator. Reliance is placed on paragraphs 15 to 21, 23 to 26 which reads as under :-

> 15. The appellant had on the other hand contended that the subject matter of the suit was within the ambit of the arbitration clause since according to him the dispute related to his retirement and the settlement of his dues after he was deemed to have retired according to the respondents. Further, it was his contention that the partnership deed dated 6 th of December, 2005 was not a valid one as it was not framed in compliance with the requirements under the Partnership Act.

kvm ARBP1062.12 Therefore, the argument of the respondents that the subject matter of the suit did not fall within the ambit of the arbitration clause of the original partnership deed dated 7 th of April, 2003, cannot be sustained. We are in agreement with the contention of the appellant to this effect.

16. It is clear from a perusal of the documents that there was a clear dispute regarding the reconstitution of the partnership firm and the subsequent deed framed to that effect. The dispute was relating to the continuation of the appellant as a partner of the firm, and especially when the respondents prayed for a declaration to the effect that the appellant had ceased to be a partner of the firm after his retirement, there is no doubt in our mind that the dispute squarely fell within the purview of the arbitration clause of the partnership deed dated 7th of April, 2003. Therefore, the Arbitrator was competent to decide the matter relating to the existence of the original deed and its validity to that effect. Thus the contention that the subject matter of the suit before the 1st Addl. District Munsif Court at Coimbatore was beyond the purview of the arbitration clause, cannot be accepted.

17. Having found that the subject matter of the suit was within the jurisdiction of the Arbitrator, we now proceed to decide whether the Arbitrator was competent to deal with the dispute raised by the parties.

18. The learned Counsel for the appellant contended that the High Court was wrong in its interpretation of the clause "difference of opinion" and held that it did not mean dispute under the Act. This, in our view, cannot be sustained. Difference of opinion leads to dispute, and it is very difficult to imagine that difference of opinion and disputes are an altogether different thing in the circumstances leading to this case.

19. The appellant had cited a catena of judicial pronouncements to contend that when there is an express provision to that effect, the civil courts are bound to refer the kvm ARBP1062.12 matter to an Arbitrator in case of any disputes arising between the parties. The appellant had raised various

issues relating to misappropriation of funds and malpractices on the part of the respondents and the allegations to that effect have been made in the notice sent to the respondents and subsequently in its written statement filed before the civil court.

20. The learned Counsel for the respondents on the other hand argued that when a case involves substantial questions relating to facts where detailed material evidence (both documentary and oral) needed to be produced by either parties, and serious allegations pertaining to fraud and malpractices were raised, then the matter must be tried in court and the Arbitrator could not be competent to deal with such matters which involved an elaborate production of evidence to establish the claims relating to fraud and criminal misappropriation.

21. In our opinion, the contention of the respondents relating to the jurisdiction of the Arbitrator to decide a dispute pertaining to a matter of this proportion should be upheld, in view of the facts and circumstances of the case. The High Court in its impugned judgment has rightly held that since the case relates to allegations of fraud and serious malpractices on the part of the respondents, such a situation can only be settled in court through furtherance of detailed evidence by either parties and such a situation can not be properly gone into by the Arbitrator.

23. The learned Counsel appearing on behalf of the respondents on the other hand contended that the appellant had made serious allegations against the respondent alleging that they had manipulated the accounts and defrauded the appellant by cheating the appellant of his dues, thereby warning the respondents with serious criminal action against them for the alleged commission of criminal offences. In this connection, reliance was placed in a decision of this Court in the case of Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak kvm ARBP1062.12 and Anr. MANU/SC/0363/1961 : AIR 1962 SC 406 in which this Court under para 17 held as under:

> " 17. There is no doubt that where serious allegations of fraud are made against a party and the party who is charged with fraud desires that the matter should be tried in open court, that would be a sufficient cause for the court not to order an arbitration agreement to be filed and not to make the reference....".

In our view and relying on the aforesaid observations of this Court in the aforesaid decision and going by the ratio of the above mentioned case, the facts of the present case does not warrant the matter to be tried and decided by the Arbitrator, rather for the furtherance of justice, it should be tried in a court of law which would be more competent and have the means to decide such a complicated matter involving various questions and issues raised in the present dispute.

24. This view has been further enunciated and affirmed by this Court in the decision of Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd. MANU/SC/0401/1999: AIR 1999 SC 2354 wherein this Court under para 4 observed:

> "4. Sub-section (1) of Section 8 provides that where the judicial authority before whom an action is brought in a matter, will refer the parties to arbitration the said matter in accordance with the arbitration agreement. This, however, postulates, in

> our opinion, that what can be referred to the Arbitrator is only that dispute or matter which the Arbitrator is competent or empowered to decide."

25. The learned Counsel for the respondent further elaborated his contention citing the decision of the High Court of Judicature at Madras in the case of Oomor Sait HG v. Asiam Sait wherein it was held:

> 'Power of civil court to refuse to stay of suit in view of arbitration clause on existence of certain grounds kvm ARBP1062.12 available under 1940 Act continues to be available under 1996 Act as well and the civil court is not prevented from proceeding with the suit despite an arbitration clause if dispute involves serious questions of law or complicated questions of fact adjudication of which would depend upon detailed oral and documentary evidence.
>
> Civil Court can refuse to refer matter to arbitration if complicated question of fact or law is involved or where allegation of fraud is made.
>
> Allegations regarding clandestine operation of business under some other name, issue of bogus bills, manipulation of accounts, carrying on similar business without consent of other partner are serious allegations of fraud, misrepresentations etc., and therefore application for reference to Arbitrator is liable to be rejected.' We are in consonance with the abovereferred decision made by the High Court in the matter concerned.

26. In the present dispute faced by us, the appellant had made serious allegations against the respondents alleging him to commit malpractices in the account books and manipulate the finances of the partnership firm, which, in our opinion, cannot be properly dealt with by the Arbitrator. As such, the High Court was justified in dismissing the petition of the appellant to refer the matter to an Arbitrator.

In this connection, it is relevant to refer the observation made by the High Court in its impugned judgment:

> " The above decision squarely applies to the facts of the present case. In the present case as well there is allegation of running rival firm, interference with the smooth administration of the firm. As already stated since the suit has been filed for declaration to declare that the revision petitioner is not a partner with effect from 18.11.2005, and for consequential injunction restraining the petitioner from disturbing the smooth functioning of the first respondent firm, the issue relates to the causes which compelled the respondents to expel the revision petitioner from the partnership firm and the necessity to reconstitute the firm kvm ARBP1062.12 by entering into a fresh partnership deed. Therefore such issues involve detailed evidence which could be done only by a civil court...."

26. Dr.Tulzapurkar submits that judgment of the Supreme Court in case of N.Radhakrishnan (supra) has been interpreted by the judgment of Calcutta High Court in case of Ram Kishan Mimani and another vs. Goverdhan Das Mimani and others in Arbitration Petition No. 126 of 2010 by judgment dated 7 th April, 2010 and it is held that it is at the discretion of the court under section 8 to refer the parties to arbitration or not even if the subject matter of the suit is covered by arbitration agreement, if the court comes to the conclusion that the same shall be appropriately dealt with by the civil court. Relevant paragraphs of the said judgment reads thus :-

> The petitioners refer to the Abdul Kadir case where notwithstanding the earlier observations that where serious allegations of fraud and malpractice had been levelled the person against whom such allegations had been made would prefer a trial in open Court, the Supreme Court found, as a matter of fact, that the allegations in that case were not of such serious nature that would warrant the refusal of a reference. The Court observed, inter alia, as follows:
>
> ".....even though questions relating to accounts which might involve misconduct amounting even to dishonesty on the part of some partner might arise in the arbitration proceedings and even cases where moral dishonesty or moral misconduct is attributed to one party or the other might be referred to arbitration. It seems to us that every allegation tending to suggest or imply moral dishonesty or moral misconduct in the matter of keeping accounts would not amount to such serious allegation of fraud as would impel a Court to refuse to order the arbitration agreement to be filed and refuse to make a reference....."

In the Haryana Telecom Ltd. matter referred to in N. kvm ARBP1062.12 Radhakrishnan, the Supreme Court considered a creditor's petition for winding up of a company under Sections 433, 434 and 439 of the Companies Act, 1956. As is well known, the prayer in a creditor's winding up petition is for a direction that the company be wound up. It was in such context that the Supreme Court held that notwithstanding Section 8 of the 1996 Act, the provision thereof postulated that what can be referred to arbitration was only a dispute or a matter which the arbitral tribunal was competent or empowered to decide. Implicit in such expression was the arbitral tribunal would not be competent or empowered to take up a question as to whether the company was liable to be wound up.

It is, however, not necessary to delve into such aspect of the matter. N. Radhakrishnan's judgment referred to the Haryana Telecom Ltd. decision to draw support from the second sentence of the fourth paragraph of the report.

What is of importance is that the N. Radhakrishnan judgment has now recognised that notwithstanding the mandate in section 8 of the 1996 Act and the use of the word "shall" therein as opposed to the word "may" as used in Section 34 of the 1940 Act, there would be an element of discretion available to Court while considering a petition to effectively stay or stultify the progress of a suit where the issues or likely issues were covered by an arbitration agreement. Even going by this test, a serious allegation of fraud or malpractice has to be made and it is only the exceptional cases

which are required to be retained in Court and not sent to arbitration on the reasoning contained in the N. Radhakrishnan's case that "it cannot be properly dealt with by the Arbitrator."

Though there is a charge of malpractice and though there is a charge of the respondents having siphoned off funds, it does not appear that such charges are such that the arbitrator or the arbitral tribunal would not be able to address the same. The extent of oral or documentary evidence that would be necessary to deal with likely issues in the reference is not such that warrant the exercise of the extraordinary discretion which kvm ARBP1062.12 has now been recognised, to negate the mandate of the 1996 Act in the present case.

In any event, Section 27 of the 1996 Act permits an arbitrator or arbitral tribunal to seek the assistance of the Court in the event the arbitrator or arbitral tribunal is faced with any problem relating to evidence being received.

It is also to be noticed that the nature of the allegations made herein is not unusual going by the disputes that arise in partnership firms. As has been noticed in Abdul Kadir , it would only be a serious allegation of fraud that would impel the Court to refuse a party seeking reference to go to arbitration. The N. Radhakrishnan judgment cannot be read to imply that upon every allegation of fraud or malpractice being made there can no longer be any adjudication of such matters in an arbitration reference. N. Radhakrishnan has to be read to imply that an exception may be made to the general rule when it appears to Court that a matter involving serious charges with heavy documentary and oral evidence may not be referred to arbitration notwithstanding the disputes being covered thereby.

27. Dr.Tulzapurkar submits that the Supreme Court in case of N.Radhakrishnan (supra) has approved the views taken by the Madras High Court in case of H.G.Oomor Sait vs. O.Aslam Sait (2001) 3 CTS 269 in which it is held that power of civil court to refuse to stay of suit in view of arbitration clause on existence of certain grounds available under the 1940 Act continues to be available under the 1996 Act as well and the civil court is not prevented from proceeding with the suit despite an arbitration clause if dispute involves serious questions of law or complicated questions of fact adjudication of which would depend upon detailed oral and documentary evidence. It is submitted that the judgment in case of N.Radhakrishnan (supra) is not an authority on the proposition that once allegation of fraud is made by the party, no such matter can be referred to arbitration at all. It is submitted that judgment of the Supreme Court kvm ARBP1062.12 refusing to refer the parties to arbitration was based on the specific facts of that matter as is apparent from the judgment itself. Dr.Tulzapurkar submits that facts of each case has to be considered while exercising jurisdiction of the court or jurisdictional authority under section 8 of the Arbitration Act. Such discretion which can be exercised by the court or judicial authority cannot be imported in section 48(2) (a) of the Arbitration Act otherwise it would be amount to expanding scope of section 48 (2) (a) while enforcing of an award. On this issue, the learned senior counsel placed reliance on the judgment of the Supreme Court in case of Abdul Kadir Shamsuddin Bubere vs. Madhav Prabhakar Oak and another reported in AIR 1962 SC 406 and in particular paragraphs 12, 13, 16 and 17 which read thus :-

12. Re. (4). We now turn to the question of fraud. The contention on behalf of the appellant in this connection is that serious allegations of fraud have been made against him and therefore this is not a case which should be referred to arbitration Sub-section (4) of section 20 lays down that where no sufficient cause is shown, the court shall order the agreement to be filed and make an order of reference to the arbitrator. It is therefore open to a court under this sub-section, where sufficient cause is shown not to order the agreement to be filed and not to make a reference to the arbitrator. The words of this sub-section leave a wide discretion in the court to consider whether an order for filing the agreement should be made and a reference made accordingly. It is neither necessary nor desirable to lay down in general terms when would be sufficient cause which would entitle a court to refuse to order the agreement to be filed and thus refuse to make an order of reference. The court will have to decide on the facts of each case whether sufficient cause has been made out for not ordering the agreement to be filed and not making the order of reference.

13. Learned counsel for the appellant, however, contends that serious allegation of fraud has been generally held by kvm ARBP1062.12 courts to be a sufficient ground for not ordering the agreement to be filed and not making the reference. He relies in this connection on the leading case of Russel v. Russel . That was a case of partnership between two brothers containing an arbitration clause. One of the brothers gave notice to the other for dissolving the partnership. The other brother thereupon brought an action alleging various charges of fraud and claiming that the notice should be declared void and no announcement of the dissolution of partnership should be allowed. Thereupon the brother who was charged with fraud moved that the matter be referred to arbitration under the arbitration clause. That was resisted and the court held that "in a case where fraud is charged, the court will in general refuse to send the dispute to arbitration if the party charged with the fraud desires a public inquiry. But where the objection to arbitration is by the party charging the fraud, the court will not necessarily accede to it, and will never do so unless a prima facie case of fraud is proved. "

16. The principle of these cases has also been followed in India with reference to cases coming under sections 20 and 34 of the Act. (See, Maharaja Sir Mahindra Chandra Nandy v. H. V. Low & Co., Ltd. AIR1924Cal796 , Narsingh Prasad Boobna v. Dhanraj Mills (I. L. R. (1942) 21 Patna 544), Union of India v. Firm Vishvadha Ghee Vyopar Mandal , Sudhangsu Bhattacharjee v. Ruplekha Pictures : AIR1954Cal281.

17. There is no doubt that where serious allegations of fraud are made against a party and the party who is charged with fraud desires that the matter should be tried in open court, that would be a sufficient cause for the court not to order an arbitration agreement to be filed and not to make the reference. But it is not every allegation imputing some kind of dishonesty, particularly in matters of accounts, which would be enough to dispose a court to take the matter out of the forum which the parties themselves have chosen. This to our mind is clear even from the decision in Russel's

> case . In that case there were allegations of constructive and actual fraud by one brother against the other and it was in those circumstances kvm ARBP1062.12 that the court made the observations to which we have referred above. Even so, the learned master of the Rolls also observed in the course of the judgment at p. 476 as follows :- "Why should it be necessarily beyond the purview of this contract to refer to an arbitration questions of account, even when those questions do involve is conduct amounting even to dishonesty on the party of some partner ? I do not see it. I do not say that in many case which I will come to in the second branch of the case before the Court. The Court may not, in the exercise of its discretion, refuse to interfere; but it does not appear to me to follow of necessity that this clause was not intended to apply to all questions, even including questions either imputing moral dishonesty or moral misconduct to one or other of the parties. "

We are clearly of opinion that merely because some allegations have been made that accounts are not correct or that certain items are exaggerated and so on that is not enough to induce the court to refuse to make a reference to arbitration. It is only in cases of allegations of fraud of a serious nature that the court will refuse as decided in Russel's case to order an arbitration agreement to be filed and will not make a reference. We may in this connection refer to Minifie v. The Railway Passengers Assurance Company . There the question was whether certain proceedings should be stayed; and it was held that notwithstanding the fact that the issue and the evidence in support of it might bear upon the conduct of a certain persons and of those who attended him and so might involve a question similar to that of fraud or no fraud, that was no ground for refusing stay. It is only when serious allegations of fraud are made which it is desirable should be tried in open court that a court would be justified in refusing to order the arbitration agreement to be filed and in refusing to make a reference.

28. Learned senior counsel placed reliance on the judgment of the Supreme Court in case of Booz Allen and Hamilton Inc. vs. SBI Home Finance Limited kvm ARBP1062.12 and others reported in (2011) 5 SCC 532 and in particular paragraphs 20, 32 to 42 in support of his submission that what disputes cannot be referred to arbitration and would not be arbitrable and in support of the submission that court has to see whether subject matter of the suit is arbitrable and not the allegations whether arbitrable or not. Paragraphs 20, 32 to 42 of the said judgments reads thus :-

> 20. On the contentions urged the following questions arise for our consideration:
>
> (i) Whether the subject matter of the suit fell within the scope of the arbitration agreement contained in Clause 16 of the deposit agreement?
>
> (ii) Whether the Appellant had submitted his first statement on the substance of the dispute before filing the application under Section 8 of the Act?
>
> (iii) Whether the application under Section 8 was liable to be rejected as it was filed nearly 20 months after entering appearance in the suit?

(iv) Whether the subject matter of the suit is 'arbitrable', that is capable of being adjudicated by a private forum (arbitral tribunal); and whether the High Court ought to have referred the parties to the suit to arbitration under Section 8 of the Act?

Re: Question (iv)

32. The nature and scope of issues arising for consideration in an application under Section 11 of the Act for appointment of arbitrators, are far narrower than those arising in an application under Section 8 of the Act, seeking reference of the parties to a suit to arbitration. While considering an application under Section 11 of the Act, the Chief Justice or his designate would not embark upon an examination of the issue of 'arbitrability' or appropriateness of adjudication by a private forum, once he finds that there was an arbitration agreement between or among the parties, and would leave the issue of arbitrability for the decision of the arbitral Tribunal. If the arbitrator wrongly holds that the dispute is arbitrable, the kvm ARBP1062.12 aggrieved party will have to challenge the award by filing an application under Section 34 of the Act, relying upon Sub-

Section 2(b)(i) of that section.

33. But where the issue of 'arbitrability' arises in the context of an application under Section 8 of the Act in a pending suit, all aspects of arbitrability have to be decided by the court seized of the suit, and cannot be left to the decision of the Arbitrator. Even if there is an arbitration agreement between the parties, and even if the dispute is covered by the arbitration agreement, the court where the civil suit is pending, will refuse an application under Section 8 of the Act, to refer the parties to arbitration, if the subject matter of the suit is capable of adjudication only by a public forum or the relief claimed can only be granted by a special court or Tribunal.

34. The term 'arbitrability' has different meanings in different contexts. The three facets of arbitrability, relating to the jurisdiction of the arbitral tribunal, are as under:

(i) whether the disputes are capable of adjudication and settlement by arbitration? That is, whether the disputes, having regard to their nature, could be resolved by a private forum chosen by the parties (the arbitral tribunal) or whether they would exclusively fall within the domain of public fora (courts).

(ii) Whether the disputes are covered by the arbitration agreement? That is, whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the 'excepted matters' excluded from the purview of the arbitration agreement.

(iii) Whether the parties have referred the disputes to arbitration? That is, whether the disputes fall under the scope of the submission to the arbitral tribunal, or whether they do not arise out of the statement of claim and the counter claim filed before the arbitral tribunal. A dispute, even if it is capable of being decided by kvm ARBP1062.12 arbitration and falling within the scope of arbitration agreement, will

not be 'arbitrable' if it is not enumerated in the joint list of disputes referred to arbitration, or in the absence of such joint list of disputes, does not form part of the disputes raised in the pleadings before the arbitral tribunal.

35. Arbitral tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of arbitral tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the Legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by a public fora (courts and Tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes.

36. The well recognized examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

37. It may be noticed that the cases referred to above relate kvm ARBP1062.12 to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property.

Correspondingly, judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself. (Vide: Black's Law Dictionary).

38. Generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to sub-ordinate rights in personam arising from rights in rem have always been considered to be arbitrable.

39. The Act does not specifically exclude any category of disputes as being not arbitrable. Sections 34(2)(b) and 48(2) of the Act however make it clear that an arbitral award will be set aside if the court finds that "the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force."

40. Russell on Arbitration [22nd Edition] observed thus [page 28, para 2.007]:

> " Not all matter are capable of being referred to arbitration. As a matter of English law certain matters are reserved for the court alone and if a tribunal purports to deal with them the resulting award will be unenforceable. These include matters where the type of remedy required is not one which an arbitral kvm ARBP1062.12 tribunal is empowered to give."

The subsequent edition of Russell [23rd Edition, page 470, para 8.043]] merely observes that English law does recognize that there are matters which cannot be decided by means of arbitration.

41. Mustill and Boyd in their Law and Practice of Commercial Arbitration in England [2nd - 1989 Edition], have observed thus:

> In practice therefore, the question has not been whether a particular dispute is capable of settlement by arbitration, but whether it ought to be referred to arbitration or whether it has given rise to an enforceable award. No doubt for this reason, English law has never arrived at a general theory for distinguishing those disputes which may be settled by arbitration from those which may not. ....
>
> Second, the types of remedies which the arbitrator can award are limited by considerations of public policy and by the fact that he is appointed by the parties and not by the state. For example, he cannot impose a fine or a term of imprisonment, commit a person for contempt or issue a writ of subpoena; nor can he make an award which is binding on third parties or affects the public at large, such as a judgment in rem against a ship, an assessment of the rateable value of land, a divorce decree, a winding-up order....
>
> (Emphasis supplied) Mustill and Boyd in their 2001 Companion Volume to the 2nd Edition of commercial Arbitration, observe thus (page 73):
>
> " Many commentaries treat it as axiomatic that 'real' rights, that is rights which are valid as against the whole world, cannot be the subject of private arbitration, although some acknowledge that subordinate rights in personam derived from the real rights may be ruled upon by arbitrators. The conventional view is thus that, for example, rights under a patent licence may be arbitrated, but the validity of the underlying patent may not..... An arbitrator whose powers are kvm ARBP1062.12 derived from a private agreement between A and B plainly has no jurisdiction to bind anyone else by a decision on whether a patent is valid, for no-one else has mandated

him to make such a decision, and a decision which attempted to do so would be useless. " (Emphasis supplied)

42. The distinction between disputes which are capable of being decided by arbitration, and those which are not, is brought out in three decisions of this Court. In Haryana Telecom Limited v. Sterlite Industries India Ltd. 1999 (5) SCC 688, this Court held:

4. Sub-section (1) of Section 8 provides that the judicial authority before whom an action is brought in a matter, will refer the parties to arbitration the said matter in accordance with the arbitration agreement. This, however, postulates, in our opinion, that what can be referred to the arbitrator is only that dispute or matter which the arbitrator is competent or empowered to decide.

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

29. Dr Tulzapurkar invited my attention to various e-mails on record of the proceedings in support of his submission that the petitioner had invested US $ 60 million in respondent No.1 company based on the representations made by the respondents which included the deal with British Broadcasting Corporation kvm ARBP1062.12 (BBC), respondent No.1 having the benefit of number of material contracts with parties such as Kinden Holdings S.P.C. (Kinden), Strategic Publicity & Advertising WLL (SPAC), Purple Passion Productions Limited (Purple Passion) worth approximately USD $ 758 to the Avitel group etc. Learned senior counsel also invited my attention to the correspondence on record regarding those contracts and parties pre-investments and post-investments.

30. Dr Tulzapurkar submits that the amounts invested by the petitioner were transferred to the bank accounts by Avitel Dubai on 10 th May 2011. Out of Us $ 60 million, at least $ 51 million had circulated back to respondent No.3 who is the son of respondent No.2 and brother of respondent No.4 as he was the sole signatory to the companies to whom those amounts were credited and were not used to purchase the equipment for the BBC contract as was represented to the petitioner.

31. Learned senior counsel pointed out following instances in support of allegations of siphoning off funds by the respondents.

(i) On May 15, 2011 Avitel Dubai's Account was debited in the amount of USD 6 million (approx. INR 33 crores) which was credited to an account held in the name of Highend. It has been discovered that in fact Respondent No. 3 is the sole signatory of Highend's Dubai accounts;

(ii) On May 23, 2011 the Avitel Dubai Account was debited in the amount of USD 12.22 million (approx INR 67 crores) which was credited again to Highend and hence Respondent No. 3 account;

(iii) On June 9, 2011, the Avitel Dubai Account was debited in the amount of USD 10 million (approx. INR 55 crores) which was credited to Highend and hence Respondent No. 3's account. On July 27, 2011 this amount was transferred to a bank account in the name of Digital Fusion.

kvm ARBP1062.12 Respondent No. 3 is the sole signatory of Digital Fusion's Dubai account as well;

(iv) on June 13, 2011 and June 14, 2011, Avitel Dubai paid USD 15 million (approx. INR 83 crores) to Digital Fusion and hence Respondent No. 3. These funds were then paid on the Cralton, and thus put within the control of Mr. Boban Idiculla;

(v) on February 23, 2012 the Avitel Dubai Account was debited in the amount of USD 8 million (approx. INR 44 crores) which was also credited to Highend and hence Respondent No. 3's account.

32. Mr Rohatgi, learned senior counsel appearing for respondents opposed the petition on the issue of maintainability as well as on merits. It is submitted that the Petitioner is merely a disgruntled shareholder in the Respondent No.1 Company and is not a creditor in any respect. Its remedies, therefore, lie in the realm of the Indian Companies Act, 1956, if at all. The investment of the Petitioner ceased to have the "character of money" and was transformed into "capital" of Respondent No.1 Company upon the allotment of shares to it. The Petitioner is effectively seeking refund of the money paid by it - i.e. conversion of the assets of the company back into the share subscription money of the Petitioner. It is submitted that this is not permissible in law. Learned counsel placed reliance on the Judgment of Supreme Court in case of Hindustan Lever Employees Union v. Hundustan Leter Ltd. (1995) Supp (1) SCC 499 and in particular paragraph 49 in support of his submission that a shareholder has no rights in the assets of the company and can only seek rights in the case of liquidation of the company.

33. Learned senior counsel submits that the present petition is not maintainable since the entire cause of action raised by the Petitioner is based on the alleged kvm ARBP1062.12 fraudulent conduct of the Respondent. It is submitted that any matter relating to the question of fraud in not arbitrable and has to be decided by the civil court. It is submitted that matters relating to fraud cannot be referred to arbitration.

Learned senior counsel placed reliance on the Judgment of Supreme Court in case of N. Radhakrishnan v. Maestro Engineers (2010) 1 SCC 72. The relevant portion of the said Judgment reads thus :

> "17. Having found that the subject-matter of the suit was within the jurisdiction of the arbitrator, we now proceed to decide whether the arbitrator was competent to deal with the dispute raised by the parties.
>
> 21. In our opinion, the contention of the respondents relating to the jurisdiction of the arbitrator to decide a dispute pertaining to a matter of this proportion should be upheld, in view of the facts and circumstances of the case. The High Court in its impugned judgment has rightly held that since the case relates to allegations of fraud and serious malpractices on the part of the respondents, such a situation can only be settled in court through furtherance of detailed evidence by either parties and such a situation can not be properly gone into by the arbitrator.

34. It is submitted that there is jurisdictional bar in the matter relating to fraud being decided by an arbitrator and the same can be settled only by a Court. It is submitted that the Supreme Court clearly held that the issue relating to fraud relates to the jurisdiction of the arbitrator. It also held that the matter could only be settled in Court thereby precluding any possibility of referring the matter to arbitration.

35. Learned senior counsel placed reliance on the Judgment of this Court in case of Goldstar Metal Solutions v. Dattarao Gajanan Kavtankar in Arb. Appeal No.12 of 2013 dt. 13/03/2013. Relevant portion of the said Judgment reads thus :

> "... In my prima-facie view, the learned counsel appearing for M/s.
>
> kvm ARBP1062.12 Goldstar is right in his submissions that in view of such serious allegations of fraud, fabrication and manipulation which are prima facie demonstrable on record, even if there existed any arbitration agreement between Mr.Kavtankar and M/s.Goldstar, the learned District Judge could not have granted by interim measures under section 9 as such serious allegations could be adjudicated by a civil court. In my view, the learned counsel is right in his submission that though the learned District Judge referred to the judgment of the Supreme Court in case of N.Radhakrishnan (supra) however overlooked the law laid down by the Supreme Court in the said judgment .... Mr.Kadam, the learned senior counsel in my view is right in his submission that in view of such serious allegations which were prima facie demonstrable, such issue could not be left open to be decided by the Arbitral Tribunal"

36. Learned senior counsel also placed reliance on the Judgment of Division Bench of this Court in case of MSM Satelite v. World Sport Group 2011 Supp Bom CR 4 and also the Judgment of learned Single Judge of this Court in case of Ivory Prop Hotels v. Nusli Neville Wadia 2011 (2) Bom CR 559 and submits that it has been held that the bar of arbitration in cases of fraud is not restricted to instances of Section 8, i.e. stay of suits alone but also applied to cases of Section

11. It is submitted that a Court who refuse to appoint an arbitrator in the case of issues relating to fraud, the same logic ought to apply in case of Section 34 and 48 of the Act. It is submitted that rule relating to reference to arbitration is mandatory and not discretionary. Reliance is placed on the Judgment of Supreme Court in case of Hindustan Petroleum v. Pink city midway Petroleums (2003) 6 SCC 503 paragraph 14.

37. It is submitted that Once the Court finds that substantial issues of fraud, misrepresentation etc. are raised on the facts of a given case, the Court has no discretion whatsoever. It will, in such a situation refuse arbitration whether it is a kvm ARBP1062.12 case under Section 11 of the Act, or a case under Section 8 of the Act and similarly in a case under Section 9 which is based on an arbitration whether in India or abroad. Indian law, it is submitted, does not allow arbitration in respect of matters relating to fraud etc. The instant petition is replete with allegations of fraud and deception.

38. It is submitted by the learned senior counsel that the governing law of the contract is Indian Law. The Singapore arbitration tribunal had no authority to apply any other law and clothe itself with jurisdiction to arbitrate upon matters where extensive fraud is pleaded. Doing it in the guise of 'law of the agreement' is wholly impermissible. Law of the agreement, unless specified to the contrary, will follow the governing law of the contract. A Section 9 arising from proceedings which are inherently lacking in jurisdiction before the Singapore tribunal is without any legs to stand upon. It is like an interim injunction under Order 39 in the absence of a suit.

39. Mr Rohatgi, learned senior counsel distinguished the Judgments relied upon by Dr Tulzapurkar on the issue of fraud whether can be referred to arbitration or not including the Judgment of Supreme Court in case of Booz Allen Hamilton (supra) and the Judgment of Calcutta High Court in case of Ram Kishan Mimani (supra).

40. Learned senior counsel then submits that as per the law laid down by the Supreme Court in the case of arbitration, it is possible to have 4 different kinds of laws:

> (1) Proper law of the underlying contract, i.e. the law governing the substantive rights of the parties under the contract;

kvm ARBP1062.12 (2) The proper law of the arbitration agreement, i.e. inter alia the law relating to the arbitrability of the dispute, the validity of the agreement etc. (3) The proper law of the reference. We are not presently concerned with this law.

(4) The curial law: i.e. the law relating to the procedure of the arbitration.

41. Learned senior counsel placed reliance on the Judgment of Supreme court in case of Sumitomo Heavy Industries v. ONGC (1998) 1 SCC 305 and would submit that as per agreement between the parties, the law governing the agreement is Indian law. Reliance is placed on clause 15 of the SHA which reads as under :

> "15. GOVERNING LAW: This Agreement shall be governed by and construed in accordance with the laws of the Republic of India without regard to applicable conflict of Laws principles."

42. Learned senior counsel placed reliance on the Judgment in case of NTPC v. Singer & Co. (1992) 3 SCC 551; and in particular paragraph 23 which reads thus :

> " 23. The proper law of the arbitration agreement is normally the same as the proper law of the contract. It is only in exceptional cases that it is not so even where the proper law of the contract is expressly chosen by the parties. Where, however, there is no express choice of the law governing the contract as a whole, or the arbitration agreement as such, a presumption may arise that the law of the country where the arbitration is agreed to be held is the proper law of the arbitration agreement. But that is only a rebuttable presumption."

43. Learned senior counsel placed reliance on clause 16.4 of the agreement and would submit that the said clause does not oust Indian law but merely ousts part of kvm ARBP1062.12 part I of the Arbitration Act. Hence even looking at Clause 16.4 of the SSA (and same clause in SHA), the law of Arbitration is Indian Law. Relying on Judgment of NTPC (supra), it is submitted that even the said matter, the parties had agreed to oust the Indian Arbitration Act, 1940 and in spite of such exclusion, the Court held in that case that the applicable law of arbitration would be Indian law because the substantive law was Indian Law. Mr Rohatgi, learned senior counsel distinguished the Judgment in case of Bharat Aluminium company (2012) 9 SCC 552 and would submit that the said Judgment was dealing only with the curial law i.e. law relating to procedure and does not hold that law. The law of arbitration agreement is determined by the country of arbitration.

ig Learned senior counsel then submits that assuming that any award is passed by the Arbitral Tribunal, the same would inevitably have to be brought to India and subjected to the Indian legal process before the same can be executed. The only way a foreign award can be executed is if the conditions of enforceability laid down by Section 48 of the Arbitration and Conciliation Act, 1996 are met. The relevant part of the Section reads as under:

> "Section 48. Conditions for enforcement of foreign awards (2) Enforcement of an arbitral award may also be refused if the Court finds that:
>
> (a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or
>
> (b) the enforcement of the award would be contrary to the public policy of India."

44. It is submitted that the issue of arbitrability is to be decided as per Indian law as required by the Section. If the issue cannot be sent to arbitration, as per the law of India, the same cannot be enforced in India either. It follows that if final relief cannot be given in a matter (i.e. the award cannot be finally enforced), no interim order can be passed in that regard either. This is also the

ratio of this Court kvm ARBP1062.12 in the judgment of Goldstar. Since an issue of fraud is not capable of settlement through arbitration under the law of India, an Award based on issues of fraud cannot be enforced either.

45. Learned senior counsel placed reliance on the Judgment of Supreme Court in case of India Household Healthcare v. LG Household Healthcare (2007) 5 SCC 510. Relevant paragraph of the said Judgment reads thus :

> ".....It is also no doubt true that where existence of an arbitration agreement can be found, apart from the existence of the original agreement, the courts would construe the agreement in such a manner so as to uphold the arbitration agreement. However, when a question of fraud is raised, the same has to be considered differently. Fraud, as is well known, vitiates all solemn acts. A contract would mean a valid contract; an arbitration agreement would mean an agreement which is enforceable in law." (Para 10)

46. Mr Rohatgi distinguished the Judgment of Supreme Court in case of Booz Allen and Hamilton (supra) and placed reliance on paragraph 39 of the said Judgment which reads thus :

> "39. The Act does not specifically exclude any category of disputes as being not arbitrable. Sections 34(2)(b) and 48(2) of the Act however make it clear that an arbitral award will be set aside if the court finds that "the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force".

47. Reliance is also placed on para from Law and Practice of commercial Arbitration in England (2nd Edn. 1989) which is extracted as under :

> " In practice therefore, the question has not been whether a particular dispute is capable of settlement by arbitration, but whether it ought to be referred to arbitration or whether it has given rise to an enforceable award. No doubt for this reason, English law has never kvm ARBP1062.12 arrived at a general theory for distinguishing those disputes which may be settled by arbitration from those which may not."

48. Learned senior counsel submits that the Judgment of Supreme Court in case of Phuchand Export v. OOO Patriot (2011) 10 SCC 300 is overruled in the Judgment of Shree Lal Mahal v. Progetto Grano only to the extent that a patent illegality does not amount to something contrary to the fundamental policy of Indian Law. It is submitted that the fundamental policy of Indian law is that matters relating to fraud ought not to be referred to arbitration. In this view of the matter, the award would also be hit by Section 48 (2)(b) of the Act. It is settled law that when a statute mandates that a particular thing has to be done in one way, it must be done in that way or not at all. Once the statute requires the filing of objections under Section 48 of the Arbitration Act, the Petitioner cannot be allowed to circumvent that by filing a Section 9 Petition.

49. Mr Rohatgi, learned senior counsel then submits that the reliance placed by the petitioner on the Singapore award on jurisdiction is inadmissible and irrelevant in the light of express wording of Section 48(2)(a) which requires the award to be capable of settlement as per Indian law. Mr Rohatgi distinguished the various Judgments relied upon by Dr Tulzapurkar on the issue of estoppel and submits that the bar of issue estoppel cannot arise for two reasons. First, the present case is a pure question of law and the doctrine of estoppel can never apply to a pure question of law or to a jurisdictional question. Secondly, the doctrine of estoppel would require the issue to have been finally decided. In the present case, the issue has not been finally decided as the party in whose favour the award has been passed has not chosen to enforce the award.

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50. Learned senior counsel placed reliance on the Judgment of Supreme Court in case of Dadu Dayalu v. Mahant Ram Niwas (2008) 11 SCC 753. Relevant paragraph of the said Judgment which is relied upon by the learned senior counsel reads thus :

> " We, however, are not unmindful of the principles of estoppel, waiver and res judicata are procedural in nature and, thus, the same will have no application in a case where judgment has been rendered wholly without jurisdiction or issues involve only pure questions of law. Even in such cases, the principle of issue estoppel will have no role to play."

51. It is submitted that for there to be an estoppel, the decision ought to have achieved finality. After all, estoppel is a procedural rule based on equity whereby a party who has allowed an order to go unchallenged cannot later be heard to urge against it. However, in the present case, the arbitral award has not become final. In fact, as per law, the award is merely an inchoate document which has no legal effect till it is sought to be enforced. This Court, in the case of Jindal Drugs v.

Noy Vallesina Eng SPA Italy (2002) 3 Bom CR 554 has held unlike a domestic award wherein an aggrieved party can file objections under Section 34 of the Act, the scheme of a foreign award is different. In the case of a foreign award, the aggrieved person is not required to challenge the same unless the Court finds it enforceable upon a Petition filed by a person in whose favour the award is made. It is submitted that even if the Respondents wished to challenge the award on any ground, it could not have done so in any independent Petition. Any petition seeking to challenge a foreign award would not be maintainable.

52. Learned senior counsel then submits that the interim emergency award is also inadmissible. It is submitted that the Petitioner is simply seeking to enforce the emergency award passed by the arbitral tribunal on 28 th May 2012 and 29th May 2012. The Petitioner, rather than seeking enforcement of the award under kvm ARBP1062.12 Section 48 of the Act, is seeking to enforce it circuitously under Section 9 of the Act. By invoking Section 9, the Petitioner is seeking to bypass the mandatory conditions of enforceability required by Section 48 of the Act. It is submitted that this is impermissible in law. Reliance is placed on the Judgment of Delhi High Court in case of HFCL v. UOI OMP 464 of 2009 dt. 18/08/2009 in which it is held that no petition under Section 9 can be

filed to execute an award. It is submitted that till the Petitioner seeks enforcement of the award under Section 48 of the Act, the Respondent will not have any occasion to assail its correctness or validity. In this view of the matter, the Petitioner cannot be allowed to rely on an award that has by no means attained finality. It is merely an inchoate document which can be enforced only in accordance with law, provided it meets the test of Section 48 of the Act.

53. Mr Rohatgi, learned senior counsel submits that the Petitioner had filed a Criminal complaint/FIR with the Economic Offence Wing ('EOW') on 23 rd April 2013. The complaint was basically a reproduction of the present petition and includes all the material allegations that were made at the time of the hearing. The EOW investigated the entire alleged incident, examined all the relevant papers and also recorded the statements of various persons. After concluding an exhaustive inquiry (for almost 3 months) it found that there was no merit on the claims of the Petitioner and has filed a closure report under Section 173 CrPC which is pending before the Magistrate. The relevant part of the report reads as under:

> " The comprehensive investigations revealed that HSBC PI Holdings was not induced to invest under the pretext of any BBC contract, Avitel Group has utilized the amount invested for purchase of Machinery/business, the alleged customers and suppliers are genuine, no forged documents were found or made available by kvm ARBP1062.12 Complainant as alleged, alleged meeting at London was indeed set up by Mr. John Smith, an intermediary broker and HSBC PI Division officials, there is no evidence that Avitel has sent any invitation for setting up of meeting of HSBC officials with Mr. John Linwood, CTO of BBC and Mr. John Smith was not portrayed as an official of BBC, the accused company has issued and delivered shares representing 7.8% of their share capital as per the understanding/agreement and completed the deal."

54. It is submitted that even though there is no final determination on the report by the Magistrate, there is no contrary report either. In fact, the EOW report is the only an independent report by a statutory authority and it ought to be given great weight by this Court. While the report may not be determinative of the issue at hand, it is certainly presumptively correct. Learned senior counsel distinguished the Judgment of Supreme court in case of Vishnu Dutt Sharma v. Daya Sapra (2009) 13 SCC 729 and placed reliance on Section 5 of the Evidence Act and submits that all the findings of EOW report are directly in issue in the present case and hence the same can be proved in the Court. It is submitted that in the present case, it is very important to note that the Petitioner has not placed any material before the court and has advanced no argument whatsoever to show how or why the findings in the EOW report are inaccurate or incorrect. There is, in fact a deemed admission by the Petitioner of the findings in the EOW Report which was placed on the record of this Court by an affidavit filed as far back as in August 2013. In so far as e-mail from one of the respondents in August 2011 stating that BBC contract had been signed, it is submitted that this email is entirely irrelevant since it was sent after the execution of the contract. It is not possible for the Petitioners to contend that they relied on any email or representation of the kvm ARBP1062.12 Respondent after the execution of the agreements. It is elementary that any alleged misrepresentation which induced the Petitioner to enter into a contract must have been made before the contract is entered into and

not after.

55. In so far as allegation regarding contracts with Purple Passions Productions Ltd. is concerned, it is submitted that in the Petitioners due-diligence report dated 14th January 2011, where the Petitioner itself sets out their "base case financials"

> on the basis of which they had made the investments. The said base case financials show business of Animation is non-existent not only for the year 2011 but there was no potential business expected for the following years. Further, the Petitioners aforesaid due-diligence report specifically mentions "Animation business - assumed no cash flows from the animation business". Accordingly, the Petitioner cannot claim that they have relied on the Purple Passion Contracts and also cannot submit that there was any misrepresentation in respect of Purple Passion.

56. Learned senior counsel submits that HAV3 continues to hold about 10 % in the Respondent No.1 Company. It has never filed any complaint for any mismanagement or any fraudulent conduct by the Respondents. In fact, none of the other shareholders (holding 92.2%) have ever complained of any mismanagement. The Petitioner is the only shareholder who is seeking a refund of its investment while simultaneously seeking to retain its shares. It is submitted that this conduct is completely inequitable and ought not to be condoned by this Court.

57. In so far as allegation regarding post agreement conduct of the respondents is concerned, it is submitted that the Petitioner is merely a shareholder in the company from the date of allotment of shares to it. Keeping aside any issue in relation to fraudulent misrepresentation, the Petitioner is merely in the same kvm ARBP1062.12 position as any other shareholder who alleges that the funds of the company are being misused. The Petitioner has the right to file a Petition under Section 397/398 of the Companies Act, alleging oppression and/or mismanagement of the company.

The Company Law Board (CLB), under Section 402 of the Companies Act, has full powers to grant relief to such disgruntled Shareholder. However, the Petitioner is aware that it cannot cross the threshold hurdle of having 10% of the shares of the company before a petition under Section 397/398 of the Companies Act can be maintained. In so far as allegation regarding fraud in respect of BBC contract is concerned, it is submitted that there was, in fact, no suggestion that there was an almost concluded BBC contract.ig

58. Learned senior counsel submits that a subsidiary of HSBC Bank Plc (the parent of Petitioner), namely HAV3 had invested a sum of 10 million USD in for 10% of the Respondent No.1 Company. For this purpose, it had conducted a due diligence from May 2009 till March 2010 (for more than 10 months) with the assistance of leading and renowned professional firms including Ernst & Young (E & Y), Aryan Business Consultants and Clifford Chance. HAV3 was admittedly an affiliate of the Petitioner at the time it made the investment. As on date, Even though the Petitioner's Parent has allegedly divested its share from HAV3, it continues to retain about 20% shares in HAV3 and HAV3 & the Petitioners continue to be affiliates. This due diligence was conducted for 5 months from December 2010 and April 2011. A total sum of Rs. 3 crores or so was paid by the Respondent

towards this due diligence. It is submitted that USD 300,000 was paid towards structuring fees, USD 304,665 towards re-imbursement of fees paid to international lawyers and a sum of Rs. 25,35,000 paid to the Indian lawyers. It is submitted that there is no mention of BBC contract in the SSA or SHA entered into between the parties or in the disclosure letter which was pursuant to and forms part kvm ARBP1062.12 of the SSA. The SHA was signed by the petitioner after the disclosure letter was given on 6th May 2011. Learned senior counsel submits that in no circumstances, it can be believed that the petitioner had relied on BBC contract to enter into the SSA and SHA.

59. Learned senior counsel placed reliance on email dated 18th January 2011 addressed by Mr Heath Zarin, representing the petitioner to his colleagues in HSBC in support of the allegations that the petitioner was aware that the equipment which was being purchased was already ordered by the respondents and they had already paid the earlier installment. The petitioner had accepted that the respondents would be using such equipments regardless of any BBC contract.

60. Dr.Tulzapurkar, learned senior counsel and Mr.Sakhardande, learned counsel appearing for the petitioner in rejoinder submits that in the statement of claims filed before the Arbitral Tribunal by the petitioner, no claim is made for recovery of equity share but is made for damages proceeded on the misrepresentation made by the respondents on BBC contract and other acts of misrepresentation regarding material contract vendors and suppliers. It is submitted that fraud committed by the respondent is voidable. Under section 397 of the Companies Act, petitioner could not have claimed damages before Company Law Board. My attention is invited to the statement of claims filed by the petitioner before the Arbitral Tribunal in this regard.

61. Dr.Tulzapurkar submits that application filed under section 9 of the Arbitration Act filed by the petitioner is not for enforcement of the interim emergency award but is based on the choice made by the parties under section 9 of the Arbitration Act. In so far as issue of due diligence raised by Mr.Rohatgi, kvm ARBP1062.12 learned senior counsel appearing for the respondents is concerned, my attention is invited to various e-mail forming part of the record exchanged between the parties to demonstrate that the contract with BBC was an issue even before the execution of the agreement between the petitioner and the respondents. Even after signing the agreement, petitioner was enquiring about BBC contract and had permitted the respondent no.1 to use the equipments till BBC contract was signed. It is pointed out that the Purple Passion Productions Limited was dissolved on 29th November, 2010. Inspite thereof, in the list of contract as on 21 st October, 2011, the said contract was continued to be shown as pending contract with the respondents. It is submitted that if the report of the EOW can be considered, then the jurisdictional award of the arbitral tribunal also can be looked into. Dr.Tulzapurkar, learned senior counsel distinguished the judgment of the Supreme Court in case reported in (2008) 11 SCC 753 on the ground that two judges of the Supreme Court did not noticed the judgment of the three judges reported in AIR 1960 SC 941. It is submitted that the petitioner is relying upon the jurisdictional award and not applying for enforcement of the said award in this proceedings filed under section 9 of the Arbitration Act. If the petitioner would have applied for enforcement of the jurisdictional award, the objection under section 48(2) (a) could have been considered by this court. Learned senior counsel submits that there is difference between incapacity of the arbitrator to decide as against inappropriateness for an arbitrator to decide. Only such dispute which are barred cannot be referred to arbitration. Whether disputes which are not

barred and should be referred to arbitration or not depend on the fact of each case. Section 48 of the Arbitration Act does not talk of any "cannot go category". The allegations of fraud are not incapacitated of adjudication. Learned senior counsel placed reliance on the judgment of the Division Bench of this court in case of Konkola Copper Mines (PLC) (supra). It is submitted that law of arbitration agreement is excluded in so kvm ARBP1062.12 far as judgment of the Supreme Court in case of NTPC is concerned. Learned senior counsel submits that in this case except section 9 of the Arbitration Act, provisions of Part 1 are excluded expressly under the agreement entered into between the parties. Learned senior counsel placed reliance on the judgment of the Supreme Court reported in (2013) 11 JT SC 84 and in particular paragraphs 25 to 28 thereof to demonstrate that the judgment of the Supreme Court in case of Phulchand Exports Ltd. has been reversed by three Judges reported in (2013) 11 JT SC 84. It is submitted that arbitrability issue is not covered under the public policy. Allegations of fraud does not come any of the categories of public policy.

62. Dr.Tulzapurkar submits that the reliance placed by the respondents on the decision of the Supreme Court in Dadu Dayalu Mahasabha, Jaipur (Trust) Vs Mahant Ram Niwas and Anr. (2008) 11 SCC 753 is misplaced. It is submitted that the principle of issue estoppel is applicable in the case of a question of fact or a question of law or to a mixed question of fact and law. There is no question of there being any estoppel against law. It is submitted that the estoppel operates against the respondents and not against any law.

63. In so far as judgment of the Supreme Court in case of N.Radhakrishnan (supra) relied upon by the respondents is concerned, it is submitted that the said decision does not lay down the proposition canvassed by the Respondents viz. that once allegations of fraud are made the Arbitrators are incompetent to decide the matter referred to them. It is submitted that the Supreme Court has held in the said judgment that the Civil Court will be in a better position to decide the question rather than the Arbitral Tribunal. Dr.Tulzapurkar placed reliance on the judgment of the Calcutta High Court in case of Ram Kishan Mimani & Anr. Vs. Goverdhan Das Mimani and Ors. reported in A.P. No. 126 of 2010 (Calcutta kvm ARBP1062.12 High Court) in support of the same issue.

64. On the issue raised by Mr.Rohatgi on the applicability of section 48(2) (a), it is submitted by Dr.Tulzapurkar that the question of the Arbitral Tribunal being less suitable than a civil court in deciding a matter involving allegations of fraud is not a ground to be found in Section 48(2)(a) of the Arbitration Act. What the section states is that the subject matter of the dispute should be incapable of being decided by the Arbitral Tribunal. It is only those cases which cannot be decided by the arbitrators that can be said to be covered by section 48(2)(a). Reliance is placed on the judgment of the Supreme Court in case of Booz Allen & Hamilton Vs. SBI Home Finance Ltd. (supra) in which it is held that the matter in rem are not arbitrable whereas disputes relating to rights in personam are considered to be amenable to arbitration. It is submitted that bar contemplated under section 48(2)

(a) does not apply and therefore petitioner is entitled to rely on the final partial award on jurisdiction. Dr.Tulzapurkar, learned senior counsel reiterated that the law governing the arbitration agreement is the law of Singapore and not the law of India.

65. In so far as reliance on the opinion of EOW dated 22 nd July, 2013 by the respondents is concerned, it is submitted that the opinion of the EOW is not binding on the Magistrate, nor can it be relied upon in a civil dispute. It is submitted that it is a settled position in law that the opinion of the police officer making investigation is not binding on the Magistrate and notwithstanding the opinion to the contrary, the Magistrate can order further investigation. It is further submitted that even a final judgment in a criminal proceeding is not binding on the civil court deciding the matter in a civil proceeding and vice versa. It is therefore submitted that this Court will decide the petition under Section 9 of the Arbitration kvm ARBP1062.12 Act independent of the opinion of the EOW. The said opinion has, as of now not even been accepted by the learned Magistrate at this stage. Dr.Tulzapurkar, learned senior counsel submits that the petitioner has made out a case for interim measures and the same shall be granted as prayed.

Whether parties were governed by law of Singapore or by law of India ?

66. Clause 15 of the agreement provided that the Agreement shall be governed by and construed in accordance with the laws of the Republic of India without regard to applicable conflict of Laws principles.

ig Clause 16 of the agreement provided that the dispute shall be referred to and finally resolved by binding arbitration at the Singapore International Arbitration Centre in accordance with the Singapore International Arbitration Rules which Rules are deemed to be incorporated by reference into this clause and as may be amended by the rest of this clause. Clause 16.1.2 provides that the seat of arbitration shall be Singapore.

Clause 16.4 provided that except section 9, Part I of the Indian Arbitration and Conciliation Act, 1996, the provisions of Part I of the Arbitration Act shall not apply to the terms of this Agreement.

67. It is not in dispute that the seat of the arbitration was at Singapore. The arbitration proceedings were held at Singapore. In case of Sumitomo Heavy Industries Ltd. (supra) it is held by the Supreme Court that the proper law of the arbitration agreement, i.e. the law governing rights and obligations of the parties arising from their agreement to arbitrate and, in particular, their obligation to submit their disputes to arbitration and to honour an award. This includes inter alia questions as to the validity of the arbitration agreement, the validity of the notice of arbitration, the Constitution of the tribunal and the question whether an award kvm ARBP1062.12 lies within the jurisdiction of the arbitrator. It is held that in majority of cases it is found that the curial law, i.e. the law governing the conduct, of the reference, is the same as the law governing the obligation to arbitrate. It is, however, open to the parties to submit, expressly or by implication, the conduct of the reference to a different law from the one governing the underlying arbitration agreement. In such a case, the court looks first at the arbitration agreement to see whether the dispute is one which should be arbitrated, and which has validly been made the subject of the reference; it then looks to the curial law to see, how that reference should be conducted; and then returns to the first law in order to give effect to the resulting award. It is held that in the absence of express agreement, there is a strong prima facie presumption that the parties intend the curial law to be the law of the "seat" of the arbitration, i.e. the place at which the arbitration is to be conducted, on the ground that is the country most closely

connected with the proceedings. The curial law operates during the continuance of the proceedings before the arbitrator to govern the procedure and conduct thereof. It is held that the courts administering the curial law has the authority to entertain applications by parties to arbitration being conducted within their jurisdiction for the purpose of ensuring that the procedure that is adopted in the proceedings before the arbitrator conforms to the requirements of the curial law and for reliefs incidental thereto.

68. Question that arises for determination is whether in the facts of this case the law governing the arbitration agreement is the law of Singapore because of the agreement between the parties that the seat of arbitration would be at Singapore and in view of the exclusion of applicability of Indian law as the governing law of arbitration agreement except applicability of section 9 of the Arbitration and Conciliation Act.

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69. In case of National Thermal Power Corporation (supra) it is held that if there is no express choice of law governing the contract as a whole or the arbitration agreement as such, a presumption may arise that the law of country where the arbitration is agreed to be held is the proper law of the arbitration agreement. Parties may choose the substantive law governing the arbitration agreement as well as the procedural law governing the conduct of the arbitration.

Such choice is exercised either expressly or by implication. It is held that where there is no express choice of the law governing the contract as a whole, or the arbitration agreement in particular, there is, in the absence of any contrary indication, a presumption that the parties have intended that the proper law of the contract as well as the law governing the arbitration agreement are the same as the law of the country in which the arbitration is agreed to be held. It is held that the proper law of arbitration, i.e. substantial law of governing arbitration the validity, effect and interpretation of the arbitration agreement are conducted, in the absence of any agreement to the contrary in accordance with law of the country in which the arbitration is held. If such choice is not made by the parties, expressly or by necessary implication, the procedural aspect of the conduct of arbitration (as distinguished from the substantive agreement to arbitrate) will be determined by the law of the place or seat of arbitration. The question that arises in this proceedings is that in addition to the agreement that the dispute, controversy or claim shall be resolved by binding arbitration at Singapore International Arbitration Centre and shall be in accordance with Singapore International Arbitration Rules, what is the effect of the parties having agreed that except section 9, Part I of the Indian Arbitration and Conciliation Act shall not apply to the terms of the agreement.

70. In case of Bharat Aluminium Co. Ltd. (supra) Supreme Court has held that kvm ARBP1062.12 Indian Arbitration Act is a seat centric. Division Bench of this Court in case of Konkola Copper Mines (PLC) (supra) after adverting to the judgment of the Supreme Court in case of Bharat Aluminium Co. Ltd. (supra) has held that the entire judgment of the Supreme Court in case of Bharat Aluminium Co. Ltd. (supra) would not apply with prospective effect. It is held by the Supreme Court that a seat of arbitration would determinate the governing law of arbitration agreement. Placing reliance on the judgment in Sumitomo Heavy Industries Ltd. (supra), National

Thermal Power Corporation (supra), Bharat Aluminium Co.

Ltd. (supra) and judgment of Division Bench in case of Konkola Copper Mines (PLC) (supra), the submission of Dr.Tulzapurkar is that in this case in view of expression choice of the parties to make a seat of arbitration in Singapore, a seat of arbitration would govern the law of arbitration agreement and under the Singapore law, Aribtral Tribunal can decide the claims involving allegations of fraud if any. It is submission of Dr.Tulzapurkar that in view of the express agreement between the parties that except section 9, no part of part (I) would apply also clearly indicates that Part (I) is expressly excluded by the agreement between the parties except the extent of applicability of section 9. It is submitted that thus this proceedings under section 9 of the Arbitration and Conciliation Act, 1996 is thus maintainable in this court for the purpose of granting interim measures though for all other parties, the law of Singapore would apply to the arbitration proceedings. The submission of Dr.Tulzapurkar is that since the parties were governed by law of Singapore, even if there are any allegations of fraud in statement of claim before the Arbitral Tribunal or in this proceedings filed under section 9, under law of Singapore, there is no bar against the arbitrator from adjudicating upon the allegations of fraud. Per Contra, the submission of Mr.Rohatgi, learned senior counsel appearing for the respondents on this issue is that under clause 16.4 of the agreement, the said clause does not oust Indian law but merely oust part of Part I kvm ARBP1062.12 of Arbitration Act. Learned senior counsel placed reliance on the judgment of the Supreme Court in case of National Thermal Power Corporation (supra) and it is submitted that inspite of such exclusion agreed by the parties, in that matter, Supreme Court held that applicable law of arbitration would be Indian law because the substantial law would be Indian law. It is submitted that even if any award is passed by the Arbitral Tribunal at Singapore, the same would have to be brought to India and subjected to Indian legal process before the same could be executed and thus Indian law would apply and not law of Singapore.

71. The second submission of Dr.Tulzapurkar is that even if Indian law would have been made applicable, there is no bar against an arbitrator to adjudicate upon the allegations of fraud, forgery and malpractices etc. Learned senior counsel in support of his submission distinguished the judgment of the Supreme Court in case of N.Radhakrishnan (supra) and would submit that the court has to decide in the facts of this case that though the arbitration agreement exist between the parties considering the nature of dispute which is even if based on allegations of fraud, forgery and malpractice, whether it would be more convenient and proper to refer such dispute/allegation to arbitration or it would be more convenient that such dispute is decided by a civil court. Learned senior counsel submitted that in case of N.Radhakrishnan (supra) the Supreme Court has not laid down any law to this effect that no sooner any allegations of fraud or forgery are made in any proceedings between the parties which are governed by the arbitration agreement, matter cannot be referred to arbitration at all but has to be decided by civil court only. In support of this submission, Dr.Tulzapurkar, learned senior counsel placed reliance on the judgment of the Madras High Court in case of H.G.Oomor Sait vs. O.Aslam Sait (2001) 3 CTS 269 which is upheld by the Supreme Court in case of N.Radhakrishnan (supra). Reliance is also placed on the judgment of Calcutta kvm ARBP1062.12 High Court in case of Ram Kishan Mimani and another vs. Goverdhan Das Mimani and others in Arbitration Petition No. 126 of 2010. Submission of the learned senior counsel is that the Calcutta High Court has interpreted the judgment of the Supreme Court in case of

N.Radhakrishnan (supra) and has rightly held that there is a discretion available to the court while considering a petition involving allegations of fraud or malpractice whether to refer such dispute to arbitration or that the same shall be decided by a civil court. Various parts of the judgment of N.Radhakrishnan (supra) are relied upon by the learned senior counsel in support of his submission that merely because there are such allegations of fraud, fabrication etc., it is not mandatory on the part of the court to refuse to refer such dispute to arbitration and/or to try such dispute only by civil court. Reliance is also placed by the learned senior counsel in case of Booz Allen and Hamilton Inc. vs. SBI Home Finance Limited and others (supra) in support of his submission that court has to see whether subject matter of the suit is arbitrable and not the allegations. It is submitted that neither under the law of Singapore nor under Indian law, there is any bar against an arbitrator to adjudicate upon the allegations of fraud, forgery and/or malpractice. Court has to see whether subject matter of arbitration is arbitrable and not whether allegations are arbitrable or not.

Supreme Court in the judgment of the Booz Allen and Hamilton Inc. vs. SBI Home Finance Limited and others (supra) has interpreted the term arbitrability and has held that whether the dispute is capable of adjudication and settled by arbitration is one of the important aspect relating to jurisdiction of the arbitral tribunal. Reliance is also placed on treaties of Mustill and Boyd in their Law and Practice of Commercial Arbitration in England.

72. Submission of Mr.Rohatgi, learned senior counsel appearing on behalf of the respondents on the other hand is that the judgment in case of kvm ARBP1062.12 N.Radhakrishnan (supra) would squarely apply to the facts of this case in which Supreme Court has held that if the allegations of fraud, forgery and fabrication are made, though arbitration agreement exist, such allegations cannot be settled in arbitration but can be settled only by court. Reliance is also placed on the judgment of this Court in case of Goldstar Metal Solutions (supra) and judgment of the Division Bench in case of MSM Satelite (supra), submission of learned senior counsel is that this court has interpreted the judgment of the Supreme Court in case of N.Radhakrishnan (supra) and has held that once there are serious allegations of fraud, forgery and fabrication, the same cannot be decided by the arbitrator at all though arbitration agreement exist between the parties. Learned senior counsel submits that in so far as judgment of the Supreme Court in case of Bharat Aluminium (supra) is concerned, it is held by the Supreme Court that the said judgment would apply with prospective effect and in view of the fact that the agreement entered into between the parties is prior to the date of pronouncement of the said judgment by the Supreme Court in case of Bharat Aluminium (supra), merely because the seat of the arbitration was at Singapore, it cannot be construed that parties would be governed by law of Singapore and not Indian law.

73. It is not in dispute that petitioner had invoked arbitration agreement which was forming part of the agreement entered into between the parties. On perusal of clause 15 of the agreement, it is clear that it was not intended by the parties that the Indian law would apply to the main agreement as well as to the arbitration agreement. Admittedly arbitration proceedings were held at Singapore in accordance with Singapore International Arbitration Rules. Respondents have participated in the said proceedings before the Arbitral Tribunal. It is also not in dispute that the parties had agreed that the seat of arbitration shall be at Singapore. In my view, agreement to arbitrate at Singapore has a closer and real connection kvm ARBP1062.12 with the place where the parties had chosen to

arbitrate. Arbitration agreement would be thus governed by the law of Singapore and not Indian law. In my view principles of law laid down by the Supreme Court in case of Sumitomo Heavy Industries Ltd. (supra) and in case of National Thermal Power Corporation (supra), shall be squarely applicable to the facts of this case. Judgment of the Supreme Court in case of Bharat Aluminium (supra), has been interpreted by the Division Bench of this court in case of Konkola Copper Mines (PLC) (supra) in which it is held by the Division Bench of this court that the entire judgment of the Supreme Court in case of Bharat Aluminium (supra), would not apply with prospective effect. It is held that in so far as applicability of the law of governing based on arbitration is concerned, the seat of the arbitration agreement would determine the governing law of arbitration agreement. In this case also the express choice of the parties was that seat of the arbitration would be at Singapore and thus in my view, the seat of the arbitration would govern by law of agreement i.e. law of Singapore and not Indian law in this case. I am respectfully bound by the judgment of the Supreme Court in case of Sumitomo Heavy Industries Ltd.

(supra), in case of National Thermal Power Corporation (supra) and judgment of the Division Bench of this court in case of Konkola Copper Mines (PLC) (supra) which in my view squarely apply to the facts of this case.

74. In my view judgment of Supreme Court in case of National Thermal Power Corporation (supra) is of no assistance to the respondents but assist the case of the petitioner. In view of the aforesaid reasons, I am of the view that there is no merits of the submission of the learned senior counsel for the respondents that clause 16.4 of the agreement does not oust Indian law. In my view issue of arbitrability has to be decided under the law of arbitration agreement which is law of Singapore in this case and thus whether dispute raised by the petitioner was kvm ARBP1062.12 arbitrable or not would have been decided as per law of Singapore and not as per Indian Law. In my view, since there is no dispute that allegations of fraud, forgery and fabrication etc. can be decided under the laws of Singapore by the learned tribunal, there is no merit in the submission of Mr.Rohatgi, learned senior counsel that such issue has to be decided only as per Indian law.

75. The next submission of Mr.Rohatgi, on this issue was that if any award is passed by the arbitral tribunal, the same would have to be brought in India for enforcement and would be subjected to the Indian legal process and as per Indian law, since allegations of fraud, fabrication and forgery cannot be decided by arbitrator, such award would not be enforceable in India under Indian law.

76. It is not in dispute that the arbitral tribunal which has held hearing at Singapore and has applied laws of Singapore has rendered a jurisdictional award in this matter. The arbitral tribunal has considered the objections raised by the respondents herein that the arbitral tribunal did not have jurisdiction to decide the allegations to forgery, fraud and fabrication and has rendered the jurisdictional award holding that under law of Singapore, the arbitral tribunal has jurisdiction to decide such allegations. Admittedly the respondents have not challenged the said jurisdictional award in any proceedings at Singapore under the laws of Singapore. Question that arises is whether such jurisdictional award can be relied upon in this proceedings by the petitioner in view of the respondents not having challenged the said jurisdictional award rejecting the plea of jurisdiction raised by the respondents, without filing an application for enforcement of the said award. Question

also arises is that whether present petition filed under section 9 of the Arbitration and Conciliation Act, 1996 is an application for enforcement of the jurisdictional award, interim award or is simplicitor for interim measures against kvm ARBP1062.12 the respondents independently. Submission of the respondents is that if as per law of India, if final relief cannot be enforced in India in view of the subject matter of the difference being not capable of settlement by arbitration under the law of India or if enforcement of the award would be contrary to public policy of India, interim measures in that situation can not be granted by this court under section 9 of the Act.

77. It is not in dispute that under law of Singapore, arbitral tribunal has jurisdiction to decide the allegations of fraud, forgery and fabrication in arbitration proceedings. In my view, Dr. Tulzapurkar, learned senior counsel for the petitioner is right in his submission that the subject matter of difference in the arbitration proceedings before the arbitral tribunal was claim for damages made by the petitioner which was capable of settlement by arbitration even under law of India. The learned senior counsel is right in his submission that the subject matter of the difference if not capable by settlement of arbitration under the laws of India cannot be enforced in India and not the allegations of fraud, fabrication and forgery etc. In my view there is no merit in the submission of Mr.Rohatgi that under law of Singapore, allegations of fraud, forgery and fabrication was not capable of settlement by arbitration. I am of the view that the subject matter of the reference was whether petitioner was entitled to claim damages from the respondents which was capable of settlement by arbitration even under laws of India. Be that as it may, since no application is made by the petitioner for enforcement of the jurisdictional award, submission of the learned counsel for the respondents that conditions of section 48 (2) (a) and (b) for enforcement of foreign award would apply to this application under section 9 for interim measures has no merits. In my view reliance placed by Mr.Rohatgi on paragraph (39) of the judgment of the Supreme Court in case of Booz Allen and Hamilton Inc. (supra) is misplaced.

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78. Next question that arises for consideration is whether such jurisdictional award rendered by the arbitral tribunal by applying laws of Singapore can be referred to and relied upon by the petitioner in this proceedings and is binding on the parties or not.

79. Dr.Tulzapurkar, learned senior appearing for petitioner has pressed in service the law of estoppel on this issue against the respondents and placed reliance on several judgments of Supreme Court and judgment of this Court on the issue that principles of estoppel and res judicata are based on public policy and justice. Supreme Court in case of Hope Plantations Ltd.(supra), Bhanu Kumar Jain (supra), Ishwar Dutt (supra), Arjun Singh (supra) and this court in case of Indo-Pharma Pharmaceutical Works Private Limited has considered this issue at length, relevant paragraphs thereof are highlighted in earlier part of this judgment. It is held that principles of estoppel and res judicata are based on public policy and justice. Issue of arbitrability and jurisdiction having been concluded cannot be agitated by the same parties in another proceedings being barred by law of estoppel. It operates as estoppel in any subsequent proceedings if in the earlier proceedings between the parties, the issue had been determined. It is held that res judicata could be applicable to different stages of the same suits as to findings on the issues.

80. Having taken a view that law of Singapore would apply to the parties in this proceedings and under laws of Singapore, respondents would have remedy of challenge the interim awards before the appropriate court at Singapore and the respondents not having challenged the said jurisdictional award and interim award, in my view the said jurisdictional award and interim award made by the arbitral kvm ARBP1062.12 tribunal between the same parties arising out the same agreement in the arbitration proceedings have become final and conclusive on the issue of jurisdiction and the respondents are barred by the principles of estoppel in re-agitating the same issue in this proceedings. The principles of law laid down by the Supreme Court and this court in various judgments referred to aforesaid by the petitioner are squarely applicable to the facts of this case and are binding on this court. In my view there is no merit in the submission of Mr.Rohatgi, learned senior counsel that the issue raised by the respondents was a pure question of law and the doctrine of the estoppel could never apply to such question of law or to a jurisdictional question. In my view the principles of issue estoppel is issue applicable in case of question of fact or a question of law or to a mixed question of fact and law. The estoppel operates against the respondents and not against any law.

81. The next question that arises for consideration is even if section 48 of the Arbitration Act is pressed in service and would have been applicable at this stage, whether allegations of fraud, forgery and/or fabrication were capable of adjudication by an arbitrator under Indian law or the same would be opposed to public policy.

82. Reliance is placed by Mr.Rohatgi, learned senior counsel in support of this issue on the judgment of supreme Court in case of N.Radhakrishnan (supra), judgment of this court in case of Goldstar Metal Solutions (supra), in case of MSM Satelite (supra), , judgment of this court in case of Ivory Properties (supra) and judgment of Supreme Court in case of Hindustan Petroleum v. Pink city midway Petroleums (2003) 6 SCC 503. Dr.Tulzapukar, learned senior counsel on the other hand distinguished the judgment of the Supreme Court in case of N.Radhakrishnan (supra) and other judgments relied upon by Mr.Rohatgi, kvm ARBP1062.12 learned senior counsel on the ground that no law is laid down by the Supreme Court in case of N.Radhakrishnan (supra) that if any allegations of fraud, forgery and fabrication etc. are made by a party, such allegations cannot be decided by the arbitrator at all. It is submitted that in the facts of that case the Supreme Court has held that it is at the discretion of the court under Section 8 to refer the parties to arbitration or not even if the subject matter of the suit is covered by arbitration agreement, if the court comes to the conclusion that the same shall be appropriately dealt with by the civil court. Dr.Tulzapurkar, learned senior counsel placed reliance on the judgment of Calcutta High Court and Madras High Court in support of this submission. Learned senior counsel submitted that though parties are not governed by Indian law, even if section 48 is applied at this stage, allegations of forgery, fraud and fabrication etc. are not incapable of adjudication by an arbitrator or such award is not in conflict with public policy. None of the judgments relied upon by Mr.Rohatgi would be applicable to the facts of this case. Since, both the parties have made detailed submissions on the issue whether allegations of fraud, forgery and fabrication etc. made in the pleadings in an arbitration proceedings can be decided by an arbitrator or not or it can be decided only by a civil court only under Indian Laws, I am dealing with those submissions also in this judgment. According to Dr.Tulzapurkar, learned senior counsel, even if Indian law is applicable to the parties or even if section 48 is applicable at this stage to this

application under section 9, there is no law laid down by the Supreme Court that such allegations of fraud, forgery and fabrication cannot be decided by the arbitrator at all. It is submitted that under Indian law also, there is no bar against an arbitrator to decide such allegations. Learned senior counsel placed reliance on the judgment of the Supreme Court in case of Booz Allen Hamilton (supra).

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83. A perusal of judgment of the Supreme Court in case of N.Radhakrishnan (supra) would indicate that the issue before the Supreme Court was whether the said case falls within the jurisdiction of the arbitrator and if it was, whether the procedural requirements under Section 8(2) of the Act had been complied with to the satisfaction of the court Supreme Court considered the submission made by the respondents that when a case involves substantial questions relating to facts where detailed material evidence was needed to be produced by either parties and serious allegations pertaining to fraud and malpractice were raised, the matter must be tried in a court and the arbitrator could not be competent to deal with such matters which involved an elaborate production of evidence to establish the claims relating to fraud and criminal misappropriation. It is held by the Supreme Court that the contention of the respondents relating to the jurisdiction of the arbitrator to decide a dispute pertaining to a matter of that proportion should be upheld in view of the facts and circumstances of the case. Such allegations cannot be properly gone into by the arbitrator. Supreme Court has held that in the facts of that case it did not warrant the matter to be tried and decided by the arbitrator, rather for the furtherance of justice, it should be tried in the court of law which could be more competent and have a means to decide such a complicated matter involving various questions and issues raised in the said dispute. Supreme court agreed with the views taken by the Madras High Court in case of H.G.Oomor Sait vs. O.Aslam Sait (2001) 3 CTS 269. In paragraphs 26 of the said judgment in case of N.Radhakrishnan (supra), it is held that in view of the serious allegations made against the respondents alleging them to commit mal-practises in the account books and manipulates the finances of the partnership firm, such allegations could not be properly raised with before the arbitrator. It is held that such issues involved detailed evidence which could be done only by a civil court. A perusal of the judgment of the Supreme Court in case of N.Radhakrishnan (supra) minutely, kvm ARBP1062.12 I am of the view that it would be at the discretion of the court in facts of each case to decide that though arbitration agreement exist, whether such disputes could be appropriately dealt with by an arbitrator or by a civil court considering the seriousness of the allegations made by the parties in the facts of each case. The said judgment in my view holds that it is at the discretion of the court to refer the matter to arbitration or whether the same can be decided by the court appropriately in the facts of each case. The judgment of the Supreme Court in my view is based on the facts of that case as is clear in paragraphs 21, 23 and 26 of the said judgment.

84. Calcutta High Court has interpreted the judgment of the Supreme Court in case of N.Radhakrishnan (supra) and has held that the N.Radhakrishnan (supra) judgment cannot be read to imply that every allegation of fraud for malpractice being made, there can no longer be adjudication of such matters in an arbitration reference. N.Radhakrishnan (supra) has to be read to imply that an exception may be made to the general rule when it appears to court that a matter involving serious charges with heavy documentary and oral evidence may not be referred to

arbitration notwithstanding the dispute being covered thereby. Calcutta High Court has held that there would be element of discretion available to court while considering the petition to stay or stultify the progress of a suit where the issues or likely issues were covered by an arbitration agreement. It is held that even if a serious allegations of fraud or malpractice has to be made and it is only the exceptional cases which are required to be retained in court and not sent to arbitration on the reasoning contained in the N.Radhakrishnan's case that "it cannot be property dealt with by the arbitrator". It is held that though there is a charge of malpractice and the respondents having siphoned of funds, it does not appear that such charges are such that the arbitrator or the arbitral tribunal would kvm ARBP1062.12 not be able to address the same. The extent of oral or documentary evidence that would be necessary to deal with like issues in the reference is not such that warrant of the exercise of the extra ordinary discretion which has not been recognized to negate the mandate of the 1996 Act in the present case. Under section 27 of the Arbitration Act, an arbitrator or the arbitral tribunal can seek the assistance of the court in the event the arbitrator or the arbiral tribunal is faced with any problem relating to evidence being received.

85. In my view, Dr. Tulzapurkar, learned senior counsel appearing for the petitioner is right in his submissions that judgment in case of N. Radhakrishnan (supra) is not an authority on the proposition that as soon as allegations of fraud is made by any party, no such matter can be referred to arbitration at all. I am in agreement with the view taken by the Calcutta High Court which has dealt with and interpreted the judgment of the Supreme Court in the case of N. Radhakrishnan (supra).

86. In so far as judgment of this court in case of Goldstar Metal Solutions (supra), MSM Satelite (supra), Ivory Properties Hotels (supra) relied upon by Mr. Rohatgi, learned senior counsel appearing for respondent in support of his submission that such allegations of fraud and forgery could not be referred to arbitration at all though arbitration agreement exists are concerned, a perusal of these judgments would indicate that there was no issue raised by any of the parties in those matters whether in the facts of those cases, it would be more convenient and proper to decide the allegations by a civil court or by an arbitrator. In case of Goldstar Metal Solutions (supra), this court accepted the submissions of the respondents that in view of the serious allegations which were prima facie demonstrable, such issue could not be left open to be decided by the arbitral kvm ARBP1062.12 tribunal under section 9 of the Arbitration & Conciliation Act. In my view the judgment of this court in the case of Goldstar Metal Solutions thus would not be applicable to he facts of this case. In my view even if there are any such allegations made by a party, arbitral tribunal is empowered to take assistance of the court under section 27 of the Arbitration & Conciliation Act, 1996 and thus merely because some allegations or fraud or mal-practices made by any party, court cannot simply refuse to refer such matter to arbitration. Court has to decide in the facts of each case whether it would be appropriate and proper to deal with and adjudicate upon such allegations by a Civil Court or by an arbitrator. In my view, there is no bar provided under Arbitration and Conciliation Act against arbitrator from entertaining and/or deciding the issue of fraud, forgery, manipulation etc.

87. In this case, arbitral tribunal, has already rendered a jurisdictional award that under laws of Singapore, arbitral tribunal has jurisdiction to deal with such allegations, fraud, fabrication etc. Out

of the two matters, in one mater the arbitral tribunal has already rendered final award and in the other matter, final award is awaited. In my view, thus there is no merit in the submission of Mr. Rohatgi learned senior counsel that under Indian law such allegations could not be decided by the arbitral tribunal at all or that such award would be in conflict with public policy of India.

88. Supreme Court in the case of Booz Allen and Hamiltan (supra) has carved out categories of dispute which are non arbitrable such as disputes relating to rights and liabilities giving rise to or arising out of criminal offences, matrimonial disputes, child custody, guardianship matters, insolvency and winding up matters, kvm ARBP1062.12 testamentary matters, eviction or tenancy matters etc. Supreme Court has also held that where a cause/dispute is inarbitrable, court where a suit is pending will refuse to refer the parties to arbitration under section 8 of the Act, even if parties might have agreed upon arbitration. In my view, court has to decide whether such allegations made by the parties can be referred to arbitration or it would be more appropriate and covenant to decide such allegations by court itself though arbitration agreement exists. Supreme Court in the said judgment did not carve out any such category of allegations under the category of non arbitrable disputes.

In my view Dr. Tulzapurkar is right in placing reliance upon the judgment of the Supreme Court in the case of Booz Allen (supra). I am respectfully bound by the said judgment.

89. In so far as judgment of this court in case of Jindal Drugs (supra) relied upon by Mr. Rohatgi, learned senior counsel that unless petitioner files an application for enforcement of foreign award in this court, respondents cannot challenge the validity of such award is concerned, in my view, since present application filed under section 9 of the Arbitration Act by the petitioner is not for enforcement of the interim award or jurisdictional award rendered by the arbitral tribunal but the petitioner seeks interim measures against the respondents, independently, parties by agreement having excluded the applicability of part I of the arbitration Act except section 9, the petitioner is thus entitled to invoke section 9 for interim measures. In my view petitioner has not bypassed any mandatory conditions of enforceability required by section 48 of the Act. Reliance placed on the judgment of this Court in case of Jindal Drugs (supra) is thus misplaced.

90. Next question that arises for consideration of this court is whether reports submitted by economic offence wing closing the complaint under section 173 of kvm ARBP1062.12 Criminal Procedure Code can be relied upon in this proceedings as conclusive.

Submission of Mr.Rohatgi learned senior counsel for the respondent is that it was found after an exhaustive enquiry by the Economic Offence that there was no merit in the complaint of the petitioner which was identical to the allegations made in the arbitration proceedings and there being no contrary report, such report is presumptively correct. In this regard, Dr. Tulzapurkar placed reliance on various judgments referred in the earlier paragraphs of this judgment which are sought to be distinguished by Mr. Rohatgi learned senior counsel.

91. It is not in dispute that learned Magistrate has not accepted the reports submitted by Economic Office Wing so far.

92. In my view Dr Tulzapurkar learned senior counsel is right in his submission that opinion of the police officer making investigation is not binding on the Magistrate and notwithstanding the opinion of the Magistrate to the contrary, the Magistrate can order further investigation. Similarly even a final judgment in a criminal proceeding is not binding on the civil court deciding the matter in a civil proceeding and vice versa. In my view, even for the purpose of considering application under section 9 of Arbitration Act 1996, this Court is empowered to decide the matter based on evidence produced by both parties for the purpose of granting interim measures independently irrespective of the opinion of the Economic Offence Wing to the contrary. It is not in dispute that the opinion of Economic Offence Wing has not even been accepted by the learned Magistrate at this stage. I am thus not inclined to consider the correctness of the report submitted by EOW at this stage.

93. The next submission of Mr Rohatgi learned senior counsel for the kvm ARBP1062.12 respondent is that the petitioner is only a shareholder in respondent No.1 company and not a creditor and its investment in the respondent 1 company ceased to have the character of money and remedy of the petitioner if any was under the provisions of the Companies Act 1956 is concerned, on perusal of the statement of claim filed before the arbitral tribunal and the pleadings filed in this proceedings it is clear that the claims made by the petitioner is not for recovery of equity shares but is for damages on the premise that the respondent No.1 had misrepresented the petitioner on BBC contract and had committed various other acts of misrepresentation regarding material contract vendors, suppliers etc. In my view, reliefs claimed in the arbitration proceedings could not be subject matter of the proceedings under Section 397 of the Companies Act. I am not inclined to accept the submission of Mr Rohatgi learned senior counsel that the claim of the petitioner is made as a shareholder of respondent No.1 company and not as a creditor in any respect.

94. Next submission of Mr Rohatgi learned senior counsel is that M/s HAV 3 continues to hold about 10% shares in the respondent 1 company and none of the other shareholders holding about 92.2 % made any complaint of any mismanagement against respondent No.1 company. M/s HAV 3 had conducted a due diligence for more than 10 months and the petitioner had conducted due diligence for period of 5 months before execution of the agreement in question and there was no mention of BBC contract in any of those two agreements, petitioner at this stage, cannot make any grievance in respect of BBC contract for seeking any relief.

95. On perusal of Clause 6.3 of the said SSA, it is revealed that the said clause clearly provides that the petitioner did not have any opportunity to conduct an kvm ARBP1062.12 extensive due diligence into Avitel India and have relied upon the representation, warranties and undertakings contained in the agreement. Correspondence placed on record also prima facie indicates that a representation was made by the respondents to the petitioner that the BBC contract was almost concluded, various meetings were held to execute BBC contract etc. Some of these correspondence which are on record of this proceeding prima facie indicates that an assurance was made to the petitioner by the respondents that petitioner would be allowed to peruse the MOU, any e-mail correspondence between Avitel and BBC. It also prima facie indicates that representation was made to the petitioner that Avitel had required the investment of the petitioner to purchase equipment which was necessary for the BBC contract and that the BBC was unwilling to enter into the BBC contract until

Avitel had infact purchased such equipment. The petitioner was making inquiries time and again with the respondents even post investments. Correspondence annexed on record also prima facie indicates that there was neither any meeting between the respondents and BBC as alleged by the respondents nor any contract was ever negotiated between the respondents and BBC and the said representation was false on the part of the respondents to induce the petitioner to invest huge amount in respondent No.1 company.

96. Some of the correspondence on record also prima facie indicates that even there was misrepresentation on the part of the respondents in so far as M/s Purple Passion who was stated to be one of leading customer of the respondents which entity was already dissolved much prior to the date of execution of the agreements between the parties. In my prima facie view the allegations of the petitioner that there was false misrepresentations on the part of the respondent on various such issues has substance.

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97. A perusal of the record also prima facie indicates that out of USD 60 million invested by the petitioner in respondent No.1 at least USD 51 million had been circulated back to respondent No.3 as he was sole signatory of the companies to whom those amounts were credited and was not used to purchase the equipments for the BBC contract though represented by the respondent. Details of routing such amounts have been highlighted in the earlier part of this Judgment.

98. In my view, whether HAV 3, and other shareholders concerned who had also invested some amount in respondent No.1 have demanded any refund or made any grievance against respondent No.1 or not would not affect the claims made by the petitioner which is based on the false representation and for other reasons.

99. In my view Dr Tulzapurkar learned senior counsel is right in his submission that the question as to whether the arbitral tribunal being less suitable or it would be more convenient or appropriate for a civil court to decide allegations of fraud etc., is not a ground available under Section 48 (2)(a) of the Arbitration Act. In my view, only such cases which cannot decided by the arbitrators can be covered by Section 48(2)(a). In my view the dispute raised by the petitioner before the arbitral tribunal related to the rights of the petitioner in personam and could be considered by the arbitral tribunal and there is no bar contemplated under Section 48 (2)(a) in the arbitral tribunal adjudicating upon such dispute. In my view, petitioner has made out a case for interim measures. In one of the arbitration proceeding out of the two arbitral tribunal has already rendered a final award. In my view petitioner has good chances of succeeding in the arbitration proceedings. If the interim measures are not granted in favour of the petitioner, even if petitioner succeeds in arbitration proceedings, petitioner would not be able to recover any amount from the respondents. In my view, balance of convenience is in favour of kvm ARBP1062.12 the petitioner and against the respondents.

100. Pursuant to the ad interim order passed by this Court, respondents have been already restrained from withdrawing the amount lying in the account of the respondents with Corporation bank other than the amount allowed to be withdrawn. The said order is in force since 3/8/2012.

Respondents have not filed any appeal against the said order. The respondents have rendered an undertaking to return the amount allowed to be withdrawn by this Court in this proceedings. Respondents have also not paid fees of the arbitral tribunal. Pursuant to the order passed by Division Bench on 30/01/2013, respondent No.1 has been directed to deposit Rs. 1.40 cores equivalent to 3,35,000 Singapore dollars with the Corporation bank in a separate fixed deposit towards arrears of contribution of arbitration fees to be paid by respondent No.1 and has directed that the said order is passed without prejudice to rights and contentions of the parties keeping all contentions open. I accordingly pass the following order.

101. Respondents are restrained from withdrawing the amounts retained by the Corporation Bank in the accounts of the respondents to the extent of USD 60 million. In the event of the balance in the said accounts with the Corporation bank of the respondents less than USD 60 million, respondents are directed to deposit the shortfall in the said account so as to maintain the balance of USD 60 million within four weeks from today.

102. Arbitration petition is disposed of in aforesaid terms. No order as to costs.

103. In view of disposal of the arbitration petition, Chamber Summons no. 573 of 2013 does not survive and is accordingly disposed of.

(R.D. DHANUKA, J.)