Jamuna Transport Corporation Limited & ... vs Ghanashyamdas Baheti & Others on 16 July, 2010

Equivalent citations: 2010 A I H C 3555, (2011) 1 ARBILR 387, (2011) 3 ICC 21, (2010) 4 CAL HN 488

Author: Sanjib Banerjee

Bench: Sanjib Banerjee

1

GA No. 379 of 2010
GA No. 906 of 2010
GA No. 2143 of 2010
CS No. 24 of 2010

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION

JAMUNA TRANSPORT CORPORATION LIMITED & OTHERS
-Versus-
GHANASHYAMDAS BAHETI & OTHERS

For the Plaintiffs: Mr S.N. Mookerjee, Sr. Adv.,
Mr Ratnanko Banerji, Adv.,
Ms Lopita Banerji, Adv.,
Mr Neelesh Choudhury, Adv.,
Ms Anuradha Poddar, Adv.

For the Defendant Nos. 1 & 2: Mr Surajit Nath Mitra, Sr. Adv.,
Mr Aniruddha Roy, Adv.,
Mr Deepak Kr. Jain, Adv.,
Mr M.J. Ojha, Adv.

Hearing concluded on: July 12, 2010.

BEFORE
The Hon'ble Justice
SANJIB BANERJEE
Date: July 16, 2010.

SANJIB BANERJEE, J. : -

The legal question raised is as to whether an interlocutory injunction may

be granted in a civil suit to stall an arbitral reference that has been commenced by the defendants without recourse to any judicial authority or to the Chief Justice or his designate. The larger issue that arises is as to whether a suit is maintainable to challenge the existence of an arbitration agreement.

2

GA No. 379 of 2010 is the plaintiffs' principal interlocutory application in aid of the reliefs in the suit. GA No. 906 of 2010 is an application by the first and second defendants for rejection of the plaint and/or dismissal of the suit. GA No. 2143 of 2010 is the plaintiffs' application for extension of the interim order that has run out by efflux of time.

The second and third plaintiffs and the first three defendants are brothers. The first plaintiff is a company in which the five brothers are or, claim to be, directors. The fourth defendant is the arbitrator nominated by the three other defendants in pursuance of an arbitration agreement said to be contained in a memorandum of understanding of March 15, 2007. The third defendant has obviously been served and was represented at an earlier stage of the proceedings as is recorded in an order dated February 24, 2010 passed in GA No. 379 of 2010. No affidavit has been used by the third defendant and such brother is not represented at the protracted final hearing. The fourth defendant has, understandably, not evinced any interest in the present proceedings and has chosen not to be represented in Court.

The plaintiffs say that the second and third plaintiffs control the majority shareholding in the plaintiff company and that the three defendant brothers are minority shareholders in such company. The plaintiffs state that disputes and differences had arisen between the shareholders of the plaintiff company prior to January, 2006 resulting in the five Baheti parties to the present suit instituting proceedings under, inter alia, Sections 397 and 398 of the Companies Act before the Company Law Board in Delhi against a sixth brother, Sushil Kumar, and the widow of a seventh brother. It is the plaintiffs' case that such company petition, CP No. 3 of 2006, was disposed of on the basis of two sets of terms of settlement executed on March 15, 2007: the first between the five Baheti brothers who are parties to the present suit on one side and Sushil Kumar and his immediate family on the other side; the second between these five Baheti brothers on the one side and the branch of the deceased seventh brother on the other side. The

3

terms of settlement were taken on record by the Company Law Board on May 15, 2007 and CP No. 3 of 2006 disposed of on such basis. The plaintiffs have relied on the two several sets of the terms of settlement executed on March 15, 2007 and the Company Law Board order of May 15, 2007.

There is not much dispute between the parties to the present proceedings that upon the settlement between these Baheti brothers and the families of the two others, these five Baheti brothers came to be in exclusive management of the plaintiff company. The plaintiffs say that by or about March, 2009 disputes and differences arose between the two plaintiff brothers on the one hand and the three defendant brothers on the other. These disputes were in respect of the management and administration of the plaintiff company which carries on business as transporter of goods, passengers, livestock and materials. By the middle of the year 2009, a second petition under, inter alia, Sections 397 and

398 of the Companies Act was instituted in respect of the plaintiff company by the plaintiff brothers against, inter alia, the defendant brothers. The plaintiffs demonstrate that by a consent order of July 20, 2009 the disputes covered in the second petition relating to the plaintiff company, CP No. 09(KOL)/09, were resolved. The order dated July 20, 2009 required the parties to report on October 30, 2009, possibly to ascertain whether the settlement had been completely worked out. Allegations have been made by the two sets of contesting parties of the other not complying with the informal terms recorded in the Company Law Board order of July 20, 2009. It is not necessary to enter into such disputes in the present proceedings.

After the prelude spread over ten paragraphs, the plaintiffs' immediate cause for instituting the action is spelt out at paragraph 11 of their principal interlocutory application. They complain of a notice of November 24, 2009 issued by advocate representing the defendant brothers by which an arbitration clause was invoked for settlement of certain disputes on the basis of a claim that such arbitration clause was contained in a memorandum of understanding of March

4

15, 2007. The plaintiffs submit that there is no arbitration agreement between the plaintiffs and the first three defendants. At the time that the suit was instituted and the plaintiffs filed their principal interlocutory application, no copy of the arbitration agreement was apparently available with the plaintiffs. Upon a copy of the memorandum of understanding of March 15, 2007, which contains the arbitration agreement, being supplied to the plaintiffs, there is a more detailed attack as to the existence of the agreement in the affidavit in reply. But since the original grievance with which the plaintiffs came to court was that no copy of the arbitration agreement had been supplied by the defendants despite demand, the challenge to the existence of the arbitration agreement is somewhat fluid in the petition relating to GA No. 379 of 2010. It is the plaintiffs' case that they were not aware of any arbitration agreement between themselves and the first three defendants. The challenge in the plaint and in their application is to the factum and existence of the arbitration agreement. The plaintiffs cite the surrounding circumstances and the failure of the first three defendants to cite the arbitration agreement at an earlier stage. They say that not only did the purported arbitration agreement not surface upon disputes breaking out between these five brothers, there was no reference to it despite the second company petition before the Company Law Board being instituted and, seemingly, the disputes being settled by July, 2009. They suggest that the purported arbitration agreement was thought up by the first three defendants or on their behalf in course of these three defendants attempting to wriggle out of the informal settlement recorded in the Company Law Board order of July 20, 2009.

In the suit the plaintiffs have obtained leave under Order II Rule 2 of the Code of Civil Procedure and leave under clause 12 of the Letters Patent. The reliefs claimed are as follows:

"a. Decree for declaration that the notice dated 24th November, 2009 and the notice dated 1st January, 2010 are illegal, null and void;

b. Decree for delivery up and cancellation of the notice dated 24th November, 2009 and the notice dated 1st January, 2010 and for the same be adjudged null and void;

5

c. Decree for declaration that there is no arbitration agreement between the parties for adjudication of any disputes and differences by the defendant No.4;

d. Decree for declaration that the defendants are not entitled to proceed in arbitration as against the plaintiffs;

e. Decree for perpetual injunction restraining the defendants and each one of them from proceeding any further with the arbitration on the basis of the notice dated 24th November, 2009 and 1st January, 2010;

f. Decree for perpetual injunction restraining the defendants and each one of them from taking any step or any further steps on the basis of the purported notice dated 24th November, 2009 and the notice dated 1st January, 2010;

g. Attachment before judgment;

h. Receiver;

i. Injunction;

j. Costs;

k. Further or other reliefs;"

On the plaintiffs' initial application, an ex parte order was made on February 11, 2010 in terms of prayer (b) of the petition, restraining the first three defendants from proceeding any further with the purported reference before the fourth defendant. The defendants were directed by such order to produce the arbitration agreement on the returnable date. The matter was next taken up on February 24, 2010 when directions were given for filing affidavits; the interim order was extended for a period of five weeks; and, the original memorandum of understanding of March 15, 2007 was directed to be kept on record. By subsequent orders of March 30, 2010 and May 17, 2010, the interim order was extended till May 17, 2010 and June 30, 2010, respectively.

6

The impugned notice of reference of November 24, 2009 was also addressed by advocate representing the three defendant brothers to the plaintiff company at its registered office and at its other offices said to be in Pune and Aurangabad. The second and third plaintiffs herein were the fourth and fifth addressees of the notice of November 24, 2009. The notice claimed that the plaintiff brothers and the defendant brothers were directors of the plaintiff company and were also shareholders and directors of five other sister companies "either directly or through family members." The notice asserted that in the year 2005 certain disputes "arose amongst the directors and shareholders aforesaid companies and pursuant to the memorandum of understanding dated 15/03/2007, the disputes amongst the directors of the aforesaid companies are

resolved and prior to resolution of disputes, the out going directors as well as present directors, filed several Criminal as well as Civil case against each other and therefore with a view to avoid, the unnecessary and unwarranted proceedings, the remaining directors including my clients, as well as you addressee Nos. 4 and 5 by entering into memorandum of understanding dated 15/03/2007 itself, decided to resolve the future disputes if any by way of process of arbitration and none of the directors or shareholders of the aforesaid companies shall be entitled to initiate Criminal proceeding in future."

The third paragraph of the notice of November 24, 2009 alleged that disputes arose between the plaintiff brothers and the defendant brothers in the year 2008 and despite the plaintiff brothers apparently being aware of the memorandum of understanding of March 15, 2007 they approached the Company Law Board "for alleged oppressions and mismanagements of the company on the part of my clients and ... by suppressing this arbitration agreement, obtained certain orders also from the Hon'ble Company Law Board." Though the suggestion in the third paragraph of the notice is that the Company Law Board proceedings initiated by the plaintiff brothers were in derogation of the arbitration agreement, the fourth paragraph of the letter claimed that the charges of oppression and mismanagement and other disputes under Section

7

235, 397, 398, 402 and 403 of the Companies Act "are specifically excluded from the operation of the arbitration agreement ..." The fifth paragraph proceeded to set out the subject-matter of the disputes to be resolved through the process of arbitration. The sixth paragraph alleged mismanagement of the company by the plaintiff brothers and persons under their control and misappropriation of funds from the Pune branch of the company. It is in the light of such charge of mismanagement of the company and misappropriation of company funds at its Pune branch that the arbitration agreement was invoked. The sixth paragraph referred to non-renewal of the company's contract with Tata Motors Distribution Ltd, Pune. The seventh paragraph of the letter referred to the contract between the company and the Mahindra Motors, Nasik being non-operational "because of the huge misappropriation of funds and mismanagement on the part of you addressee Nos. 4 and 5 ..." The eighth paragraph claimed that the contract between the company and General Motors Ltd, Talegaon, Pune had become "practically non-operational" because of "mismanagement and misappropriation of funds ..." It is such disputes as covered by paragraphs 6, 7 and 8 of the letter that were sought to be referred to arbitration. In addition, the ninth paragraph said that "my client(s) have decided to resolve all the disputes amongst the directors even with respect to their rights, interest and liabilities in the aforesaid companies by invoking the arbitration clause as per memorandum of understanding dated 15/03/2007."

The tenth paragraph of the notice informed the addressees that the defendant brothers had decided to appoint the fourth defendant as arbitrator "to resolve the various disputes and differences between you addressee Nos. 4 and 5 and my clients, with respects to the above mentioned companies." A copy of such letter was marked to the fourth defendant with a request to enter upon the reference.

The plaintiff brothers responded through advocate's letter dated January 4, 2010, asserting that there was no question of going to arbitration "as there exists

no Arbitration Agreement entered between our clients and your client." The plaintiff brothers called upon the defendant brothers "to produce/supply the purported Arbitration Agreement/Memorandum of Understanding dated 15th March, 2007" and denied all allegations contained in the notice of November 24, 2009. A copy of such response of January 4, 2010 was marked to the fourth defendant.

By a letter of January 1, 2010, the fourth defendant informed each of the other parties to the present proceedings that he had been "duly appointed" as arbitrator by "some of the Directors" to resolve the disputes in terms of the arbitration clause in the memorandum of understanding of March 15, 2007 "executed amongst all the Directors of the company ..." The fourth defendant, a retired district and sessions judge, invited all the addressees to be represented "on 14/01/2009 on my official residence ..." Later in the letter, the correct date was indicated.

The plaintiff brothers caused a reply to be issued to the fourth defendant by a letter of January 13, 2010. They asserted that "there is no Memorandum of Understanding dated 15th March, 2007 containing any Arbitration clause." The also complained that despite demand, advocate representing the defendant brothers had not supplied the purported memorandum containing the arbitration clause. The letter signed off by repeating that there was no arbitration agreement between the parties. Copies of such letter appear to have been forwarded to the defendant brothers.

The fourth defendant issued a notice on January 15, 2010 fixing the first meeting in the reference on February 1, 2010. The fourth defendant recorded in the notice that each of the plaintiffs had failed to appear at the preliminary meeting on January 14, 2010. The fourth defendant called upon the company and the plaintiff brothers "to remain present" at the first meeting on February 1, 2010. A copy of the minutes of the preliminary meeting of January 14, 2010 was appended to the fourth defendant's notice of January 15, 2010. The minutes

9

recorded that, "None appeared for opposite parties i.e. for Company as well as" the plaintiff brothers. The minutes reflected the fourth defendant's decision "to reissue the notice to the Company Jamuna Transport Corporation as well as opposite parties/Directors ..."

A reply to the fourth defendant's second notice was issued by advocates representing the plaintiffs on January 29, 2010, on the same day that the plaintiffs claimed to have received the fourth defendant's letter. The plaintiffs' letter repeated that there was no arbitration agreement between the parties and enclosed a copy of their earlier letter of January 13, 2010.

In their affidavit to the plaintiffs' principal application, the first and seco defendants have clarified that the plaintiff company "is a separate legal entity, and therefore, it has no concern with the inter-se dispute/differences between the brothers ..." In the context of how a third memorandum of understanding came to be executed on March 15, 2007 when the plaintiffs claimed that the two agreements of such date concerned the settlement with the two other Baheti

branches, the first and second defendants claim at paragraph 5 of their affidavit that the third agreement was executed in the Alipore Judges Court before a separate notary public when the plaintiff brothers and the defendant brothers were present. Elsewhere in such affidavit and in their independent application, the defendants contend that this Court does not have the territorial jurisdiction to receive the suit in view of the forum selection clause contained in the relevant memorandum of March 15, 2007; that the reliefs claimed in the suit cannot be countenanced in view of Section 16 of the Arbitration and Conciliation Act, 1996; and, that in any event, the reference cannot be arrested by an order of a civil court.

On the plaintiffs' representation that they were not aware of the contents of the relevant memorandum of March 15, 2007 prior to the original thereof being carried to court on February 24, 2007 and a copy of it being made over to them, the plaintiffs elaborated in their affidavit in reply as to how the existence of the

10

arbitration agreement is inconsistent with the defendant brothers' conduct and is otherwise ex facie bad. In addition to the grounds of fraud pleaded at paragraph 23 of their principal application, the plaintiffs assert in their reply that the circumstances arouse such suspicion as to the existence of the arbitration agreement that the overwhelming convenience is to arrest the reference till the issue as to the existence of the arbitration agreement is determined by court.

The plaintiffs question why a different notary was needed for the execution of the relevant memorandum when two other memoranda were executed by all or most of the alleged executants of the third memorandum before another notary public. They say it is absurd that the alleged executants of the relevant memorandum would travel from Old Post Office Street to Alipore Court or vice-versa when there was no logical reason for the alleged third document to be dealt with differently. The plaintiffs describe it as perplexing that the second plaintiff had allegedly presented the relevant memorandum to the notary public but the original thereof was produced by the defendant brothers. They suggest that it was abnormal for the relevant memorandum to contain an arbitration clause when there was no dispute between these five brothers, though the memoranda relating to the settlement with the two other branches contained no arbitration clause. The plaintiffs state that they are bemused that the arbitration agreement did not surface when the disputes between these brothers were carried to the Company Law Board. They say that in a subsequent suit brought by the company against its bank the company had complained of the defendant brothers interfering with the operation of the company's bank account despite the plaintiff brothers being the authorised signatories thereof. They point out that despite the defendant brothers not being parties to such suit (CS No. 21 of 2009), the court required notice to be issued to the objecting directors. The objecting directors appeared on February 11, 2009 but did not refer to their charges of mismanagement and misappropriation of company funds being covered by any arbitration agreement. The plaintiffs insist that the relevant memorandum has been manufactured and ante-dated as the following paragraph could not have

11

been incorporated on March 15, 2007 since the disputes with the other branches were resolved on or after May 15, 2007 when the other two memoranda were taken on record by the Company Law Board:

> "The parties of the first to fifth part had cleared the legal dues of said Mr. Sushilkumar Baheti and Rama Baheti as well as their family members and in this way the entire disputes resolved amicably in the year 2007 and ultimately aforesaid companies came into - control of parties of the first to fifth part."

Finally, the plaintiffs submit that the specific nature of disputes recorded in the purported arbitration agreement is a tell-tale indication of it being manufactured subsequently and being ante-dated. They refer to the strange procedure for the reference, to the procedure having been tailor-made for reference to the fourth defendant and to the unusual choice of forum despite the situs of the company being in Calcutta. This, according to the plaintiffs, together with the defendant brothers' refusal to supply a copy of the purported memorandum despite demand, makes the document highly incredible. To top it all, the plaintiffs refer to the second plaintiff's letter of January 19, 2009 to advocate who had represented these five plaintiff brothers in their matters relating to the disputes with the sixth brother. Such letter claimed that some blank signed papers had been left with such advocate. To this letter, advocate representing the defendant brothers in the 2009 Company Law Board proceedings responded by alleging that substantial fees remained outstanding and that it was ridiculous to suggest that any blank signed or unutilised papers remained with him. It is the plaintiffs' alternative case that one of the blank signed papers bearing the signatures of the five brothers left with advocate representing them earlier may have been misused as the last page of the purported memorandum in which the arbitration clause is set up.

The plaintiffs assert that it would take a lot to hold that the natural right of a party to institute a suit in respect of a civil claim is lost. They refer to Section 9 of the Civil Procedure Code and say that the Arbitration and Conciliation Act,

1996 does not expressly or impliedly bar the jurisdiction of a civil court to try a suit where the claim is for declaration of an arbitration agreement to be adjudged void or for delivery up and cancellation of any document containing such arbitration agreement on the ground that the plaintiff had not executed the document or otherwise entered into the arbitration agreement. So that the inherent authority of a civil court to receive and try all suits of a civil nature is not lost sight of, the plaintiffs rely on the judgment reported at 1966 (3) SCR 617 (Abdul Waheed Khan v. Bhawani) for the principle that it is for the party who seeks to oust the jurisdiction of a civil court to establish his contention and the corollary to the principle that the ouster of the jurisdiction of a civil court must be strictly construed. In the same vein, the judgment reported at 1969 (1) SCR 573 (Dewaji v. Ganpatlal) has been relied upon. The provision in the relevant statute in such case prohibited civil courts from entertaining any suit to obtain a decision on any matter which a revenue officer under such statute was empowered to determine, decide or dispose of. Prior to the relevant enactment coming into effect, a suit had been instituted in respect of a matter which, after the Act came into force, a revenue officer was empowered to determine. The question was whether the bar under the relevant statute to entertain any suit on a matter which a revenue officer under the enactment was empowered to determine implied that the pending suit could not be prosecuted after the Act

came into force. The Supreme Court opined that the bar was as to the prospective receipt of a suit and did not apply to the civil court's authority to try a pending suit.

The plaintiffs refer to Section 28 of the Contract Act, particularly the exceptions to the general rule as enumerated therein. They submit that Section 32 of the Arbitration Act, 1940, that barred a civil suit for a decision upon the existence, effect or validity of an arbitration agreement, has not been retained in any form in the 1996 Act.

13

A judgment reported at (2007) 2 LLR 1 (Albon v. Naza Motor Trading Sdn Bhd) is relied upon by the plaintiffs to demonstrate that an application for stay of a suit or reference of the disputes covered thereby to arbitration can be successfully resisted by citing the arbitration agreement to be an act of forgery. The defendant in that case applied under Sections 9 and 30 of the English Arbitration Act, 1996. Sub-section (4) of Section 9 of the English Act mandates that on an application under such section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed. Section 30 of the English Act permits an arbitral tribunal to rule on its own substantive jurisdiction unless otherwise agreed to by the parties. The ruling on the arbitral tribunal's substantive jurisdiction would cover issues as to whether there is a valid arbitration agreement, whether the tribunal is properly constituted, and whether the matters that have been carried to the reference are covered by the arbitration agreement. The plaintiff in that case contested the defendant's application for stay of the suit and reference of the disputes to arbitration on the ground that the agreement which was said to contain the arbitration clause was a forgery and that the plaintiff had not executed the document. In addressing such legal question, the court found that notwithstanding sub-section (4) of Section 9 of the English Act, the issue as to whether an agreement had been concluded between the parties had to be ascertained before assessing whether such agreement was null and void or inoperative or incapable of being performed. The substance of the reasoning is evident from paragraph 22 of the report:

> "22. As regards the fourth submission Mr Nathan relies on another dictum of Potter LJ in Downing where he said:
>
> > The burden of proving that any of the grounds in section 9(4) has been made out lies upon the claimant and, if the defendant can raise an arguable case in favour of validity, a stay should be granted: Hume v. AA Mutual International Insurance Co Ltd [1996] LRLR 19.
>
> The fact that under section 9(4) a party invoking an arbitration clause may need only to raise an arguable case of the validity of an arbitration

14

> agreement to entitle himself to a stay in no way militates against the existence of the requirement under section 9(1) of establishing the conclusion (and not merely the arguable conclusion) of an arbitration agreement. It is unnecessary to examine the question raised by Mr Waksman whether the statement of law by Potter LJ is established by the authority which he cited."

A Court of Appeal judgment between the same parties, reported at (2008) 1 LLR 1 (Albon v. Naza Motor Trading Sdn Bhd), is next cited by the plaintiffs. The question in that case was almost the same as the one that arises in the present proceedings. In the present suit the plaintiffs have questioned the very existence of an arbitration agreement set up by the first three defendants. The interlocutory order that the plaintiffs seek in aid of the primary relief in the suit is an injunction restraining the first three defendants from proceeding with the reference before the fourth defendant. The question before the Court of Appeal was a shade different. After the defendant's application seeking stay of the English proceedings in favour of arbitration in Malaysia had been rejected by the English court on the ground that the existence of the arbitration clause had to be ascertained, the plaintiff applied for an anti-arbitration injunction. The trial court considered two aspects: whether the English court had the jurisdiction to grant the injunction in respect of the arbitration in Malaysia; and, if so, whether the court should in its discretion bar the defendant from taking any further steps in the arbitration pending the English court's adjudication on the existence of the arbitration agreement, or whether the relief should be limited to barring the defendant from inviting the arbitrators to rule on the authenticity of the agreement while leaving it free to proceed with the arbitration in the interim. The trial court granted the injunction. The appellate court acknowledged and upheld the basis for the trial court granting the injunction. The trial court's reasoning rested on three planks: there would be limited scope in the arbitration until the authenticity of the agreement had been decided; it would be oppressive to the plaintiff who had limited funds to fight a battle on two fronts; and, it would not be long before the question of authenticity of the agreement was pronounced upon by the English court.

15

The appellate court observed that the related orders of the trial Judge had found that the plaintiff had a sufficiently good arguable case to continue the proceedings in England; that the plaintiff had made out a good arguable case not only that his signature on the agreement had been forged but that the forgery had been brought into existence to circumvent the English proceedings; and, that the English court was to be the final judge on the question of the authenticity of the agreement. The appellate forum found that in the circumstances "the immediate and co-extensive continuance of the arbitration proceedings is indeed unconscionable (in the sense of being oppressive) ..."

The plaintiffs have relied extensively on the Constitution Bench judgment reported at (2005) 8 SCC 618 (SBP & Co. v. Patel Engineering Ltd.). At paragraph 19 of the majority judgment, the Court rejected an argument that there was an exclusive conferment of jurisdiction on the arbitral tribunal to decide on the existence or validity of the arbitration agreement. The court held that in an application under Section 8 of the 1996 Act, the judicial authority receiving such application was not to act mechanically and refer the parties to arbitration, but "has necessarily to decide whether, in fact, there is in existence a valid arbitration agreement and whether the dispute that is sought to be raised before it, is covered by the arbitration clause." The court observed that even when a petition under Section 9 of the 1996 Act was carried to a court and the respondent disputed the existence of the arbitration agreement, "that court had

necessarily to decide whether it has jurisdiction, whether there is an arbitration agreement which is valid in law and whether the dispute sought to be raised is covered by that agreement."

At paragraph 20 of the report, the scope of Section 16 of the 1996 Act has been recognised in the following words:

> "20. Section 16 is said to be the recognition of the principle of Kompetenz-Kompetenz. The fact that the Arbitral Tribunal has the competence to rule on its own jurisdiction and to define the contours of its jurisdiction, only means that when such issues arise before it, the Tribunal can, and possibly, sought to decide them. This can happen when the parties have gone to the Arbitral Tribunal without recourse to Section 8 or 11 of the Act. But where the jurisdictional issues are decided under these sections, before a reference is made, Section 16 cannot be held to empower the Arbitral Tribunal to ignore the decision given by the judicial authority or the Chief Justice before the reference to it was made. The competence to decide does not enable the Arbitral Tribunal to get over the finality conferred on an order passed prior to its entering upon the reference by the very statute that creates it. That is the position arising out of Section 11(7) of the Act read with Section 16 thereof. The finality given to the order of the Chief Justice on the matters within his competence under Section 11 of the Act are incapable of being reopened before the Arbitral Tribunal. In Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd., (2002) 2 SCC 388 what is considered is only the fact that under Section 16, the Arbitral Tribunal has the right to rule on its own jurisdiction and any objection, with respect to the existence or validity of the arbitration agreement. What is the impact of Section 11(7) of the Act on the Arbitral Tribunal constituted by an order under Section 11(6) of the Act, was not considered. Obviously, this was because of the view taken in that decision that the Chief Justice is not expected to decide anything while entertaining a request under Section 11(6) of the Act and is only performing an administrative function in appointing an Arbitral Tribunal. Once it is held that there is an adjudicatory function entrusted to the Chief Justice by the Act, obviously, the right of the Arbitral Tribunal to go behind the order passed by the Chief Justice would take another hue and would be controlled by Section 11(7) of the Act."

Paragraph 39 of the report lists what the Chief Justice or his designate receiving a request under Section 11 of the Act is to decide at such stage. Though the question involved in the present proceedings is not related to the bounds of authority of a Chief Justice or his designate under Section 11 of the 1996 Act, it cannot be missed that the underlying legal thought therein is the primacy of the regular institution of adjudication over the consensual forum. The next judgment that the plaintiffs bring is reported at (2007) 5 SCC 510 (India Household and Healthcare Ltd v. LG Household and Healthcare Ltd.). The judgment is on an application to the Chief Justice of India for securing the constitution of an arbitral tribunal for an international commercial arbitration. The respondent opposed the request on the ground that the agreement containing the arbitration clause was vitiated by fraud. The allegation levelled by the respondent was that the petitioner had bribed certain officials for creating the documents and the officials had been convicted and sentenced to

undergo imprisonment by the criminal court in Korea. The respondent in that case had filed a suit in the Madras High Court and obtained an interlocutory injunction restraining the petitioner in the Section 11 proceedings from taking further steps under the agreement containing the arbitration clause. At paragraph 10 of the report, the Supreme Court held that though the court would ordinarily lean in favour of an arbitration agreement, "when a question of fraud is raised, the same has to be considered differently." Fraud, the Supreme Court said, vitiates all solemn acts and a "contract would mean a valid contract; an arbitration agreement would mean an agreement which is enforceable in law." The court referred to Section 45 of the 1996 Act, noticed the injunction passed by the Madras High Court, referred to the celebrated decision in Manohar Lal Chopra v. Seth Hira Lal [(1962) Supp 1 SCR 450; where the Supreme Court recognised the inherent jurisdiction of a civil court to pass an order of injunction de hors Order XXXIX of the Code of Civil Procedure] and, applied the principle of comity of courts to hold that the request made under Section 11 of the 1996 Act was not maintainable at that stage.

The plaintiffs have next brought a judgment reported at (2008) 2 SCC 602 (Atul Singh v. Sunil Kumar Singh). The question arose in connection with an application under Section 8 of the 1996 Act to, effectively, arrest the suit. The main relief in the suit was for a declaration that a certain partnership deed was illegal and void. One of the defendants applied under Section 8 of the 1996 Act for reference of the disputes to arbitration. The application failed on the ground that the predecessor-in-interest of the plaintiffs was not a party to the partnership deed which contained the arbitration clause and that since a declaration had been sought for adjudging such deed to be illegal, the question could only be decided by the civil court. The High Court allowed the civil revisional application from the trial court order dismissing the Section 8 application but made no specific order for referring the parties to arbitration. The Supreme Court held that for Section 8 of the 1996 Act to be applicable, "it is absolutely essential that there should be an arbitration agreement between the parties." The decision, however, turned on the admitted fact that neither the plaintiffs nor their predecessor-in-interest was a party to the partnership deed which contained the arbitration clause.

The plaintiffs endeavour to demonstrate that not only would the setting up of an arbitration agreement not denude the civil court of its authority to adjudicate upon the existence of such agreement, but also that there are circumstances where a reference may be declined notwithstanding the admitted execution of an arbitration agreement covering the disputes. For such purpose, the plaintiffs rely on a judgment reported at (2010) 1 SCC 72 (N. Radhakrishnan v. Maestro Engineers) where the issue was slightly removed from what falls directly for consideration in the present proceedings. The court held in that case that despite the existence of an arbitration agreement and the disputes in the suit falling within the purview thereof, if the adjudication of the disputes required detailed investigation and production of elaborate evidence, such disputes had to be tried by court. The N. Radhakrishnan judgment, though not strictly applicable to this case, appears to enlarge the extent of the primacy of the civil court over the agreed private forum. The arbitration agreement was not in dispute in that case. Charges of misappropriation of funds were levelled against the plaintiff in that case by a partner and the suit was instituted for a declaration that the complaining person was not even a partner of the defendant firm. The judgment noticed the dictum of a three-Judge Bench in Abdul Kadir Shamsuddin Bubere v. Madhab Prabhakar Oak

[(1962) 3 SCR 702] that where serious allegations of fraud are made against a party and such party charged with fraud desires that the matter should be tried in open court, it would be sufficient cause for the court not to order an arbitration agreement covering the disputes to be filed. Though Abdul Kadir was a case under the 1940 Act and notwithstanding the transformation of the law on arbitration in the country upon the 1996 Act coming into force, N. Radhakrishnan found that an element of discretion was still retained by the court to refuse a prayer for reference despite an admitted arbitration agreement.

The plaintiffs rely on an unreported Division Bench judgment of this Court in GA No. 1459 of 2009, APOT No. 190 of 2009, GA No. 640 of 2009, CS No. 61 of 2009 (Siddhi Vinayak Industries Pvt Ltd v. Virgoz Oils & Fats PTE Ltd) delivered on September 7, 2009 where it was held that Section 16 of the 1996 Act is an enabling provision that permits the arbitral tribunal to rule on its own jurisdiction; but that does not imply that the jurisdiction of the civil court to consider such matter has been ousted. In another unreported Division Bench judgment of this Court in GA No. 678 of 2009, CS No. 69 of 2009 (Nicco Corporation Ltd v. Prysmian Cavie Systemi Energia s.r.1.) delivered on January 29, 2010, it was held that if the factual existence of an arbitration agreement was questioned the civil court would have authority to entertain a suit; but if the question hinged on the legal existence or validity of the arbitration agreement, it would be the arbitral tribunal that would have exclusive jurisdiction. It must, of course, be noticed that both the unreported judgments were rendered in the context of Section 45 of the 1996 Act relating to an arbitration agreement covered by the New York Convention. The wording of Section 45 of the 1006 Act is somewhat similar to sub-section (4) of Section 9 of the English Act as the judicial authority receiving a Section 45 application has to assess whether the arbitration agreement "is null and void, inoperative or incapable of being performed."

The plaintiffs finally cite a Division Bench judgment of this Court reported at 2009 (2) CHN 597 (G.E. Capital Transportation Financial Services Ltd. v. Amritajit Mitra). The 21 appeals that were disposed of by such judgment were directed against similar orders passed by the trial court extending ad interim orders of injunction earlier granted restraining the defendant financier in each case from taking possession of the relevant vehicle till the disposal of the interlocutory application. The grievance of the financier appellant was that such order had been continued despite the financier's application under Section 8 of the 1996 Act seeking a reference of the disputes to arbitration. Paragraph 3 of the judgment records that the plaintiffs had claimed a declaration that they were the owners of the relevant vehicles and that the defendant financiers had no right to interfere with the plaintiffs' possession of the vehicles. A second declaration was sought in each suit to the effect that the plaintiffs were entitled to get the papers and documents upon which the plaintiffs' signatures were apparently taken in blank by the defendant financiers. A permanent injunction was also sought to restrain the financiers from seizing or otherwise taking possession of the vehicles or disturbing the plaintiffs' possession thereof. In all the suits, on the plaintiffs' applications for temporary injunction notices were issued to the defendant financiers and an ad interim order of injunction or status quo was granted for a limited period. The defendants thereafter entered appearance and applied under Sections 5 and 8 of the 1996 Act seeking reference of the disputes to arbitration. The plaintiffs objected in writing to such prayer of the defendants, but before the matters were taken up for hearing the plaintiffs applied under Section 151 of the Code of Civil

Procedure for their injunction applications to be treated as petitions under Section 9 of the 1996 Act. In most of the matters, as the judgment records at paragraph 6, the suits and the interlocutory applications were converted into miscellaneous cases under Section 9 of the 1996 Act and the ad interim order of injunction was continued till disposal of such Section 9 applications.

The first question framed by the Division Bench (at paragraph 17 of the report) was as to whether the suits and the interlocutory applications therein could be converted into applications under Section 9 of the 1996 Act without determining the question as to whether there was a valid arbitration agreement in each case. The next question framed is reflected in paragraph 19 of the report:

> "19. The next question is whether the plea that the written agreement between the parties containing the clause of arbitration was void as the signature of the one of the parties was taken on a blank paper can at all be decided by the arbitrator and whether even disputing the agreement between the parties as a void agreement on the aforesaid ground one can maintain an application under section 9 of the Act."

The Division Bench noticed, inter alia, the Supreme Court judgments in SBP Co., Atul Singh and India Household and Healthcare Ltd and observed that if the respondents' contention was upheld, that even the question as to whether the purported arbitration agreement was vitiated by fraud or coercion should be decided by the arbitrator, "the result would be disastrous." The disastrous consequence was elucidated by the following example:

> "23. A fraudulently prepares an agreement by forging the signature of B and in that fraudulent agreement makes a provision of appointment of C, a friend of A as arbitrator as if appointment of C is consented by B. B files a civil suit challenging the signature of B as an outcome of fraud and forgery. If we accept the contention of the learned counsel for the respondent that the Court should on the application of the Respondent under section 8 of the Act without deciding the dispute of fraud mechanically refer the dispute to C, in that case, it would be an abuse of process of law to compel B to face the adjudication before C, the man set up by A, of the dispute of forgery. The aforesaid contention is opposed to the observation of the Supreme Court in the case of SBP & Co. (supra).
>
> The Division Bench held that once the plaintiffs had prayed for the conversion of the suits to applications under Section 9 of the 1996 Act and had enjoyed the benefit of an order thereunder, they were precluded from contending that the arbitration agreements were vitiated by fraud. The judgment then proceeded to record at paragraph 25 of the report that such a plea "is available only by filing a suit in the Civil Court."

The contesting defendants say that in the plaintiffs' principal application the existence of the arbitration agreement has been questioned but the factum of the relevant memorandum of understanding containing the arbitration agreement has not been disputed. The contesting

defendants place several passages, including paragraphs 11 to 16, from the plaintiffs' first application and the letters addressed on behalf of the plaintiffs following the issuance of the notice of reference of November 24, 2009 and the fourth defendant's notices. These defendants point out that in the reliefs claimed only the existence of the arbitration agreement has been challenged, the relevant memorandum of understanding has not been.

On the legal aspect, the contesting defendants submit that there is a distinction between Section 8 of the 1996 Act and Section 45 thereof. It is their submission that a judicial authority receiving an application under Section 45 of the 1996 Act has a greater scope of assessing the arbitration agreement than a judicial authority receiving an application under Section 8 of the Act. It is on such basis that the contesting defendants distinguish the two unreported division Bench judgments of this Court cited by the plaintiffs. They suggest that the power conferred on a judicial authority receiving a Section 8 application has been curtailed because of the exclusive conferment of jurisdiction to assess the existence and validity of the arbitration agreement on the arbitral tribunal under Section 16 of the 1996 Act.

The first and second defendants rely on a judgment reported at (2005) 7 SCC 234 (Shin-Etsu Chemical Co. Ltd v. Aksh Opti Fibre Ltd). At paragraph 38 of the report there is a distinction which is made between the quality of assessment called for in an application under Section 8 of the 1996 Act and one under Section 45 of such Act.

The contesting defendants submit that unlike Section 34 of the 1940 Act which gave the court an element of discretion as to whether to enforce the arbitration agreement, there is no discretion which is conferred by the 1996 Act on a judicial authority in seisin of a dispute covered by an arbitration agreement. They suggest that since under sub-section (3) of Section 8 of the 1996 Act an arbitration may be commenced or continued and an award made therein notwithstanding the pendency of an application under Section 8 of the 1996 Act before a judicial authority, it would be absurd to hold that a civil court would have the authority to take up a question as to the existence of an arbitration agreement in preference to the arbitral tribunal. They refer to the judgment in Abdul Kadir, emphasise that the judgment was rendered under the old law and suggest that the entire object of the 1996 Act would be lost if an arbitration agreement could be avoided merely by alleging fraud. They rely on a judgment reported at 2006 (Suppl.) Arb LR 20 (Meguin GMBH & Co. v. Nandan Petrochem Ltd.) where a request made to the designate of the Chief Justice of India was acceded to notwithstanding an allegation of fraud.

On the judgments cited on behalf of the plaintiffs, the contesting defendant say that the two English judgments are distinguishable in view of sub-section (4) of Section 9 of the English Act. On India Household and Healthcare Ltd, the contesting defendants say that the judgment turned on the principle of comity of court. They contend that Atul Singh would have no bearing in the present case since the plaintiffs in that suit and their predecessors-in-interest were not parties to the subsequent partnership deed which had been challenged. They submit that the question involved in N. Radhakrishnan is far removed from the issue at hand and that the two unreported Division Bench judgments were in proceedings under Section 45 of the 1996 Act.

On the G.E. Capital judgment of a Division Bench of this Court, the contesting defendants submit that the question did not directly arise in such proceedings as to whether a civil suit could be maintained to challenge the existence or validity of an arbitration agreement and the relevant sentence in paragraph 25 of the report has to be read as an obiter dictum.

Before the more contentious legal issue is addressed, the merits of the case brought by the plaintiffs have to be assessed. If the quality of the case does not warrant any order of injunction it would be futile to enter the academic issue as to whether an injunction of the nature sought may be granted in law. On merits, the plaintiffs make out an overwhelming case to disbelieve the arbitration agreement that has been set up by the first three defendants. On March 15, 2007 two memoranda of understanding were admittedly executed, but these involved the two other Baheti brothers or their branches. At such point of time there did not appear to be any dispute between the five Baheti brothers who are parties to this suit. Prima facie, it appears unnatural that these brothers who were then together would contemplate future disputes arising between them and enter into an agreement containing an arbitration clause. There was no assertion of the existence of the third memorandum of understanding till the issuance of the notice of reference on November 24, 2009 by advocate representing the defendant brothers. Again, the arbitration agreement appears to be somewhat contrived. On a plain reading of it, it appears that it could be invoked only if three of the brothers jointly demanded it and not otherwise.

There is no merit in the contesting defendants' assertion that the execution of the third memorandum of understanding is virtually unquestioned. The letters addressed by the plaintiffs in response to the notices issued by and/or on behalf of the defendants undeniably question the existence of the third memorandum of understanding. It must also be remembered that it is the plaintiffs' case that prior to the third memorandum of understanding surfacing in court on February 24, 2010, they were not aware of such document, whether or not it had been manufactured or fraudulently prepared. There is a frontal attack on the existence of the third memorandum of understanding in the plaintiffs' affidavit-in-reply in their principal application. No leave has been sought by the contesting defendants to deal with such affidavit. In any event, this suit is for the principal purpose of questioning the existence of the arbitration agreement and that the plaintiffs have not sought to specifically challenge the alleged memorandum of understanding containing the arbitration agreement is of no consequence.

The purported arbitration agreement, the convoluted exclusion clause therein, the mode of appointment of the arbitrator and the seemingly unnatural forum selection clause - all these raise serious doubts as to the existence of the arbitration agreement. There is a further point which does not appear to have been specifically made by the plaintiffs. The contesting defendants have urged that there was no reason for them to produce the arbitration agreement in connection with the second company petition that was sought to be resolved by the order dated July 20, 2009 since the matters covered thereby were excluded. The second case before the Company Law Board was on account of oppression and mismanagement. A copy of the second company petition is appended to the first two defendants' affidavit in GA No. 379 of 2010. The allegations there include charges of defalcation of company funds by the defendant directors. The arbitration agreement that the contesting defendants rely on contains the exception clause to the following effect: "... except the

disputes covered under the provisions of Sections 235, 397, 398, 402 and 403 of Indian Companies Act 1956 ..." Apart from the strikingly strange coincidence that these were the very sections, along with Section 406, of the Companies Act that had been invoked by the petitioners in the second company petition, the charge levelled against the plaintiff brothers in the notice of reference is of misappropriation of funds and mismanagement of the first plaintiff company. The same is evident from paragraphs 6, 7 and 8 of the notice of reference. It is inconceivable that a charge of misappropriation of funds and mismanagement that can be made under Section 398 of the Companies Act would be beyond the purview of the arbitration clause if the charge was brought by the plaintiff brothers, but the same nature of charge would be covered by the arbitration agreement when the charges are levelled by the defendant brothers. It would be too fine a distinction to say that the same nature of charges would fall beyond the pale of the arbitration agreement if they have been made the subject-matter of a company petition, but similar charges would be within the fold of the arbitration agreement if they were brought otherwise than by way of a company petition. It would also rob the arbitration agreement of the essential element of mutuality.

Even overlooking the fact that the fourth defendant understood that the plaintiff company was also a party to the purported arbitral reference, the procedure for the appointment of the arbitrator under the purported arbitration agreement calls for scrutiny. The agreement conveniently records that a judicial officer not below the rank of "retired" district judge would be the sole arbitrator. The further qualification of the arbitrator is that he should have been a district judge or a superior judicial officer "of the concerned State/States where the question forming subject matter of Arbitration" arose. It is also a matter of suspicion that a retired district judge in the first defendant's backyard in Aurangabad propped up to be nominated on the strength of the tailor-made "agreed procedure" providing that at least three directors out of five had to give notice to an office of the plaintiff company for the commencement of the arbitral proceedings.

On merits, the writing containing the arbitration agreement appears to be a highly suspicious document and, on the basis of the material now presented, it appears to have been manufactured and brought into existence. It is of no mean importance that about ten months prior to the arbitration agreement being asserted for the first time, one of the plaintiff brothers had alleged that signed blank documents had been left in the possession advocate who had represented all five brothers in previous proceedings.

Despite the overwhelming case made out on merits, the entire exercise would come to naught if the civil court does not have jurisdiction to receive a suit challenging the existence of an arbitration agreement. On the basis of the authorities produced, there is little to go by except the underlying thought in N. Radhakrishnan and the Constitution Bench opinion in SBP & Co. that Section 16 does not confer exclusive jurisdiction to the arbitral tribunal to adjudicate upon its jurisdiction. In G.E. Capital, the question as to whether a civil suit would be maintainable on a challenge to the existence of an arbitration agreement was not directly in issue, though the Division Bench dwelt on such aspect.

In the form of jurisprudence that exists in this country, a natural right inheres in every person and legal entity to approach a civil court for a civil wrong, subject to the conditions as to territorial and

pecuniary limits recognised by the Code of Civil Procedure. The right to seek redress of a civil wrong may be taken away from a civil court or a person may be prohibited to canvass a particular grievance in a civil court by any express provision of law or by necessary implication. The prohibition by law may sometimes be on the civil court or otherwise be on the person seeking to institute a suit or in respect of particular matters. A court will not readily accept the bar by implication of the natural right to approach it for redress of a civil wrong. The civil court does not zealously guard its authority to massage any judicial ego, but only to uphold the basic right of a person to file a civil suit complaining of a civil wrong.

There is also a distinction, sometimes lost sight of, between a suit being not maintainable and the suit being utterly unmeritorious. Though the effective result in both cases may be the same, there is a gulf of difference between the two. In the first case, the best of claims has per force to be disregarded; in the second case the court has to exercise its jurisdiction to arrive at a conclusion that the claim is unmeritorious. The point that the contesting defendants canvass in the present proceedings is that a civil court is precluded from entering into the question as to whether an arbitration agreement is authentic.

Arbitration, by its very nature, is consensual. A claim founded on an agreement where the arbitration clause stares in the face may be carried by way of a civil suit. The authority of the civil court to receive the suit is not denuded by the mere admitted existence of the arbitration agreement covering the matters in issue or likely to be in issue in the suit. Just as it is open to two parties to agree to have the disputes in relation to certain transactions being adjudicated by a private forum, it is equally possible that notwithstanding such agreement the parties waive it. The maintainability of a suit where the disputes are covered by an arbitration agreement can never be questioned; what can be questioned is as to whether the suit should be continued in the civil court upon the defendant asserting the arbitration agreement and, in effect, seeking to specifically enforce the same.

The understanding of the 1996 Act has undergone a sea change. To begin with, the 1996 Act was touted to have curbed the authority of the natural forum in a severe way. A Constitution Bench in Konkan Railway v. Rani Construction [(2002) 2 SCC 388] regarded the process of receipt of a request for reference under Section 11 of the 1996 Act to be administrative in nature. A larger Bench in SBP & Co. has now found that it is a judicial exercise. Despite Sections 8 and 11 of the 1996 Act not specifically conferring authority on the judicial authority or the Chief Justice or his designate receiving applications under such provisions to adjudicate upon the existence of the arbitration agreement, it has now been established that such power inheres in the judicial authority or the Chief Justice or his designate receiving such applications.

Section 16 of the 1996 Act has been held to not confer exclusive jurisdiction on the arbitral tribunal to adjudicate upon its jurisdiction. One can do no better than to refer to the example cited in G.E. Capital to press home the point. It would be absurd to suggest that when a party claims that it has had no transaction with another party and has not entered into an arbitration agreement with that other party, a fraudulent reference by the other party to a pliant arbitrator would rob the first party of its inherent right to approach the civil court to seek a declaration as to the existence of the arbitration agreement or the cancellation thereof. A suit would be maintainable in every case that

the physical existence of an arbitration agreement is questioned by a person who is alleged to be a party thereto.

That might open the floodgates for every knave to postpone judgment against himself by making a frivolous claim in a civil suit challenging the existence of the arbitration agreement. That is when the underlying purpose and objective of the 1996 Act would come into play. There is no provision in the 1996 Act that corresponds to Section 35 of the 1940 Act. The mere filing of a suit challenging the existence of an arbitration agreement will neither preclude the arbitral tribunal from proceeding with the reference nor absolve the plaintiff from participating therein. It is only a specific interlocutory order in such suit, upon appreciating an overwhelming case being made out, that would arrest the reference. Ordinarily, a civil court would lean towards arbitration to hold the parties to their bargain. It is a lot more than an arguable case that has to be made by a plaintiff to obtain an interlocutory order of injunction to arrest the initiation or the continuation of an arbitration reference. But if such a case is made out, the civil court, as the natural forum in our form of jurisprudence to receive claims against any civil wrong, has unbridled authority to stop the commencement of an arbitration reference or the continuation thereof. The onus will be heavy on the plaintiff to demonstrate the lack of existence of the arbitration agreement. Ordinarily, an interlocutory injunction to arrest arbitration may not be made unless there is a seriously credible charge of fraud in the creation of the document that is the arbitration agreement. It is more the challenge to the physical existence of an arbitration agreement that a court would look at to issue an interlocutory injunction to thwart a reference than the legal efficacy of an executed arbitration agreement.

Since it is found that a suit challenging the physical existence of an arbitration agreement would be maintainable and since an overwhelming case has been made out by the plaintiffs to cast doubts on the existence and execution of the arbitration agreement, GA No. 379 of 2010 is allowed by restraining the first three defendants from acting in pursuance of the purported arbitration agreement contained in the third memorandum of March 15, 2007 in any manner whatsoever. The effect is that there can be no reference in terms of such purported agreement. The first two defendants' application, GA No. 906 of 2010, is dismissed. In view of the order already made in GA No. 379 of 2010, GA No. 2143 of 2010 is disposed of without any further order. The first three defendants will pay costs of these applications assessed at 10,000 GM to the plaintiffs, if the suit succeeds. If the suit fails, the plaintiffs will be jointly and severally liable to pay costs of 6,000 GM to the first two defendants.

Urgent certified photocopies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(Sanjib Banerjee, J.)