(2014) 14 Supreme Court Cases 574 : (2015) 1 Supreme Court Cases (Civ) 374 : (2014) 184 Comp Cas 1 : 2013 SCC OnLine SC 1084

In the Supreme Court of India

(BEFORE G.S. SINGHVI AND V. GOPALA GOWDA, JJ.)

CHATTERJEE PETROCHEM COMPANY AND ANOTHER . . Appellants;

Versus

HALDIA PETROCHEMICALS LIMITED AND OTHERS . . Respondents.

Civil Appeal No. 10932 of 2013[†], decided on December 10, 2013

A. **Arbitration and Conciliation Act, 1996 — Ss. 45 and 5 — International commercial arbitration whose juridical or legal seat of arbitration is outside India (foreign-seated ICA) where arbitration agreement entered into prior to 6-9-2012 [cut-off date laid down by five-Judge Bench in *BALCO*, (2012) 9 SCC 552 : *Bhatia International*, (2002) 4 SCC 105 and *Venture Global*, (2008) 4 SCC 190 still good law only for arbitration agreements entered into prior to 6-9-2012]**

— Foreign-seated ICA agreement dt. 12-1-2002 in present case providing for reference of all disputes, in any way relating to the said agreement to Arbitral Tribunal under Rules of ICC at Paris — Applicability of S. 5 of the 1996 — Bar of intervention of judicial authority in foreign-seated ICAs

— As per the law applicable to arbitration agreements entered into prior to 6-9-2012, S. 5 being general provision, is applicable to entire Act, including foreign-seated international arbitrations — Hence suit challenging invocation of such arbitration clause on ground that it was void in Indian courts, held, not maintainable[*]

— Suit filed against invocation of arbitration clause in said agreement dt. 12-1-2002 for arbitration before International Chamber of Commerce (ICC) at Paris on ground that principal agreement (dt. 12-1-2002) itself perished along with arbitration clause since it was novated by subsequent agreements dt. 8-3-2002 and 30-7-2004 which did not contain any arbitration clause — Maintainability — High Court prima facie holding that principal agreement was extinguished since it was substituted with agreements which did not contain arbitration clauses and which provided that courts at Calcutta shall alone have jurisdiction — Sustainability

— Held, there is no inherent right of filing a suit when it is barred by

statute — In instant case, since S. 5 of 1996 Act prohibits judicial intervention, abovesaid suit is not maintainable — Subsequent agreements dt. 8-3-2002 and 30-7-2004 reiterated that agreement dt. 12-1-2002 remains principal agreement and binding, subsisting, enforceable and in force

between parties — Hence, there was no novation of principal agreement — Hence arbitration clause therein remained valid and subsisting — Further, cl. 7.5 of agreement dt. 8-3-2002 merely provided jurisdiction to courts at Calcutta in relation to disputes under said supplementary agreement — It did not make principal agreement subject to jurisdiction of courts at Calcutta — Hence, held, arbitration clause in agreement dt. 12-1-2002 is valid and appellant is entitled to invoke said arbitration clause for settling disputes

— Further contention that a non-signatory (CPIL, affiliate of appellant) to agreement cannot invoke arbitration clause rejected, for it is party to subsidiary agreements and directly affected by principal agreement and as per law laid down in *Chloro Controls*, (2013) 1 SCC 641, it being a directly affected party had requisite locus standi to invoke arbitration clause — Civil Procedure Code, 1908 — S. 9 — Contract Act, 1872 — S. 69 — Novation — Subsistence of principal agreement

(Paras 22 to 39)

B. **Arbitration and Conciliation Act, 1996 — Ss. 7 and 45 — Reference to arbitration — Invocation of arbitration agreement by non-signatory/third party to agreement — Permissibility — In instant case, CPIL, an affiliate of appellant, being affected party in the proceedings, applying *Chloro Controls*, (2013) 1 SCC 641, held, can invoke arbitration clause**

(Paras 39 to 41)

Chloro Controls India (P) Ltd. v. *Severn Trent Water Purification Inc.*, (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689, *applied*

C. **Arbitration and Conciliation Act, 1996 — Ss. 45 and 16 — Foreign-seated ICA agreement — Invocation of — Suit challenging the same on ground that said agreement was no longer valid held to be not maintainable — Court if may still record prima facie finding that said agreement is not void, or question must be left to arbitrator to decide the same on kompetenz kompetenz principle — Arbitration — International Chamber of Commerce Rules, 1998, S. 6**

D. **Arbitration and Conciliation Act, 1996 — Ss. 45 and 5 — "Action pending before the judicial authority" — Scope of — Suit filed in Indian court challenging foreign-seated ICA agreement on ground that it was no longer valid — If such suit "action pending before the judicial authority" — If such**

suit non-maintainable, then whether court may still exercise jurisdiction under S. 45 to see whether the arbitration agreement is valid, operative and capable of being performed, before referring the parties to arbitration

Allowing the appeal, the Supreme Court

Held :

It is nowhere mentioned in the letter dated 8-3-2002 that transfer of shares to CPIL instead of CPMC extinguishes the principal agreement dated 12-1-2002 to nullity. Further, Clause 1 of the supplementary agreement dated 30-7-2004 reads as:"pursuant to the said principal agreement the Government of West Bengal has caused WBIDC to transfer to CPIL, *an affiliate of CPMC* Rs 155 crores of shares from the shareholding of WBIDC existing on the date of principal agreement…." This clause goes to show that CPIL is an affiliate of CPMC. Further, the letter written by CPMC to WBIDC along with the agreement dated 8-3-2002 reads "…

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It is clarified that the aforesaid *shall not prejudice any of our rights under the said agreement dated 12-1-2002* and *all terms and conditions thereof shall continue to remain valid, binding and subsisting* between the parties to be acted upon sequentially." The contents of this letter go to show that the agreement dated 12-1-2002 remains the principal agreement while the agreement dated 8-3-2002 remains a supplementary agreement which was meant for restructuring of HPL on urgency.

(Paras 22 to 28)

Chatterjee Petrochem (India) (P) Ltd. v. *Haldia Petrochemicals Ltd.*, (2011) 10 SCC 466, *considered*

Govt. of W.B. v. *Chatterjee Petrochem (Mauritius) Co.*, APO No. 45 of 2007, decided on 21-9-2007 (Cal), *referred to*

Needle Industries (India) Ltd. v. *Needle Industries Newey (India) Holding Ltd.*, (1981) 3 SCC 333; *Radharamanan* v. *Chandrasekara Raja*, (2008) 6 SCC 750, *cited*

The agreement dated 30-7-2004 which is based on shareholding issues, also notes that "the parties hereby agree, record and confirm that *all other terms and conditions as contained in the said principal agreement shall remain binding, subsisting, effective, enforceable* and in force between the parties." These clauses of the subsequent agreements dated 8-3-2002 and 30-7-2004 go to show that there has been no alteration in the nature of rights and responsibilities of the parties involved in the contract. Consequently, there has been no novation of the contract.

(Paras 29 and 30)

The argument that Section 5 of the 1996 Act, which bars intervention by judicial

authority in arbitration agreement will not be applicable to international agreements such as the present case (under Part II of the 1996 Act) is rejected in view of the legal principle laid down by the Supreme Court in *Venture Global Engg.*, (2008) 4 SCC 190 [which is still good law for agreements entered into prior to 6-9-2012]. Further, a careful reading of Clause 7.5 of the agreement dated 8-3-2002 indicates that courts at Calcutta alone shall have jurisdiction in all matters relating only to the agreement dated 8-3-2002 which is essentially a supplementary agreement and does not, by any means, make the principal agreement dated 12-1-2002 subject to the jurisdiction of the courts at Calcutta.

(Paras 31, 32 and 38)

Venture Global Engg. v. *Satyam Computer Services Ltd.*, (2008) 4 SCC 190, *relied on* (overruled with respect to agreements entered into on and after 6-9-2012)

Bhatia International v. *Bulk Trading S.A.*, (2002) 4 SCC 105, *cited*

Therefore, both the Single Judge and the Division Bench of the High Court erred in arriving at the conclusion mentioned above and their findings are liable to be set aside. In the light of the settled law and also on the basis of the clauses of the principal agreement dated 12-1-2002 and subsequent agreements dated 8-3-2002 and 30-7-2004, read with Section 5 of the 1996 Act, the arbitration clause in the principal agreement continued to be valid in view of Clause 6 of the agreement dated 30-7-2004 and also by virtue of its mention in different parts of both the supplementary agreements dated 8-3-2002 and 30-7-2004. Therefore, the arbitration clause mentioned in Clause 15 of the arbitration agreement dated 12-1-2002 is valid and the appellant is entitled to invoke the arbitration clause for settling their disputes.

(Para 33)

Haldia Petrochemicals Ltd. v. *Chatterjee Petrochem (Mauritius) Co.*, (2013) 1 Cal LT 524; *Chatterjee Petrochem (Mauritius) Co.* v. *Haldia Petrochemical Ltd.*, (2013) 3 Cal LT 1, *reversed*

It was further contended that the suit was filed under Section 9 CPC and not Section 45 of the 1996 Act to contend that the Calcutta High Court (exercising its ordinary original jurisdiction) has the jurisdiction (territorial as well as pecuniary) to entertain the present suit under Section 9 CPC and grant of such interim injunctive relief as it deems fit under Order 39 Rules 1 and 2 CPC is permissible in law. The respondent relied on *Ganga Bai*, (1974) 2 SCC 393 to hold that there is an inherent right in every person to bring a suit of a civil nature. However, a careful reading of the decision leaves no doubt in the mind as has been held in *Ganga Bai case* that *there is an inherent right in every person to bring a suit of a civil nature and unless*

the suit is barred by statute one may, at one's peril, bring a suit of one's choice."

(Paras 35 and 36)

Ganga Bai v. *Vijay Kumar*, (1974) 2 SCC 393, *explained*

It is already held that the principal agreement dated 12-1-2002 continues to be in force with its arbitration clause in place. The agreement dated 12-1-2002 remains valid and the arbitration clause, with all fours, will be applicable to the parties concerned to get their disputes arbitrated and resolved in the arbitration as per the Rules of ICC. Therefore, the contention regarding the maintainability of the suit while examining the interlocutory order in the appeals, is therefore, untenable in law.

(Para 38)

SBP & Co. v. *Patel Engg. Ltd.*, (2005) 8 SCC 618, *distinguished*

Yograj Infrastructure Ltd. v. *Ssang Yong Engg. and Construction Co. Ltd.*, (2011) 9 SCC 735 : (2011) 4 SCC (Civ) 864; *Bajaj Auto Ltd.* v. *TVS Motor Co. Ltd.*, (2009) 9 SCC 797 (para 5) : (2009) 3 SCC (Civ) 882; *Shree Vardhman Rice & General Mills* v. *Amar Singh Chawalwala*, (2009) 10 SCC 257 : (2009) 4 SCC (Civ) 152; *Milmet Oftho Industries* v. *Allergan Inc.*, (2004) 12 SCC 624; *Dhariwal Industries Ltd.* v. *M.S.S. Food Products*, (2005) 3 SCC 63, *cited*

N-M/52665/SV

Advocates who appeared in this case:

Dr Abhishek Manu Singhvi, Sudipto Sarkar, Ashok Desai, R.S. Suri, K.K. Venugopal and C.A. Sundaram, Senior Advocates (Ms Maushumi Bhattacharya, Amit Bhandari, Ms Purnima Bhat Kak, Ms Suruchi Suri, Ms Pallavi Tayal, Ms Anu Bindra, Amar Gupta, Ananya Kumar, Mayank Mishra, Sidharth Nair, Sidharth Sethi and Dheeraj Nair, Advocates) for the appearing parties.

Chronological list of cases cited ***on page(s)***

1. (2013) 3 Cal LT 1, *Chatterjee Petrochem (Mauritius) Co.* v. *Haldia Petrochemical Ltd.* **(reversed)** 583*g-h*, 584*c*, 588*f-g*

2. (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689, *Chloro Controls India (P) Ltd.* v. *Severn Trent Water Purification Inc.* 583*b-c*, 584*e*, 587*g*

3. (2013) 1 Cal LT 524, *Haldia Petrochemicals Ltd.* v. *Chatterjee Petrochem (Mauritius) Co.* **(reversed)** 583*g-h*, 584*a-b*

4. (2011) 10 SCC 466, *Chatterjee Petrochem (India) (P) Ltd.* v. *Haldia Petrochemicals Ltd.* 579*a-b*, 579*c*

5. (2011) 9 SCC 735 : (2011) 4 SCC (Civ) 864, *Yograj Infrastructure Ltd.* v. *Ssang Yong Engg. and Construction Co. Ltd.* 580*d-e*

6. (2009) 10 SCC 257 : (2009) 4 SCC (Civ) 152, *Shree Vardhman Rice & General Mills* v. *Amar Singh Chawalwala* 582*h*

7. (2009) 9 SCC 797 : (2009) 3 SCC (Civ) 882, *Bajaj Auto Ltd.* v. *TVS Motor Co. Ltd.* 582*h*

8. (2008) 6 SCC 750, *Radharamanan* v. *Chandrasekara Raja* 579*g-h*

9. (2008) 4 SCC 190, *Venture Global Engg.* v. *Satyam Computer Services Ltd.* 581*b-c*, 585*f*

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10. APO No. 45 of 2007, decided on 21-9-2007 (Cal), *Govt. of W.B.* v. *Chatterjee Petrochem (Mauritius) Co.* 578*g-h*

11. (2005) 8 SCC 618, *SBP & Co.* v. *Patel Engg. Ltd.* 587*c*

12. (2005) 3 SCC 63, *Dhariwal Industries Ltd.* v. *M.S.S. Food Products* 583*a*

13. (2004) 12 SCC 624, *Milmet Oftho Industries* v. *Allergan Inc.* 582*h*

14. (2002) 4 SCC 105, *Bhatia International* v. *Bulk Trading S.A.* 581*a*, 585*f-g*

15. (1981) 3 SCC 333, *Needle Industries (India) Ltd.* v. *Needle Industries Newey (India) Holding Ltd.* 579*e*

16. (1974) 2 SCC 393, *Ganga Bai* v. *Vijay Kumar* 586*e-f*, 587*b*

The Judgment of the Court was delivered by

V. GOPALA GOWDA, J.— On 21-3-2012, the appellant, Chatterjee Petrochem (Mauritius) Co. (hereinafter referred to as "CPMC") filed a request for arbitration in International Chamber of Commerce (ICC), Paris, in relation to an agreement of restructuring which was entered into between CPMC, Government of West Bengal, West Bengal Industrial Development Corporation (in short "WBIDC") and Haldia Petrochemicals Ltd. (in short "HPL") on 12-1-2002. As per the agreement, the Government of West Bengal was to cause WBIDC to transfer existing shareholding to CPMC to ensure that CPMC holds 51% of the total paid-up capital of HPL. Clause 15 of the agreement provides for reference of all disputes, in any way relating to the said agreement or to the business of or affairs of HPL to the Rules of ICC, Paris.

2. The respondent HPL on the other hand, claims that the arbitration agreement contained in Clause 15 of the agreement dated 12-1-2002 is void and/or unenforceable and/or has become inoperative and/or incapable of being performed.

3. A dispute arose between the parties regarding the allotment of shares and the appellant filed Company Petition No. 58 of 2009 before the Company Law Board (in short "CLB") on the grounds of oppression and mismanagement. The appellant also sought transfer of 155 million shares in favour of Chatterjee Petrochem (India) (P) Ltd. (in short "CPIL"), the Indian counterpart of CPMC as was decided in the agreement.

4. The company petition was disposed of by CLB by upholding the decision of the Company to allot 155 million shares to Indian Oil Corporation (in short "IOC"). The transfer of 155 million shares to CPIL by WBIDC was also confirmed. CLB further directed the Government of West Bengal and WBIDC to transfer 520 million shares held by them in HPL to Chatterjee Groups.

5. The Government of West Bengal preferred an appeal against the said order before the High Court of Judicature of Calcutta under the provisions of Section 10-F of the Companies Act, 1956. The High Court set aside[1] the order of CLB on the ground that CPIL was not a member

of HPL and CLB could not have enforced its right under private contract entered into between

CPIL and WBIDC for transfer of shares as the same could not be the subject-matter of a petition under Section 397 of the Companies Act.

6. Aggrieved by the same, the appellant preferred Appeals Nos. 5416-19, 5420, 5437 and 5440 of 2008 before this Court. Vide judgment dated 30-9-2011[2], this Court held that the claim of the appellant transferring shares to IOC has changed the private character of the Company and was not an act of oppression on the part of the Company. According to this Court, the transfer of shares to IOC was a result of failure on the part of the appellant to infuse adequate funds into the Company by way of equity as promised and to participate in its rights issues. The Company was therefore, constrained to induct IOC as a member and the 155 million shares which were to be transferred to the appellant were instead transferred to IOC.

7. The relevant paragraphs of the judgment read as under: (*Chatterjee Petrochem case*[2], SCC p. 508, paras 148-150)

> "*148*. The failure of WBIDC and the GoWB to register the 155 million shares transferred to CP(I)PL could not, strictly speaking, be taken to be failure on the part of the Company, but it was the failure of one of the parties to a private arrangement to abide by its commitments. The remedy in such a case was not under Section 397 of the Companies Act.
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> *149*. It has been submitted by both Mr Nariman and Mr Sarkar that even if no acts of oppression had been made out against the Company, it would still be open to the learned Company Judge to grant suitable relief under Section 402 of the Act to iron out the differences that might appear from time to time in the running of the affairs of the Company.
>
> *150*. No doubt, in *Needle Industries case*[3], this Court had observed that the behaviour and conduct complained of must be held to be harsh and wrongful and in arriving at such a finding, the Court ought not to confine itself to a narrow legalistic view and allow technical pleas to defeat the beneficial provisions of the section, and that in certain situations the Court is not powerless to do substantial justice between the parties, the facts of this case do not merit such a course of action to be taken. Such an argument is not available to the Chatterjee Group, since the alleged breach of the agreements

referred to hereinabove, was really in the nature of a breach between two members of the Company and not the Company itself. *It is not on account of any act on the part of the Company that the shares transferred to CP(I)PL were not registered in the name of the Chatterjee Group. There was, therefore, no occasion for the CLB to make any order either under Section 397 or Section 402 of the aforesaid Act. If, as was observed in Radharamanan case*[4], *the CLB had given a finding that the acts of oppression had not been*

established, it would still be in a position to pass appropriate orders under Section 402 of the Act. That, however, is not the case in the instant appeals."

(emphasis supplied)

8. On this decision given by this Court, the appellant sought to invoke the arbitration clause contained in the agreement dated 12-1-2002 and made a request for arbitration. Respondent 1, on the other hand, filed a suit before the High Court of Judicature of Calcutta praying that the arbitration clause in the agreement be declared as void.

9. The learned Senior Counsel on behalf of the appellant, Dr Abhishek Manu Singhvi relied upon Clause 15 of the letter of agreement dated 12-1-2002 to contend that in respect of any dispute, difference or claims arising between the parties relating to this letter of agreement dated 12-1-2002, or any construction or interpretation relating to the working of or the business of Respondent 1, the parties shall first make an endeavour to settle their disputes, differences, etc. in accordance with the Rules of Arbitration of the International Chamber of Commerce. Therefore, the learned Senior Counsel contended that the validity or existence of the arbitration agreement is to be decided by the Arbitration Tribunal in terms of Article 6 of the ICC Rules, 1998 which is pari materia to Section 16 of the Arbitration and Conciliation Act, 1996 (in short "the A&C Act") and the civil court has no jurisdiction to decide on such issues. In support of this legal contention, the learned Senior Counsel relied upon the decision of this Court in *Yograj Infrastructure Ltd.* v. *Ssang Yong Engg. and Construction Co. Ltd.*[5] wherein it was held that the arbitration shall be held as is mentioned in the agreement which in the present case, is at Paris.

10. It is the further case of the appellant that the agreement dated 12-1-2002 between the parties was not novated by the subsequent

agreements. According to the appellant, the agreement dated 12-1-2002 is the principal agreement, which was later followed by the supplemental agreements dated 8-3-2002 and 30-7-2004. The letter of agreement dated 8-3-2002 did not create any independent legal right but was a mere direction from CPMC to transfer 155 million shares to its nominee CPIL to avoid delay. Therefore, according to the appellant, the letter of agreement dated 8-3-2002 provided that the terms and conditions of 12-1-2002 agreement would continue to remain valid and subsisting between the parties. The relevant clauses will be mentioned in the reasoning portion of the judgment.

11. The learned Senior Counsel relied upon Section 45 of the A&C Act to contend that the suit instituted by Respondent 1 against the request of arbitration by the appellant is not maintainable in law. He further argued that the suit instituted by Respondent 1 to restrain a foreign arbitration for resolution of the disputes between the parties was in violation of Section 5 of the A&C Act which limits judicial authority's intervention in arbitration and therefore the impugned order of injunction passed by the High Court of Judicature of Calcutta was contrary to law and therefore, the same is liable to

be set aside. In this regard, the learned Senior Counsel relied upon the three-Judge Bench decision of this Court in *Bhatia International* v. *Bulk Trading S.A.*[6] to contend that Section 5 of the A&C Act provides that no judicial authority shall intervene except where it is provided. The relevant paragraph will be extracted in the reasoning portion of the judgment.

12. Mr Sudipto Sarkar, learned Senior Counsel also appearing on behalf of the appellant further contended that the maintainability of the arbitration of the disputes between the parties can be established by relying on the decision of this Court in *Venture Global Engg.* v. *Satyam Computer Services Ltd.*[7] wherein it was held that Part I of the A&C Act will be applicable to international arbitrations as well. Therefore, Mr Sarkar contended that the arbitration clause will be a bar for judicial intervention in the present case in spite of the fact that it is an international arbitration as per the principal agreement which will be continued in force as per the terms of the supplemental agreements.

13. On the other hand, it is the case of the respondent HPL that the arbitration agreement dated 12-1-2002 is rendered void in respect of the claim for transfer of 155 million shares in favour of CPIL inasmuch

as the parties had contracted out of their earlier agreement and the legal liability in respect thereof was redefined in the subsequent 8-3-2002 agreement which provided for an exclusive jurisdiction to courts in Calcutta to decide disputes arising out of the said agreement. Therefore, it was pleaded by Mr Ashok Desai, learned Senior Counsel appearing on behalf of Respondent 1 HPL that once a party to an arbitration agreement seeks to adjudicate dispute before another forum and such forum arrives at conclusive findings of fact in relation to the dispute then, the subsequent effort on the part of the same party to refer dispute for arbitration under the ICC Rules would be vexatious and abuse of law and it shall be construed that the arbitration clause in the principal agreement has been rendered inoperative by the conduct of the party itself.

14. The learned Senior Counsel for Respondent 1 further claimed that Section 5 of the A&C Act can come into play only when existence of a valid arbitration agreement is established. Institution of such a suit by Respondent 1 would constitute an "action pending before the judicial authority" necessitating the invocation of Section 45 of the A&C Act, if one of the parties makes a request to refer the matter for arbitration. In such cases, the court must see whether the arbitration agreement is valid, operative and capable of being performed, before referring the parties to arbitration.

15. It is the further case of Respondent 1 that by the subsequent agreement through letter dated 8-3-2002, in respect of transfer of 155 million shares of HPL, new rights and liabilities were created by and between the non-parties to the arbitration agreement. The new agreement also provided

for a different dispute resolution mechanism among the parties, that is, the courts in Calcutta. The relevant clause will be extracted in the reasoning portion of the judgment.

16. The learned Senior Counsel, Mr K.K. Venugopal, appearing on behalf of Respondent 2, Government of West Bengal, contended that the Arbitration and Conciliation Act, 1996 does not apply to the present case. According to the learned Senior Counsel, a party may purport to appoint an arbitrator who may enter upon the arbitration even when there is serious dispute as to whether the arbitration clause exists. In spite of the fact that no arbitration clause exists, if a party resorts to arbitration, then neither Section 8 nor Section 45 of the A&C Act in case of international arbitration would provide for adjudication of the issue

as to whether the arbitration clause exists. It is only where a suit has first been filed, in point of time, on the substantive agreement or the underlying agreement, either by way of specific performance or for compensation for breach of contract, that Section 8 or Section 45 of the A&C Act would come into play. However, we are not inclined to comment on this contention since it is not pertinent to the case.

17. The learned Senior Counsel for Respondent 2 also contended that when no arbitration clause exists in the agreement, the matter cannot be adjudicated either under Part I or Part II of the A&C Act, rather the matter can be adjudicated only by an independent suit seeking injunction against the party who had initiated arbitration, from proceeding with the arbitration.

18. It is further the case of the learned Senior Counsel, Mr K.K. Venugopal that the facts of the present case are extraordinary and that the matter has been extensively litigated in the previous round both, before the Company Law Board and the appellate proceedings thereof. At no point in time did the Chatterjee Group or any of its constituent affiliates, save or reserve their right to seek arbitration under the alleged arbitration agreement which they now seek to enforce. This Court has already declined the reliefs on merit as well as on the point of jurisdiction. Therefore, he submits that at this juncture, invoking the arbitration clause from the principal agreement by the Chatterjee Group disregarding the agreement dated 8-3-2002, is clearly vexatious and abuse of the process of law. Therefore, the suit filed by Respondent 1 seeking injunction relief on arbitration is maintainable in law.

19. It is further the case of the learned Senior Counsel on behalf of Respondent 2 that the matter has been elaborately argued before this Court on complicated issues of law which arise for determination in the case. It is therefore, submitted by him that in such an event this Court would not render findings on questions of law while disposing an appeal against the interlocutory order so as to give finality in such findings. This approach of the Court is adopted in many cases arising under the Intellectual Property Law, namely, *Bajaj Auto Ltd.* v. *TVS Motor Co. Ltd.*[8], *Shree Vardhman Rice & General Mills* v. *Amar Singh Chawalwala*[9], *Milmet Oftho Industries* v.

Allergan Inc.[10] and *Dhariwal Industries Ltd.* v. *M.S.S. Food Products*[11]. We are inclined to mention at this stage that in this appeal we are confined to deciding upon the validity of the arbitration clause in the principal agreement dated 12-1-2002 only. Hence, this contention does

not require to be addressed in this appeal.

20. The learned Senior Counsel for Respondent 3, Mr C.A. Sundaram contends that jurisdictional issue in the present case, shall be decided as the threshold issue in the present case. In relation to this, he placed reliance upon the three-Judge Bench decision of this Court in *Chloro Controls India (P) Ltd.* v. *Severn Trent Water Purification Inc.*[12]

21. In the light of the facts and circumstances presented before us on the basis of admitted documents on record, and also based on the legal contentions urged by the learned Senior Counsel on behalf of both the parties, the following issues would arise for consideration of this Court in these proceedings:

21.1. (*i*) Can the arbitration clause under Clause 15 of the letter of agreement dated 12-1-2002 be invoked by the appellants and whether Clause 7.5 of the subsequent agreement dated 8-3-2002 invoking the exclusive jurisdiction of the courts of Calcutta nullifies the scope of arbitration as mentioned in the previous agreement dated 12-1-2002?

21.2. (*ii*) Is the suit, filed by the respondents, seeking injunction against arbitration of disputes between the parties sought for by the appellants as per Clause 15 of the principal agreement referred to supra maintainable in law?

21.3. (*iii*) What order?

Answer to Point (i)

22. We are inclined to reject the submission made by the learned Senior Counsel on behalf of the respondents that the transfer of shares to CPIL instead of CPMC substantially changes the legal rights and responsibilities of the parties as per agreement referred to supra, thereby resulting in novation of contract.

23. It is nowhere mentioned in the letter dated 8-3-2002 that transfer of shares to CPIL instead of CPMC extinguishes the old agreement dated 12-1-2002 to nullity. In fact, in the letter dated 8-3-2002, CPMC has been constantly mentioned as a guarantor. It is only to this extent the nature of agreement has changed.

24. It is argued by the learned Senior Counsel Mr C.A. Sundaram, appearing on behalf of Respondent 3, that the concurrent findings of facts on the prima facie case by the learned Single Judge[13] and the Division Bench[14]

of the High Court of Calcutta have held that there has been a novation of agreement between the parties to the principal agreement dated 12-

1-2002 by the subsequent agreements dated 8-3-2002 and 30-7-2004.

25. It has been held by the learned Single Judge of the Calcutta High Court that: (*Haldia Petrochemicals Ltd. case*[13], Cal LT p. 540, para 30)

> "*30*. … This is a case, whereby express words the parties have altered their obligations by a new agreement on 8-3-2002 with a term that the courts in Kolkata 'alone' would have jurisdictions. This was affirmed by 30-7-2004 agreement. This put an end to the arbitration, once and for all. Therefore, the arbitration clause in 12-1-2002 agreement was abrogated by the 8th March agreement. Abrogation of an arbitration agreement could not be made in clearer terms."

26. Further, the Division Bench of Calcutta High Court vide impugned judgment dated 4-6-2013[14], made the following observations:

> (*a*) Agreement of 12-1-2002 was substituted by agreements of 8-3-2002 and 30-7-2004.
>
> (*b*) Such a subsequent agreement completely extinguished the rights existing under the 12-1-2002 agreement and also destroyed the arbitration clause.
>
> (*c*) Remedy is under the agreement of 8-3-2002 which does not provide for arbitration but states that courts at Calcutta alone shall have jurisdiction.
>
> (*d*) Agreement of 8-3-2002 is not an ancillary to the agreement of 12-1-2002 but materially alters the same. The principle laid down in *Chloro Controls case*[12] does not apply. Real intention of the parties in the instant case was to substitute one agreement with another.

27. Clause 1 of the supplementary agreement dated 30-7-2004 reads as under:

> "Pursuant to the said principal agreement the Government of West Bengal has caused WBIDC to transfer to Chatterjee Petrochem (India) (P) Ltd. (CPIL), *an affiliate of CPMC* Rs 155 crores of shares from the shareholding of WBIDC existing on the date of principal agreement…."
>
> (emphasis supplied)

The abovementioned clause goes to show that CPIL is an affiliate of CPMC. This is to say, that by means of the letter dated 8-3-2002 CPMC becomes a guarantor whereas CPIL becomes the borrower. Therefore, the same does not change the rights and responsibilities of the parties under the agreement dated 12-1-2002.

28. Further, the letter written by CPMC to WBIDC along with the agreement dated 8-3-2002 reads as follows:

> "… It is clarified that the aforesaid *shall not prejudice any of our rights under the said agreement dated 12-1-2002* and *all terms and conditions thereof shall continue to remain valid, binding and subsisting* between the parties to be acted upon sequentially."
>
> (emphasis supplied)

The content of this letter goes to show that the agreement dated 12-1-2002 remains the principal agreement while the agreement dated 8-3-2002 remains a supplementary agreement which was meant for restructuring of HPL on urgency.

29. Further, and most importantly, the agreement entered into between the parties dated 30-7-2004 states as follows:

> "WHEREAS the parties hereto had entered into an agreement dated 12-1-2002 (hereinafter referred to as the principal agreement…."

Also, the agreement dated 30-7-2004 which is based on shareholding issues, also notes through Clause 6 that:

> "6. The parties hereby agree, record and confirm that *all other terms and conditions as contained in the said principal agreement shall remain binding, subsisting, effective, enforceable* and in force between the parties."
>
> (emphasis supplied)

30. The abovementioned clauses of the subsequent agreements dated 8-3-2002 and 30-7-2004 go to show that there has been no alteration in the nature of rights and responsibilities of the parties involved in the contract. Consequently, there has been no novation of the contract.

31. It has been further argued by the learned Senior Counsel for the respondents that Section 5 of the A&C Act, which bars intervention by judicial authority in arbitration agreement will not be applicable to international agreements such as the present case. We are inclined to reject this contention by placing reliance upon the legal principle laid down by this Court in *Venture Global Engg. case*[7], the relevant paragraph of which reads as under: (SCC p. 205, para 25)

> "*25.* In order to find out an answer to the first and prime issue and whether the decision in *Bhatia International*[6] is an answer to the same, let us go into the details regarding the suit filed by the appellant as well as the relevant provisions of the Act. The appellant

VGE filed OS No. 80 of 2006 on the file of the Ist Additional District Court, Secunderabad, for a declaration that the award dated 3-4-2006 is invalid, unenforceable and to set aside the same. Section 5 of the Act makes it clear that in matters governed by Part I, no judicial authority shall intervene except where so provided. Section 5 which falls in Part I, specifies that no judicial authority shall intervene except where so provided. *The Scheme of the*

Act is such that the general provisions of Part I, including Section 5, will apply to all Chapters or Parts of the Act."

(emphasis supplied)

32. Further, it is pertinent to read Clause 7.5 of the agreement dated 8-3-2002 carefully. Clause 7.5 reads thus:

"*Jurisdiction*.—Courts at Calcutta alone shall have jurisdiction in all matters relating to this agreement."

The phrase "this agreement" means the agreement dated 8-3-2002 which is essentially a supplementary agreement and does not, by any means, make the principal agreement dated 12-1-2002 subject to the jurisdiction of the Court.

33. Therefore, we are of the opinion that both the learned Single Judge and the Division Bench erred in arriving at the conclusion mentioned above and their findings are liable to be set aside. In the light of the case mentioned above and also on the basis of the clauses of the principal agreement dated 12-1-2002 and subsequent agreements dated 8-3-2002 and 30-7-2004, read with Section 5 of the A&C Act, we are inclined to observe that the arbitration clause in the principal agreement continued to be valid in view of Clause 6 of the agreement dated 30-7-2004 and also by virtue of its mention in different parts of both the supplementary agreements dated 8-3-2002 and 30-7-2004. Therefore, the arbitration clause mentioned in Clause 15 of the arbitration agreement dated 12-1-2002 is valid and the appellant is entitled to invoke the arbitration clause for settling their disputes. We, therefore, answer Point (*i*) in favour of the appellant.

Answer to Points (ii) and (iii)

34. We answer Points (*ii*) and (*iii*) together since they are interrelated.

35. It is the claim of Respondent 3 that the suit was filed by Respondent 1 under Section 9 CPC and not Section 45 of the A&C Act. Respondent 3 further placed reliance upon the decision of this Court in

Ganga Bai v. *Vijay Kumar*[15] to hold that: (SCC p. 397, para 15)

> "*15. … There is an inherent right in every person to bring a suit of a civil nature and unless the suit is barred by statute one may, at one's peril, bring a suit of one's choice*. It is no answer to a suit, howsoever frivolous to claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit. But the position in regard to appeals is quite the opposite. The right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law. That explains why the right of appeal is described as a creature of statute."
>
> (emphasis supplied)

Therefore, the learned Senior Counsel appearing on behalf of Respondent 3 places reliance upon this decision to contend that the Calcutta High Court (exercising its ordinary original jurisdiction) has the jurisdiction (territorial as

well as pecuniary) to entertain the present suit under Section 9 CPC and grant of such interim injunctive relief as it deems fit under Order 39 Rules 1 and 2 CPC is permissible in law.

36. We are inclined to reject this contention raised by the learned Senior Counsel appearing on behalf of Respondent 3. A careful reading of the decision leaves no doubt in the mind as has been held in *Ganga Bai case*[15] that: (SCC p. 397, para 15)

> "*15. … There is an inherent right in every person to bring a suit of a civil nature and unless the suit is barred by statute one may, at one's peril, bring a suit of one's choice*."
>
> (emphasis supplied)

37. The learned Senior Counsel for Respondent 3 further places reliance upon the Constitution Bench decision of seven Judges in *SBP & Co.* v. *Patel Engg. Ltd.*[16] wherein it was held that: (SCC p. 649, para 19)

> "*19. …* When the defendant to an action before a judicial authority raises the plea that there is an arbitration agreement and the subject-matter of the claim is covered by the agreement and the plaintiff or the person who has approached the judicial authority for relief, disputes the same, the judicial authority, *in the absence of any restriction in the Act*, 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."

(emphasis supplied)

38. We have already held that the principal agreement dated 12-1-2002 continues to be in force with its arbitration clause in place. We have also mentioned, while answering Point (*i*), that Section 5 of the A&C Act will be applicable to Part II of the Act as well. The agreement dated 12-1-2002 remains valid and the arbitration clause, with all fours, will be applicable to the parties concerned to get their disputes arbitrated and resolved in the arbitration as per the Rules of ICC. The contention raised by the learned Senior Counsel for Respondent 2, Mr K.K. Venugopal regarding the maintainability of the suit while examining the interlocutory order in the appeals, is therefore, untenable in law.

39. The fact that CPIL, which initially was a non-signatory to the agreement does not jeopardise the arbitration clause in any manner. In this connection, we are inclined to record an observation made in the three-Judge Bench decision of this Court in *Chloro Controls India (P) Ltd.*[12], wherein it was held as under: (SCC p. 695, para 107)

"*107*. If one analyses the above cases and the authors' views, *it becomes abundantly clear that reference of even non-signatory parties to*

an arbitration agreement can be made. It may be the result of implied or specific consent or judicial determination. Normally, the parties to the arbitration agreement calling for arbitral reference should be the same as those to the action. But this general concept is subject to exceptions which are that when a third party i.e. non-signatory party, is claiming or is sued as being directly affected through a party to the arbitration agreement and there are principal and subsidiary agreements, and such third party is signatory to a subsidiary agreement and not to the mother or principal agreement which contains the arbitration clause, then depending upon the facts and circumstances of the given case, it may be possible to say that even such third party can be referred to arbitration."

(emphasis supplied)

40. Respondent 1 has filed a suit seeking two remedies against the appellants: *firstly*, a declaration that the arbitration agreement contained in Clause 15 of the agreement dated 12-1-2002 is void and/or unenforceable and/or has become inoperative and/or incapable

of being performed, and *secondly*, Respondent 1 sought permanent injunction restraining the appellant herein from initiating and/or continuing with the impugned arbitration proceedings bearing Case No. 18582/ARP pursuant to the impugned arbitration agreement contained in Clause 15 of the agreement dated 12-1-2002 and the request for arbitration dated 21-3-2012 and the communication dated 2-4-2012 issued by Defendant 8 in the arbitration proceedings connected therewith and incidental thereto.

41. Since we have already held that the arbitration clause is valid, the suit filed by Respondent 1 for declaration and permanent injunction is unsustainable in law and the suit is liable to be dismissed.

42. In view of the above, we direct the parties to resolve their disputes through arbitration as mentioned in Clause 15 of the letter of agreement dated 12-1-2002 in accordance with the Rules of ICC. We have also seen from the written submission of the appellants' counsel that the appellants have already initiated an arbitration proceeding. In such case, the parties shall continue with the arbitration proceeding since the suit filed for permanent injunction against the arbitration proceeding is dismissed by setting aside the impugned judgment and final order in *Chatterjee Petrochem (Mauritius) Co.* v. *Haldia Petrochemical Ltd.*[14] passed by the High Court of Judicature of Calcutta on 4-6-2013. Accordingly, the appeal is allowed, but no costs.

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† Arising out of SLP (C) No. 19951 of 2013. From the Judgment and Order dated 4-6-2013 of the High Court of Calcutta in APO No. 13 of 2013

* **Ed.**: for foreign-seated ICA agreements entered into after 6-9-2012 *Balco case* rules out applicability of Pt. I of 1996 Act thereto in its entirety and: for courts which would have jurisdiction at different stages of such foreign-seated ICA *see* Shortnotes *A*, *M* to *S* and *V* to *Z* in *Balco case*.

[1] *Govt. of W.B.* v. *Chatterjee Petrochem (Mauritius) Co.*, APO No. 45 of 2007, decided on 21-9-2007 (Cal)

[2] *Chatterjee Petrochem (India) (P) Ltd.* v. *Haldia Petrochemicals Ltd.*, (2011) 10 SCC 466

[3] *Needle Industries (India) Ltd.* v. *Needle Industries Newey (India) Holding Ltd.*, (1981) 3 SCC 333

[4] *Radharamanan* v. *Chandrasekara Raja*, (2008) 6 SCC 750

[5] (2011) 9 SCC 735 : (2011) 4 SCC (Civ) 864

[6] *Bhatia International* v. *Bulk Trading S.A.*, (2002) 4 SCC 105

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[7] *Venture Global Engg.* v. *Satyam Computer Services Ltd.*, (2008) 4 SCC 190

[8] (2009) 9 SCC 797 (para 5) : (2009) 3 SCC (Civ) 882

[9] (2009) 10 SCC 257 (para 2) : (2009) 4 SCC (Civ) 152

[10] (2004) 12 SCC 624 (paras 9 to 11)

[11] (2005) 3 SCC 63 (para 20)

[12] *Chloro Controls India (P) Ltd.* v. *Severn Trent Water Purification Inc.*, (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689

[13] *Haldia Petrochemicals Ltd.* v. *Chatterjee Petrochem (Mauritius) Co.*, (2013) 1 Cal LT 524

[14] *Chatterjee Petrochem (Mauritius) Co.* v. *Haldia Petrochemical Ltd.*, (2013) 3 Cal LT 1

[15] (1974) 2 SCC 393

[16] (2005) 8 SCC 618