G.A. 1997 of 2014

Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS

2014 SCC OnLine Cal 17695

(BEFORE SOUMEN SEN, J.)

The Board of Trustees of the Port of Kolkata ..... Petitioner

Versus

Louis Dreyfus Armatures SAS & Ors. ..... Respondents

For the Petitioner: Mr. Abhrajit Mitra, Sr. Adv.
Mr. Anirban Roy
Mr. Soumavo Ghoshe
Mr. Saurabh Gupta
Mr. K.K. Pandey
Mr. Aparna Banerjee
Ms. Manisha Gupta
Mr. Sayon Ganguly

For the Respondent No. 1: Mr. Sudipto Sarkar, Sr. Adv., Mr. Jishnu Saha, Sr. Adv.

For Union of India: Dipanjan Dutta

G.A. 1997 of 2014
CS No. 220 of 2014
Decided on September 29, 2014

The Judgment of the Court was delivered by

SOUMEN SEN, J.:— The initiation of proceeding under the arbitration rules of the United Nations Commission on International Trade Law, 1976 by a French National being the respondent no. 1 on the basis of a Bilateral Treaty Agreement (hereinafter referred to as BIT) between the Government of India and the Government of France on the Reciprocal Promotion and protection of investments 1997 is the subject matter of challenge in this proceeding.

Mr. Sudipto Sarkar the learned Senior Counsel appearing with Mr. Jishnu Chaudhury the Senior Advocate on behalf of the respondent no. 1 submits invited this Court to decide the matter without affidavit since it is contended that it is purely a jurisdictional issue for which no affidavit as such is required.

This is an application for injunction restraining the respondent no. 1 from taking further steps on the basis of a notification of claim dated 11th November, 2013 and the notices of arbitration dated 17th April, 2014 and 19th May, 2014 respectively.

The plaintiff/petitioner essentially seeks restrain order upon the respondent no. 1 to proceed with the arbitration proceeding in terms of the aforesaid notices.

The arbitration reference has been made by one Louis Dreyfus Armatures SAS (hereinafter referred to as LDA) respondent no. 1 against the Government of India.

The genesis of the dispute is the awarding of a contract executed by Port Trust in favour of the Haldia Bulk Terminals Private Limited (hereinafter referred to as HBT) for operation and maintenance of berth nos. 2 and 8 of the Haldia Dock Complex of the Port Trust.

The plaintiff and HBT had entered into a contract on 16th October, 2009. The said contract contains an arbitration clause. The said Arbitration Agreement has already

been invoked and arbitral tribunal has been constituted thereafter. The respondent no. 3 as claimant has filed the statement of claim. The claim of the respondent no. 3 against the plaintiff/petitioner is essentially one for damages allegedly suffered by the respondent no. 3, as a result of alleged breach of contract dated 16th October, 2009 by the petitioner. The arbitral reference is continuing on a regular basis. The petitioner has also filed its counter statement and counter claim. The counter claim of the petitioner also arises out of the said contract. The petitioner alleged to have suffered loss and damages and hence made the counterclaim against the respondent no. 3. On 11th of November, 2013 the Government of India, State of West Bengal and the Port Trust received notice of claim issued on behalf of the defendant no. 1, in respect of investment in the contract for the supply, operation and maintenance of cargo handling equipment at berth nos. 2 and 8 of Haldia Dock Complex in West Bengal. The said notification of claim is purported to have been issued under Article 9 of a Bilateral Treaty Agreement between the Government of India and the Government of Republic of France on the reciprocal, promotion and protection of investment of 1997 (hereinafter referred to as the Treaty).

Mr. Abhrajit Mitra the Ld. Senior Counsel appearing on behalf of the petitioner submits that a bare reading of notification of claim would show that the claim relates entirely to the disputes already pending before the arbitral Tribunal. The claim is directed against Port Trust. The subject matter of the dispute is wholly and completely connected with the dispute arising out of the said Agreement dated October 16, 2009 between the Port Trust and H.B.T which is pending before the Arbitral Tribunal. There is no Arbitration Agreement between the petitioner and the respondent no. 1 or the respondent nos. 4, 5 and the respondent no. 1.

The respondent no. 1 is not a contracting party to the Treaty. It is also not an investor, either direct or indirect within the meaning of Article 2 of the said Treaty. The respondent no. 1 is not claiming to have made any investment in the respondent no. 3 which is the company who allegedly suffered loss by entering into the said contract with the petitioner. The respondent no. 1 is claiming to be an investor in the respondent no. 2. From the annual report of ABG-LDA Bulk Handling Private Limited it appears that the respondent no. 1 is a 49% shareholder of the respondent no. 2. The respondent no. 1 is thus, not having any stake in the respondent no. 3 leave aside 51% stake as shareholder. The defendant no. 1 is thus not a qualifying investor. It is submitted that neither the petitioner nor the respondent no. 5 is a contracting party to the said Treaty. Even the respondent no. 3 could not have invoked the arbitration Agreement on the basis of the Treaty as against the petitioner or in respect of any matter arising out of the said contract with the petitioner. A notice of arbitration dated 31st March, 2014 and a notice of appointment of arbitrator dated 17th April, 2014 issued by the Advocate representing the respondent no. 1 to the respondent no. 4 are therefore not enforceable and binding on the plaintiff. The notice of arbitration is purported to have been issued under Article 9(3)(b) of the Treaty and with reference to the claim of the respondent no. 1 dated 11th November, 2013. The respondent no. 4 replied to the said notice in which the said respondents denied and disputed the right of the respondent no. 1 to invoke the arbitration Agreement under the said Treaty. Notwithstanding such denial the respondent no. 1 again by a notice dated 19th May, 2014 once again called upon the respondent no. 4 to enter appearance in the arbitration. It is submitted that the petitioner is directly affected by the said purported commencement of reference of arbitration by the respondent no. 1 since the claim of the respondent no. 1 arises out of the said contract to which the respondent no. 3 and the petitioner are parties. It is argued that the scope of the said Treaty does not cover the claim or dispute raised in the impugned arbitration notice. The said Treaty mandates a fair and equitable treatment of the investment and the grounds of most

favoured nation status to the investments made by investors in the respective contracting countries. The said Treaty also contains terms for the free transfer of interest, royalties etc. The substratum of the dispute raised in the impugned arbitration notice does not in any way attract any of the provisions or protections envisaged in the said Treaty. The dispute as raised in the impugned arbitration notice is not a dispute between the respondent no. 1 claiming to be the investor and the Government of India. The substratum of the charge is the dispute between the HBT and the Port Trust. It would appear from the notification of claim of the respondent no. 1 dated November 11, 2003 that the claim of LDA is essentially against the petitioner. In view thereof such claim and dispute is not arising between the French investor and the Government of India and the dispute is ex facie outside the scope of the said Treaty the impugned arbitration notice is nothing but an attempt to overreach the arbitral proceedings already commenced and continuing between the petitioner and the respondent no. 3. There is no case of unfair or inequitable treatment by the Government of India against the so called investments by the respondent no. 1 as made out in the statement of claim. The impugned arbitration is also an abuse of process and if commenced it would result in multiplicity of proceedings. The reference made by the respondent no. 1 is oppressive, vexatious and malafide. The initiation and continuation of such proceeding affects the interest of the plaintiff who is being implicated directly and in the alternative indirectly in the impugned reference. The entire cause of action of defendant no. 1 as pleaded is against the plaintiff and the impleadment of the defendant no. 4 is formal in nature and only for the purpose of invoking the arbitral provision in the said Treaty. The plaintiff is a public sector undertaking of limited financial resources. Conducting arbitration before an international body would be prohibitive for the plaintiff and the plaintiff would not be having means to conduct such proceeding effectively. Two separate proceedings in respect of the same subject matter is also likely to result in conflicting decisions.

The Ld. Senior Counsel has referred to *Enercon (India) Ltd.* v. *Enercon GMBH* reported at (2014) 5 SCC 1, to submit that the seat of arbitration is in India and arbitration proceedings of both the places namely at India and France would lead to unnecessary complication and inconvenience. The whole aim and object of the arbitration is to resolve the dispute speedily, economically and financially. The policy of the law must be to favour the litigation of issues only once in the most appropriate forum. The interests of justice require that one should take into account as a factor, the risks of injustice and oppression that arise from concurrent proceedings in different jurisdictions in relation to the same subject matter. Once the seat of arbitration has been fixed in India, the jurisdiction of Indian courts would be in nature of exclusive jurisdiction to exercise a supervisory power over the arbitration. Intricate complexities might arise in case of Courts of India and France were to exercise the concurrent jurisdiction in these matters. An agreement as to the seat is analogous to an exclusive jurisdiction clause and having regard to the fact that arbitration proceedings have already commenced between the petitioner and the respondent no. 3 covering the same subject matter the natural forum for all remedies in the facts of the present case is only India. Furthermore the main contract is to be performed in India. The governing law is the law of India. The enforcement of the arbitral award will be in India.

Any interim measures which are to be sought against the assets of the plaintiff ought to be in India as the assets are situated in India. The defendant/respondent no. 3 has also participated in the proceedings in Calcutta and more particularly in the Calcutta High Court. All these factors should indicate that the respondent no. 3 does not even consider Indian Courts as forum inconvenience. The only consideration for the defendant no. 1 to invoke the arbitration clause in terms of Article 9 of the Treaty is that he is an investor and if the investor so decides the dispute shall be referred to

an ad hoc arbitral tribunal in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law, as adopted by the General Assembly on December 15, 1976.

The Ld. Senior Counsel has referred to *Chatterjee Petrochem Co.* v. *Haldia Petrochemicals Ltd.* reported at 2014 (1) CAL LT 83 (SC) for the proposition that the fact that LDA was a non-signatory to the said contract does not jeopardise the arbitration proceedings that is pending before the arbitral tribunal arising out of the contract dated 16th October, 2009.

It is submitted that the Government of India nominated an arbitrator on its behalf under serious protest. He refers to the notification of claim would show that the dispute is essential between the plaintiff and HBT of which the defendant no. 1 is a shareholder. The relief sought in the notification of claim has been referred in order to demonstrate that the said reliefs are in the nature of compensation and/or damages arising out of the contract which is now the subject matter of the arbitration proceeding between the plaintiff and the defendant no. 3. The BIT is referred in order to show that an investor would mean any national or company of a contracting party and the scope of the agreement in Article 2(1) specifically says that the agreement shall apply to any investment made by the investors of either contracting party in the area of the other contracting party including an indirect investment made through another company, wherever located, which is owned to an extent of at least 51 per cent by such investors, whether made before or after the coming into force of this Agreement. The defendant no. 1 admittedly owns less than 51 per cent share in HBT. Accordingly even on the basis of the Treaty, the said defendant no. 1 claiming as an investor could not have invoked the jurisdiction of the international arbitral tribunal.

It is submitted that there is no privity of contract between the plaintiff and the defendant no. 1 in relation to the agreement dated 16th October, 2009 and accordingly, the plaintiff could not be served with any notice of arbitration nor any direction could be passed for participation of the plaintiff in the arbitration. The Ld. Senior Counsel refers to the decisions in *Emirates Grains Products company LLC* v. *L.M.J. International Limited* reported at 114 CWN 375, and *Chatterjee Petrochem Co.* v. *Haldia Petrochemicals Ltd.* reported at 2013 (3) CLT 1 (Cal) for the proposition that unless there is a valid arbitration agreement between the plaintiff and the defendant no. 1, the dispute of the defendant no. 1 cannot be referred to arbitration. It is submitted that it is a sine quo non that the parties should be at consensus ad idem and unless there is a valid arbitration agreement between the parties it is not open for either of the parties to refer the dispute to arbitration. The Civil Court has an inherent jurisdiction to decide all such disputes that are civil in nature and unless any statute expressly prohibits and such ouster clause is clear and unambiguous, the jurisdiction of the Civil Court cannot be curtailed. The jurisdiction of the Municipal Court to restrain the foreign arbitration proceedings on the ground that no arbitration agreement exists between the parties and it is inoperative and incapable of being performed is well recognised. The presumption in favour of the jurisdiction of a Civil Court would continue unless it has been expressly barred by a statute. It is submitted that though the Division Bench judgment in *Chatterjee Petrochem* (supra) has been reversed by the Hon'ble Supreme Court on other point that there is no novation of contract but the principle enunciated in Chatterjee Petrochem still holds the field. It has submitted that *Chatterjee Petrochem* (supra) had taken into consideration an earlier Division Bench Judgment of this Court in *L.M. International* v. *Sleeping Industries Company Limited* reported in 2013 (1) Calcutta Law Times 301 (HC) where same view, has been expressed. It is submitted that Section 5 of the Arbitration Conciliation Act would not apply in relation of foreign arbitration. The defendant no. 1 cannot independently maintain an action when the company is a shareholder has already initiated

proceeding in India and an arbitral tribunal consisting of three retired judges of the Hon'ble Supreme Court are in seisin of the matter. Parallel proceedings at two different fora on same facts and claiming same and similar reliefs are vexatious and harassing.

Mr. Sudipta Sarkar the learned Senior Counsel appearing on behalf of the respondent no. 1 submits that the respondent no. 1 is appearing under protest. It is submitted that anti-arbitration suit and/or anti-injunction suit is ordinarily not maintainable, unless the statute gives a right to the Court to exercise its jurisdiction against initiation of such proceeding. It is contended that there is a distinction between a subject of international law and subject of a domestic law. An arbitration agreement is ordinarily entered into between private parties. The said arbitration agreement binds only the parties to the agreement. The parties are contractually bound to refer the dispute to arbitration in the event the disputes raised are covered under the arbitration agreement. It necessarily follows that a party, who is not a party to arbitration agreement, cannot invoke the arbitration clause in case of a dispute arising out of the said contract. However, that principle is not applicable when the rights and obligations of the parties are created by a treaty agreement entered into by two sovereign nations. Same set of facts can give rise to different causes of action to different parties. The bilateral treaty gives a right to an investor of the contracting nation meaning thereby the French National to invoke the arbitration clause in the treaty. The respondent no. 1 need not to be a party to the contract of 16th October, 2009. The treaty is no uncertain term gives a cause of action to the respondent no. 1 to invoke the arbitration clause under the treaty, in the event, of failure on the part of the host nation that is to say India in protecting the investment of the French National. Section 5 of the Arbitration Conciliation Act, 1996 in no uncertain terms prevent judicial authority to intervene in matters governed by Part 1 of the Arbitration Conciliation Act, 1996, except where so provided in this Part, the rights and obligations of the parties are governed by the contract, which contends an arbitration clause. It is submitted that although Section 5 is a provision in part I of the Arbitration Act but it has been held in *Venture Global Engineering* v. *Satyam Computer Services Ltd.* reported at (2008) 4 SCC 190 paragraph 25 following *Bhatia International* v. *Bulk Trading S.A.* reported at (2002) 4 SCC 105 that the general principles of Part 1 also apply to Part II of the Arbitration Act and Section 5 is also applicable to pending Part II of the Arbitration Act.

Mr. Sarkar refers to *Kvaerner Cementation India Limited* v. *Bajranflal Agarwal* reported at to submit that it has been the consistent view of the Hon'ble Supreme Court that the arbitral tribunal has exclusive jurisdiction to rule its jurisdiction even with respect to existence or validity to the arbitration agreement and in view of Section 5 of the Arbitration Conciliation Act 1996 civil court would have no jurisdiction to go into and decide such question. The aforesaid decisions are cited in order to establish that the objections raised by the Union of India with regard to the arbitrability of the dispute and questioning the locus of the respondent no. 1 to invoke the arbitration clause of the Bilateral Treaty Agreement are matters which fall exclusively with the domain of the arbitral tribunal which has since been constituted.

It is submitted that in *Venture Global Engineering* (supra) the learned Senior Counsel referring to *Bharat Company limited* v. *Kaiser Aluminium Technical Services* reported at (2012) 9 SCC 552 submitted that although in the said decision Bhatia and Venture Global were held to be not good law, however, in paragraph 197 of the said judgment it was held that the decisions in Bhatia and Venture Global would nonetheless applicable to all arbitration agreements concluded before the judgment in BALCO dated 6th September, 2012 and in relation to those arbitration agreements Venture Global would be regarded as good law.

The provisions of Section 5 would apply in the instant case and no judicial authority

shall interfere with the pending arbitration proceeding. It is further submitted that the present arbitration agreement is dated 2nd September, 1997. Accordingly in relation to arbitration proceedings arising out of such agreement, the principle of Venture Global shall apply, that is Section 5, shall apply and no restraint order can be passed as prayed for in the petition. Mr. Sarkar has relied upon the judgment of the Hon'ble Supreme Court in *Chatterjee Petrochem* v. *Haldia Petrochemical* in reported at (2014) 1 CAL LT 83 (SC). The said judgment follows *Venture Global* (2008) 4 SCC 190 and also considered *Chloro* case (2013) 1 SCC 641 (*Chloro Controls India Private Limited* v. *Severn Trent Water Purification Inc.*). An arbitration between the contracting parties is a confidential proceedings and the award passed in such arbitration is neither binding in any other proceedings nor can be relied upon for any other purpose in relation to any other proceedings. In this regard reliance is placed on a judgment reported at (2005) 1 Lloyd's Law Reports 606 (*Sun Life Assurance Company of Canada, America Phoenix Life and Reassurance Company, Phoenix Home Life Mutual Insurance Company* v. *The Lincoln National Life Insurance Company*). The relevant paragraphs are reproduced hereinbelow:

82. “I would add that even if it were a principle of English law that a party against whom an issue had been decided in earlier proceedings could not reopen that issue in subsequent proceedings, it could only doubtfully apply in the present case. The earlier proceedings decided the issue of cover in favour of Sun/Phoenix; it can only be said to have been decided against them in the sense that for the purpose of the subsequent proceedings Sun/Phoenix would prefer that the decision had gone the other way. But I doubt if the principle on which Mr, Hunter relied (if it exists) was intended to cover such a case.

83. The sad truth is that in the absence of any third-party or consolidation procedure in arbitration, parties may be put into the position of making inconsistent cases in different proceedings. IN litigation it is possible to make inconsistent cases in the same proceedings; doing so later, in different proceedings, may come under the head of abuse of process. But that is no reason to extend the law of issue estoppel in arbitration proceedings beyond its proper sphere.

84. All the above is not to deny that there may be cases in which an award can be evidence in subsequent proceedings even though it will not necessarily be conclusive evidence. It may, to use Rix LJ's expression in *Drake Insurance Plc* v. *Provident Insurance Plc* (2003) EWCA Civ 1834, be a “fact in the world”. A good example of this is to be found in The *Sargasso* (1994) 1 Lloyds Rep. 412 where charterer had been held liable by an award in favour of sub-charterer who had sued to recover damages for damage to cargo. The charterer then sued the shipowner and proved breach of contract; the measure of damages to which he was entitled was governed by the award pursuant to which he hd been held liable to the sub-charterer. It It quantified the loss which he had actually suffered, he was entitled to put it in evidence for that purpose and say he should be able to recover not less than the amount of the award, the shipowner would also be entitled to say that the charterer should not recover more than the amount of award. That would not have prevented the shipowner from arguing that the charterer had not taken the right points and that he had dthus failed to mitigate his damages or, indeed, that the award against him had been made by reason of some fact which was not breach of contract on the owner's part.

86. I agree with both judgments. It is worth standing back from the detail. What Lincoln seek to do is to rely upon a non-operative (in the sense that no actual consequences flow from it), opinion expressed by the Cigna arbitrators. The opinion is in its nature private. Moreover, it was unappealable. Lincoln seek more than just to rely upon the opinion-they say it is conclusive for all purposes and so conclusive in the later arbitration.

87. I think such a result would be obviously wrong for the following reasons:

(a) An arbitration is an essentially private matter between the parties to it. Only some consequence of an award (e, g. that A should pay B money) can go further and extend beyond the privacy of the arbitration itself - so as to become a "fact in the world."

(b) Because the determination of arbitrators is itself of a private matter it is in its nature not intended to be available to third parties for any purpose. A third party's rights against one of the parties to an earlier arbitration cannot depend on the happenstance of the available of the details of that arbitration in a latter arbitration involving that third party. In this connection, I note that the position may be different if the earlier decision is that of a court. In particular a decision of a court as to the construction of a contract is a matter of law - with the consequence that the further principle of judicial precedent on such a question may come into play.

Where a party seeks to re-litigate in subsequent proceedings against Y a point he fought fully in earlier proceeding against X, it may be that, notwithstanding a lack of mutuality, he can be prevented from doing so on the grounds of abuse of process. As to that I express no concluded opinion for, for the reasons given by Mance LJ. There is no a question of abuse of process here".

It is thus submitted that the fact that an arbitration is pending between Kolkata Port Trust and HBT is of no relevance as the questions which may arise in that arbitration or the decision passed thereat cannot be looked into or be binding or relevant in the arbitration pending between the respondent No. 1 and Union of India. Hence, the principle of parallel proceedings and a possibility of conflict of decision, has no application in two aribtrations.

It is submitted that in *Chatterjee Petrochem* (supra) the Hon'ble Supreme Court has in no uncertain term stated that since arbitration clause is valid the suit filed by the respondent no. 1 for declaration and permanent injunction is unsustainable in law and the suit is liable to be dismissed. It is submitted that in the *Chatterjee International* (supra) the parties were directed to resolve their dispute through arbitration as mentioned in Clause 15 of the letter of the agreement on 12th January, 2012, in accordance with the laws of ICC. Since the bilateral treaty has given a cause of action to the French National as an investor and the said treaty is binding on the two sovereigns, the plaintiff is as much bound by the treaty obligation as any other entity. The Indian arbitration proceeding is between the plaintiff and the respondent no. 4 which is based on a contract entered into between two parties on 16th October, 2009. Such proceeding is no bar to invoke the arbitration clause under the treaty agreement by an investor against the host nation for the loss and damage suffered by him in the host nation. It is submitted that there may be overlapping issues but that by itself would not be a ground to stay an arbitration proceeding commenced before the International Arbitration Tribunal.

Mr. Sarkar distinguished the decision cited by Mr. Mitra by submitting that none of the cases cited by Mr. Mitra would apply since they are matters not relating to pendency of two arbitrations but relate to stay of suits on the principle of lis pendens, that is to say an arbitration proceeding has been initiated under a private contract between the parties and a suit filed by one of the parties for staying of the said arbitration proceeding which is not the case here. It is submitted that the *Chloro Controls* (supra) relied upon by Mr. Mitra also does not apply since in the *Chloro Controls* (supra) an application was made under Section 45, which enabled the Court to come to the finding as it did on the basis that Section 45 covered persons claiming through or under the parties. It is contended that it cannot be said that either the Port Trust or the Union of India is claiming through or under either parties. On the contrary, the arbitration is based on an international treaty between France and India. The

plaintiff is not a party to the arbitration agreement and cannot challenge it. The plaintiff is not challenging the arbitration agreement either but is seeking to argue that by reason of an earlier pending arbitration between it and HBT, the second arbitration cannot proceed. A non party cannot challenge the validity of an arbitration agreement. The dispute in *Enercon* (supra) was whether the seat of arbitration was India or London. The Supreme Court held that an arbitration could not have two seats and hence, decided that India was the seat of arbitration, although the venue of arbitration could be London. All the Supreme Court judgments are judgments, which are pro arbitration and in which the Arbitration Clause is enforced. In paragraph 90 of Enercon, it has been held that, Courts play a supportive role in encouraging the arbitration to proceed rather than letting it come to a grinding halt. Another equally important principle recognized in almost all jurisdictions is the least intervention by the Courts.

The invocation of the arbitration clause (Article 9) of the Treaty by the defendant No. 1 has been challenged by the plaintiff in the present suit on essentially the following grounds:

(A) The arbitraton agreement is inoperative between the defendant No. 1 and the proforma defendant No. 4, between the defendant No. 1 and; the plaintiff, as well as the defendant No. 1 the proforma defendant NO. 5;

(B) The defendant No. 1 claiming to be in control of the defendant No. 3 is bound by the arbitration clause in the agreement dated 16th October, 2009. Even otherwise the subject matter of the arbitral reference arising out of the said agreement dated 16th October, 2009 invoked by the defendant No. 3 as against the plaintiff is the same as the subject matter of the defendant No. 1's notification of claim dated 11th November, 2013.

The principle ground of challenge appears to be the arbitration agreement is inoperative between the defendant no. 1 and proforma defendant no. 4, between the defendant no. 1 and the plaintiff as well as the defendant no. 1 vis-à-vis the proforma defendant no. 5. It is submitted that the defendant no. 1 is claiming to be a qualifying investor under the said Treaty, the defendant No. 1 either had to be make a direct investment in India or would have had to have at least 51% shareholding in the company (the defendant No. 3 in this case) which has made investment in India. The attention of the court is drawn to the Article 1(4) and Article 2(1) which are set out hereinbelow:

1(4) The term "investor "means any national or company of a Contracting Party;

2(1 This agreement shall apply to any investment made by investors of ither Contracting Party in the area of the other Contracting Party, including an indirect investment made through another company, whenever located, which is owned to an extent of at least 51 per cent by such investors, whether made before or after the coming into force of this Agreement.

It is submitted that the defendant no. 1 has no direct investment in India nor has any shareholding in the defendant No. 3. The defendant No. 2 is the holding company of the defendant No. 3 and if at all the defendant No. 3 was a French company it may have been a qualifying investor under the said Treaty. The defendant No. 1 is thus not a qualifying investor. The defendant NO. 1's shareholding even in the defendant No. 2 is only 49%. Since the defendant has waived its right to file any affidavit in opposition, the statements in the petition ought to be accepted as true and correct; The defendant NO. 1 not being a qualifying investor, the agreement is inoperative vis-à-vis the defendant No. 1 irrespective of whether the other side is the Union of India or any other entity; Under no circumstances, the defendant No. 1 can be stated to be the Union of India and is thus not one of the two contracting parties to the said Treaty.

The defendant No. 1 is seeking to get around this by describing the defendant no. 4 (i.e. Union of India) as a compendium of the following juristic entities;

a) Union of India itself;

b) Federal Governments (i.e. the State Governments);

c) Authorities and statutory bodies of the Republic of India.

(vi) On the above basis the notification of claim is issued against the Chairman, Kolkata Port Trust. Accordingly, the Arbitral Tribunal has also resorted to notifying the Kolkata Port Trust at every stage as would appear from their letters dated 13th August, 2014 (page 33 supplementary affidavit), 15th August, 2014 (page 35 supplementary affidavit), 26th August, 2014 (page 45 supplementary affidavit);

The second ground of challenges that KOPT (plaintiff) is not a party to the arbitration clause is a Bilateral Treaty and accordingly could not be dragged to the said arbitration proceeding. In this connection the Ld. Senior Counsel has relied upon and the following passage from the judgment which states:

City of London v. *Sancheti* (2009) 1 LLR 117 para 35

"In the present case the Corporation of London is a not a party to the arbitration agreement, relevant party is the United Kingdom Government. The fact that under certain circumstance the State may be responsible under international law for the acts of one of its local authorities, or may have to take steps to redress wrongs committed by one of its local authorities, does not make that local authority a party to the arbitration agreement."

It is thus submitted that even if under the treaty obligation the Union of India may be held responsible for any particular Act of KOPT (which is not admitted) under no circumstances KOPT could be treated as the party to the arbitration Agreement as the Bilateral Agreement.

On the aspect of the jurisdiction of the Civil Court to decide on the existence on the foreign Arbitration Agreement in a suit for anti foreign arbitration injunction the plaintiff has relied upon the following decisions:

a) (*Dr. Devinder Gupta* v. *Realogy Corporation*) (2011) 3 Anb L.R. 227 paragraphs 16 and 17

b) *Chatterjee Petrochem (Mauritious) Co.* v. *Haldia Petrochemicals* (2013) 3 CLT 1 paragraphs 67 to 73, 78 and 100.

c) *Excalibur LLC* v. *Texas Keystone Inc.* (2011) 2 LLR 289 paragraphs 64.

As to the power and duty of Civil Court under Section 45 to adjudicate upon the existence and effectiveness of the arbitration agreement, reference is made to *Dr. Devinder Gupta* v. *Realogy Corporation*) (2011) 3 Anb LR 227 at paragraphs 17 and *Chloro Controls India Private Limited* v. *Seven Trent Water* (2013) 1 SCC 641 paragraphs 63.

Since the defendant no. 1 claiming to be the controlling shareholder of the defendant Nos. 2 and 3, is bound by the arbitration clause in the agreement between the plaintiff and the defendant No. 1 dated 16th October, 2009. In this regard reference is made to *Chloro Control India Private Limited* v. *Severn Trent Water Purification Inc.* reported at (2013) 1 SCC 641 (paras 70 to 72). It is contended that in the said judgment in the context of Section 45 of the Arbitration and Conciliation Act, 1996 it was held that when a company enters into an arbitration agreement, the same would also bind its group companies, sister concerns, parent concern as also the controlling shareholders;

It is emphasized that multiple proceeding in respect of the same subject matter is always avoidable - (*Chloro Control India Private Limited* v. *Severn Trent Water Purification Inc.* (2013) 1 SCC 641 paras 89 and 90; *Enercon (India) Limited* v.

Emercon GMBH (2014) 5 SCC 1 paras 137 to 145 and Re: The *Abidin Daver* (1984) 1 LLR 339 at 344;)

In order to emphasis on the impact of Section 45 of the Arbitration Conciliation Act, 1996 the Ld. Senior Counsel has relied upon the decision in *Bharat Aluminium Company* v. *Kaiser Aluminium Technical Services Inc.* (2012) 9 SCC 552 paras 120 to 122 & 125 to 130 and submitted that it has been conclusively held that the provisions of Part I including Section 5 will not apply to a foreign arbitration which is governed by Part II of the said Act. The obiter dictum of the two Judges's Bench in the case of *Chatterjee Petrochemicals* v. *Haldia Petrochemicals* (2014) 1 CLT 83 (SC) para 29, that Part I provisions apply to arbitration governed by Part II by relying on Satyam Computers judgment (which judgement has been expressly overruled in Balco) can not be a binding precedent for this proposition;

Section 5 cannot anyway curb the power expressly vested in the Court under Section 45 of the said Act.

As to prospective overruling of Satyam Computers and Bhatia International in Balco that would have no impact on the present case since there was no arbitration agreement, to which the defendant No. 1 was a party, in existence prior to Balco's judgment. The Treaty between the Indian Government and the French government, is not an arbitration agreement to which the defendant NO. 1 is a party since inception. It has been held in the said judgment of *City of London* v. *Sancheti* (2009) 1 LLR 117 para 3 that an arbitration agreement in a Bilateral Treaty is at best a standing offer to arbitrate and upon acceptance by a qualifying investor of this standing offer to arbitrate gives to a binding arbitration agreement.

"Typically under a BIT the investor is given direct standing to pursue his own claim against the state of the investment in respect of any "investment dispute". The arbitration provision to the BIT can amount to a standing offer to investor to arbitrate, and acceptance of this standing offer to arbitrate by an investor gives rise to binding arbitration agreement between the investor on the one hand and the host state on the other; in the absence of a specific choice of law, the law to which the agreement to arbitrate between the investor and the host state is to subject is international law; Republic of Ecuador v. *Occidental Exploration and Production Co. (2005) 2 Lloyd's Rep 707, ETI Euro Telecom International NV* v. *Republic of Bolivia (2008) 2, Lloyd's Rep 421)*

Therefore, it at all there is an arbitration agreement where the defendant no. 1 is a party, the same came into existence only upon the defendant no. 1 proposing to refer the disputes to arbitration by the notification of claim dated 11th November, 2013 (para 661), i.e. post Balco.

In refuting the argument made by Sudipta Sarkar with regard to absence of an application under Section 45 of Arbitration Conciliation Act, 1996 it is submitted that The defendant No. 1 relied on paragraphs 89 to 90 *Fuerst Day Lowson* ((2011) 8 SCC 333), for the proposition that the Arbitration and Conciliation Act, 1996 is self contained court. That does not in any manner derogate from what has been stated in paragraph 60 as to non-applicability of Section 5 to arbitration under Part II. The said paragraph reads:

"The Ld. Senior Counsel has specifically referred that Part I and Part II of the Act are quite separate and contain provisions that act independently in their respective fields. The opening words of Section 2 i.e. the defeinition caluse in Part I, make it clear that meanings assigned to the terms and expressions defined in that section are for the purpose of that part alone. Section 4 which deals with waiver of right to object is also specific to Part I of the Act. Section 5 dealing with extent of judicial intervention is also specific to part I of the Act. Section 7 that defines "arbitration agreement" in considerable detail also confines the meaning of the term to Part I of the Act alone.

Section 8 delas with the power of a judicial authority to refer parties to arbitration where there is an arbitration agreement and this provision too is relatable to Part I alone (corresponding provisions are independently made in Sections 45 and 54 of Chapters I and II, respectively of Part II). The other provisions in Part I by their very nature shall have no application in so far as the two chapters of Part II are concerned".

In the same vain paragraph 98 of *Enercon* (supra) was cited to show that there are very strong indicators to suggest that the parties always understood that the seat of arbitration would be in India and London would only be the "venue" to hold the proceedings of arbitration.

It was further held in *Enercon* (supra): By choosing that Part I of the Indian Arbitration Act, 1996 would apply, the parties have made a choice that the seat of Arbitration would be in India. Section 2(2) of the Indian Arbitration Act, 1996 provides that Part I "shall apply where the place of arbitration is in India". In BALCO it has been categorically held that Part I of the Indian Arbitration Act, 1996, will have no application, if the seat of arbitration is not in India. In the present case, London is mentioned only as a "venue" of arbitration which, in our opinion, in the facts of this case cannot be read as the "seat" of arbitration".

It is submitted that in BALCO it has been categorically held that Part I of the Indian Arbitration Act, 1996 will have no application if the seat for arbitration is not in India.

It is argued that in *Kvaerner* (2012) 5 SCC 214, the Hon'ble Supreme Court was considering a domestic arbitration governed by Part I and not an international arbitration.

It is submitted that Venture Global (2008) 4 SCC 190 has been expressly overruled in BALCO.

On this aspect the Ld. Senior Counsel has referred to a Division Bench judgment in *Coal India Limited* v. *Canadian commercial Private Limited* reported at (2013) 2 CHN 494 and submitted that in the judgment it was held that the law prevailing even prior to BALCO by virtue of the Supreme Court judgment in the case of *Fuerst Day Lowson* (2011) 8 333 and *Yograj Infrastructure Limited* v. *Ssangyong* (2011) 9 SCC 735 was the same i.e. part I provisions will not apply to arbitrations governed by Part II.

As to the prospective overruling it is submitted that since there was no arbitration agreement to which the defendant no. 1 was a party in existence prior to BALCO's judgment, Venture Global would have no application. In refuting this submission of the defendant no. 1 that the plaintiff has no locus to institute the suit it is submitted that the plaintiff is adversely affected by the invocation of the arbitration clause under the Bilateral treaty. Accordingly, the plaintiff is entitled to file the present suit for the Court to hold that the arbitration clause in the treaty is "inoperative or incapable of being performed" vis-à-vis the defendant NO. 1 (as in, its right to invoke) and the plaintiff (as to being implicated in the arbitration). Under Section 45 of the Arbitration and Conciliation Act, 1996 the civil court has been vested with the power to decide the above issue. Merely because the defendant No. 1 has chosen not to file a Section 45 application that would not mean the Court cannot exercise the power which is already vested in it and tried to draw sustenance from paragraph 17 of *Dr. Devinder Kumar Gupta's* (supra) which states:

"Since we are of the unequivocal opinion that an arbitration agreement did not come about vis-à-vis the plaintiff, we must accept the appeal and in exercise of powers under Section 45 of the A & A Act restrain Realogy Corporation, respondent no. 1, from preferring or prosecuting any claim against the plaintiff/appellant in proceedings under the aegis of the American Arbitration Association".

The plaintiff has referred to the following facts to demonstrate that the course of event, would show that the plaintiff is being implicated in the arbitration.

In the notification of claim; the expression "India", is not used in the sense of the

juristic entity "India but is an expression coined for the purpose of including amongst others KPT a statutory body within the definition India. A further reference was made to page 663 which reads "hereinafter India, which term shall include the Federal Government and authorities and statutory body of republic of India".

It is, thus contended that if at all award is made against the so called entity "India", it can very well be contended by the award holder that the expression "India" includes KPT.

The entirety of the statement of claim talks about alleged berach of contract by KPT. But for the expression "India" appearing in frequently and out of context in the statement of claim, no cause of action is made out against India.

At every state the plaintiff is being served with notices both by the defendant No. 1, its advocate as well as the Arbitral Tribunal. Notice has been given directly to the petitioner as a party to the arbitration and not merely copies marked to the plaintiff.

The second paragraph of the letter dated 31st July, 2014 is referred to which reads:

"We refer the parties to the UNCITRAL Arbitration Rules 1976……."

The Ld. Senior Counsel has also referred to the letters dated August 15, 2014, Sept. 2, 2014 and Sept. 8, 2014 to show that he plaintiff has been treated as a party to the arbitration agreement. It is submitted that because of the repeated notices that the plaintiff is receiving from the Arbitral Tribunal, the plaintiff for the purpose of chellenging/resisting the award will be treated as a party since the plaintiff would not be able to take the ground available under Section 48(1)(b) of the said Act at the stage of resisting the award that may be passed.

The ld. Senior Counsel has further relied upon the following judgments for the proposition that the Civil Court had jurisdiction to pass injunction order restraining for an arbitration.

i) *Nicco Corporation* v. *Prysmian* (2010) 11 SCC 744:

ii) *Ghanshyam Das Behti* v. *Jamuna Transport* AIR 2011 Cal 41 P 22

iii) *Bhagwandas Auto Finance Limited* v. *Citicorp* AIR 2009 Cal 231 para 19.

iv) (2011) 2 Lloyds LR 510 *Claxton Engineering* v. *TXM* paras 34 and 41.

v) (2013) 2 Lloyds LR 421 The Barito paras 72 to 73

It is submitted that in *Enercon* (supra) the issues arose for consideration was in a suit for anti arbitration injunction would the Civil Court or Arbitral Tribunal decide the issue as to whether there exists a valid arbitration agreement.

The Hon'ble Supreme Court decided the above issue and held that the saii agreement is binding on the party. It is argued that in this case the arbitration agreement in the treaty is inoperative and not-capable of being performed vis-à-vis plaintiff and/or defendant No. 1 for the following reasons:

(i) The plaintiff is not a qualified treaty investor within the meaning of Article 1(4) and Article 2.

ii) KPT is not a contracting party.

In dealing with the submission of Mr. Sudipta Sarkar that the Indian Arbitration Act does not confer any power on the Civil Court unlike the English Courts to interfere with foreign arbitration by passing anti arbitration injunction. It is submitted that Section 72 of the English Arbitration Act, 1996 empowers the Civil Court to decide whether an arbitration agreement is valid. This is in Part I of the said Act. An arbitration under New York Convention is under Part III. By virtue of Section 2(2) and 2(3), the previsions contained in Part I of the said Act, barring a few specified sections (within does not include Section 72) are not applicable to arbitrations governed under Part III. Therefore, the Civil Courts England have no special power to decide the issue as to existence of a foreign arbitration agreement.

From a reading of the judgments of the English Court it will be evident that such power is derived by the English Court from Section 37 of the Supreme Courts Act, 1981, which is the general power of a Civil Court to pass injunction and appoint Receiver.

In this regard Mr. Mitra has specifically relied upon paragraph 26 from *Claxton Engineering Services Ltd.* (supra) which reads:

26. "I am accordingly satisfied that I have jurisdiction to grant an injunction.

That jurisdiction derives from Section 37 of the Senior Courts Act 1981 which provides that:

"(1) The High Court may by order (whether inter locutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.

(2) Any such order maybe made either unconditionally or on such terms and conditions as the court thinks just."

The owner before the court of appeal submitted that the arbitration Act 1996 occupies the whole grounds relating to the granting of relief in the form of anti-suit injunctions; nothing in the AA 1996 permits a court to interfere in the question of whether or not an arbitration agreement binds the parties to it before that question has been referred first to the decision of arbitrators themselves; therefore it is not open in principle for the C ourt to avail itself of any jurisdiction togrant an anti-suit injunction which it might otherwise possess under Section 37 of the Senior Courts Act 1981 (the SCA 1981); and in the absence of any current or prospective arbitration, there was and is no jurisdiction to grant relief under section 44 of the AA 1996 either.

Section 37(1) of the SCA 1981 provides:

"The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so".

Section I of the AA 1996 provides:

"The provisions of this Part are founded on the following principles, and shall be construed accordingly (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense; (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest: (c) in matters governed by this part the court should not intervene except as provided by this part".

This part of the AA 1996 there referred to is part I, which is headed "Arbitration pursuant to an arbitration agreement". The question is raised by the submissions before the Court as to whether section I(c)'s principle, when stating that "the court should not intervene", is referring to intervention in "arbitration", "arbitration agreement", or "arbitration proceedings".

The court of appeal analysis various sections of the Indian Arbitration Act and held:

Therefore, a question of substantive jurisdiction can always be taken to the court, either sooner, by agreement of the parties or the arbitrators' and court's leave, under Section 32, or later by challenge to an award under section 67, or, it seems, sooner or later by a party who takes no part in the arbitral proceedings, under Section 72.

It is to be observed that the sections within part I (which extends down to section 84) refer as may be appropriate to "arbitration" in general (as in section I (a)'s "the object of arbitration"); to "the arbitration" as in section 3's the seat of the arbitration; to "arbitration agreement" (as in sections 5, 6, 7, 8 and 9); to "arbitral proceedings" (as in sections 12, 13, 14 and 32); and to "arbitrators" and "arbitral tribunal" (as in sections 15 ff) Section 44 is placed under a heading (which precedes section 42) named "Power of court in relation to arbitral proceedings". Section 44(I)

itself refers to the court's power for the purposes of and in relation to arbitral proceedings.

It is not obvious from its own terms that the scope of section 44 extends to the grant by the court of an anti-suit injunction in support of arbitral proceedings. Section 44(2)(e) refers to the grant of an interim injunction, but not to final injunctions: see *Cetelem SA* v. *Roust Holding Ltd.* (2005) I WLR 3555. In the Cetelem case this court discussed the power of the court, in aid of the arbitral process, to make interim injunctions for the purpose of preserving evidence or assets, see section 44(3). In *Starlight Shipping Co.* v. *Tai Ping Insurance Co. Ltd. Hubei Branch* (2008) 1 All ER (comm) 593, para 21 Cooke J held that his must include the contractual right to have disputes referred to arbitration, and thus embraced the right to seek at any rate an interim anti-suit injunction. I will assume that is correct (at any rate on the facts of that case) and it has not been formally disputed that it is, but Mr. Eder expressed some reservations, and I would for myself consider the matter unsettled.

All the various issues raised before the Court of appeal in so far as the present case concern as it concerns as it involves a jurisdiction issue. would confined to the observations made by the court of appeal to such jurisdiction issue. In the words of the court of appeal “The first raises the question whether as a matter of principle the court has effective jurisdiction to grant a declaration or an anti-suit injunction to protect a party's rights under an arbitration agreement in circumstances where there are no arbitral proceedings on foot and none are intended pursuant to what agreement”.

On construction of Section 1(c) 1996 Act it was held There seems no reason in principle why the court might not want to intervene in such a case, so as to support arbitration and not to interfere in it.

Therefore, it seems to me that section I(C) does not drive the answer to the issue in our case. Secondly, section I(C) is only one of three principles stated in section I. The first two principles are (a) that “the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense” and (b) that “the parties should be free to agree how their disputes are resolved, subject only to such safeguards a are necessary in the public interest”. As for the first of these (section I(a)), it is not really concerned with a dispute of substantive jurisdiction which arises from a fundamental disagreement as to whether the parties have ever agreed to arbitrate at ll. For if they have not agreed to arbitrate, then the arbitral tribunal can have no proper, and certainly no definitive role in resolving their disputes; and whether they have agreed to arbitrate or not, that issue of substantive jurisdiction can only ultimately (if the issue is alive, and taken and not lost by any procedural bar) be resolved by the court, and not by any arbitral tribunal. Moreover, I have already explored above (at para 8 I) the issue of “unnecessary delay or expense” in this context, which may well pushin favour of a preliminary issue in the courts even where an arbitration reference is itself up and running. As for the second of these principles (section I (b), where parties may have agreed an arbitration agreement but are in dispute as to whether they have done so, the principle of party autonomy suggests that the court should be prepared to assist in finding ways for that dispute to be resolved. Thus a consideration of all three of these principles may well suggest that a balancing exercise has to be performed in which the private and public interests involved, and the purposes of the AA I 1996, might well weigh in fabvour of the court playing a necessary role. Such a conclusion seems to me moreover to reflect the numerous cases, both before and after the AA 1996, in which the court has been prepared to use or to recognise the use of section 37 to support arbitration by requiring parties to refer their disputes to arbitration, rather than to allow one party to pre-empt the issue of arbitral jurisdiction by use of foreign courts: see, for instance, The *Angelic Grace* (1995) I Lloyd's Rep 78, and the *XL Insurance Ltd.* (2001) 1 ALL ER

(Comm) 530, *Welex* (2003) 2 Lloyd's Rep 509, *Through Transport* (2004) 1 Lloyd's Rep 206, *Elektrim (No 2)* (2007) 2 Lloyd's Rep 8, and *Starlight Shipping* (2008) 1 ALL ER (Comm) 593 cases.

102. There is nothing in the Saville Report to suggest that use of the anti-suit injunction, at that time so recently and so importantly highlighted in The Angelic Grace, in support of arbitration was unjustified or inconsistent with the principles of the new Bill".

Although various points have been raised by the plaintiff to challenge the proceeding but the moot point appears to be that the arbitration agreement is inoperative as between the plaintiff and the defendant no. 1.

The notification of claim refers to the contract dated 16th October, 2009 for the supply operation and maintenance of cargo handling equipment and berth nos. 2 and 8 of Haldia Dock Complex awarded by the Board of Trustees for the Port of Calcutta to a consortium comprising of ABG Infralogistics and ABG Kolkata Container Terminal Private Limited. The consortium has successful tenderer incorporated a Special Purpose Vehicle namely the respondent no. 3 HBT.

LDA is a company incorporated under the laws of France (registered under nb 652 012 311 Companies and Trade Registry of Nanterre) and having its registered office at "Les ecluses" 28 Guai Gallieni, - 92158 Suresnes, FRANCE. LDA is experienced in the dry bulk cargo transportation and handling industry.

ABG Ports Limited (hereinafter "ABG Ports") and ABG Kolkata Terminals Private Limited (hereinafter "ABG Kolkata"), are subsidiaries of ABG Infralogistics Limited (hereinafter "ABG"), all of which are companies constituted under the laws of India and are inter alia, engaged in the business of investing in and operating infrastructures assets including cargo terminals in ports. In or about 2008, the said Consortium secured a tender for the supply, operation and maintenance of cargo handling equipment of Berth nos. 2 and 8 (hereinafter the said Berths") at the Haldia Dock Complex (hereinafter HDC) from Ko PT, through a global competitive bid process As per the terms of the tender documents, this Consortium subsequently incorporated itself as a joint venture company namely HBT.

ALBA Asia Private Limited (previously known as ABG LDA Bulk Handling Private Limited) (hereinafter ALBA) is a joint venture company incorporated under the laws of India through a collaboration between LDA and ABG Ports.

HBT is a joint venture company incorporated under the laws of India by the Consortium, which was formed specifically for the purpose of carrying out the activities related to the Project and which entered into the Contract with Ko PT. On or about 23rd July, 2009, HBT became a subsidiary of ALBA.

The defendant no. 1 in the brief statement of facts relevant to the claim stated that HBT was incorporated for the purpose of entering into the contract with Ko PT and implementing the aforesaid project. LDA (ALBA) as on the date of filing of the statement of claim invested funds to the tune of INR 102

Crores approximately in the said project.

As per the terms of a letter of Intent dated 29th April 2009 (hereinafter the Lo I) issued by Ko PT, HBT was to procure a large number of highly specialized cargo handling equipment. Pursuant thereto, ALBA made investments in HBT to the tune of approximately INR 140 crores for the purpose of procuring the required cargo handling equipment. HBT also furnished a performance Bank Guarantee to Ko PT to the tune of INR 4 crores. In the two years of the operation of the said Project (2010-2012) and since its termination, ALBA has had to further inject funds to the tune of INR 68 Crores to fund operational losses in HBT arising out of India's breach of its obligations under the Treaty, as detailed herein below:

From the very inception of the project, India the State government, Ko PT, and a number of authorities and agencies have consistently and deliberately, through their acts and omissions:

-created impediments to the implementation of the Project in an efficacious manner;

-compelled HBT to overstaff the project;

-created impediments to the operation of the Project facilities in an efficacious manner in a normal, safe and conducive environment;

-failed to provide protection and safety to the Project facilities or HBT's personnel adequately or at all;

-financially crippled the Investment and the Project;

As a result of which the Contract was rendered redundant and HBT was left with no choice but to terminate its Contract with Ko PT.

As such, India, though its acts and omissions, has denied fair and equitable treatment to LDA, failed to provide protection and safety to LDA's Investment in India and has ultimately indirectly expropriated LDA's Investment in the Project, thereby causing irreparable harm, injury and loss to LDA in clear violation of its obligations under the Treaty.

There is a dispute resolution mechanism provided in the Treaty, which states:

ARTICLE 9:

1) Any dispute concerning the investments occurring between one Contracting Party and an investor of other Contracting Party shall, if possible, be settled amicably between the two parties concerned.

2) Any such dispute which has not been amicably settled within a period of six months from written notification of a claim may be submitted to international conciliation under the Conciliation rules of the United Nations Commission on International Trade Law, if the parties so agree.

3) Notwithstanding paragraph 2, the dispute may be referred to arbitration at any time as follows:

(a) If the Contracting party of the investor and other Contracting party are both parties to the Convention on the Settlement of Investment Disputes between States and Nationals of other States open to signature in Washington on March 18, 1965, and the investor consents in writing to submit the dispute to the International Centre for the Settlement of Investment Disputes, such a dispute shall be referred to the Centre; or

(b) If the investor so decides, the dispute shall be referred to an ad hoc arbitral tribunal in accordance with the Arbitration Rules of the United Nations Commission of International Trade Law, as adopted by the General Assembly on December 15, 1976. In respect of such arbitral proceeding, the following shall apply;

The judgments cited at the bar would show that Section 5 of the Arbitration and Conciliation Act is of general principle which would be applicable to all arbitration proceedings, irrespective of fact whether it is a domestic arbitration or an international arbitration.

Whether the Civil Court would exercise its jurisdiction to stay a foreign arbitration bristles with problem and discretion.

The Hon'ble Supreme Court in *Chatterjee Petrochem* (supra) rejected the argument of the Ld. Senior Counsel for HPL that Section 5 of the Arbitration Consideration Act which bars intervention by judicial authority in arbitration Agreement will not be applicable to International Agreement. The Hon'ble Supreme Court relied upon the following observations of the Apex Court in *Venture Global Engineering* v. *Satyam Computer Services Limited* which reads:

"..... In order to find out an answer to the first and prime issue and whether the decision in *Bhatia International* (supra) 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 O.S. no. 80 of 2006 on the file of the 1st Additional District Court, Secunderabad, for a declaration that the Award dated 03.04.2006 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".

The Hon'ble Supreme Court held that the Principal Agreement dated 12th January, 2002 continues to be in force with its arbitration clause. It was further held that Section 5 of the Arbitration Conciliation Act would be applicable to para II of the Act as well. The Agreement dated 12th January, 2002, remain valid and arbitration clause with all forms would be applicable to the parties concerned to get their disputes arbitrated and resolved in the arbitration as per the rules of ICC.

The fact of non-signatory to the agreement was also considered in paragraph 36 of the said report in which it was held that the non-signatory to the agreement does not jeopardize the arbitration clause in any manner. The observation is stated below:

"The fact that CPIL, which initially was a non-signatory to the Agreement does not jeopardize 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 Pvt. Ltd.* (supra), wherein it was held as under:

"107. If one analyses the above cases and the authors' views, it becomes abundantly clear that reference of even non-signatory parties to 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 an action. But this general concept is subject to exceptions which are that when a third party, i.e. non-signatory party, is claiming or issued 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."

The Hon'ble Supreme Court accordingly dismissed the suit and directed the parties to resolve the dispute for arbitration in terms of clause 15 of the letter of agreement dated 12th January, 2002 in accordance with the rules of ICC. In *Excalibur Ventures* v. *Texas Keystone* reported at 2011 (2) LLOYD'S LAW REPORTS the issue was whether the Court has jurisdiction to grant an anti arbitration injunctions when a dispute is raised as to the parties to arbitration clause and whether there was ever an agreement to arbitrate. It was held:

"The English Courts had jurisdiction under Section 37 of the Supreme Courts Act 1981 to grant injunctions restraining arbitrations where the seat of the arbitration was in a foreign jurisdiction, although it was a power only exercised in exceptional circumstances and with caution. An English court would be particularly slow to restrain arbitration proceedings where there was an agreement for the arbitration to have its seat in a foreign jurisdiction and the parties had "unquestionably agreed" to the foreign arbitration clause. Questions relating to arbitrability or jurisdiction, or to staying the arbitration might in appropriate circumstances better be left to the foreign courts having supervisory jurisdiction over the arbitration. Nonetheless in exceptional cases, for example where the continuation of the foreign arbitration proceedings might

be oppressive or unconscionable, where the very issue was whether the parties had consented or where there was an allegations that the arbitration was a forgery the court might exercise its power. The court would pass an anti-arbitration injunction. The court accepted the broad and flexible approach of Rix LJ in *AES Ustkamenogorsk Hydropower Plant LLp* v. *Ust-Kame-nogorsk Hydropower Plant JSC* (2011) 2 Lloyd's Rep 233 and referred to paragraphs 81 to 85 and paras 98 to 100 of the said judgment which read:

81. This analysis, in my respectful opinion, usefully underscores the wider picture about the autonomy of the parties and the jurisdiction of arbitrators with power to investigate their own jurisdiction, namely that, sooner or later, the question of substantive jurisdiction is likely to come before the court. Where parties differ as to a matter as fundamental as whether they have agreed any contract, or any contract containing an arbitration clause, it is most unlikely that one or other of them will rest content with the decision of arbitration as to either their jurisdiction or as to the parties' rights. For one or other party is saying that there is simply no agreement that arbitrators can resolve their disputes. In such circumstances, the issue of jurisdiction is likely to come before the courts sooner or later, and when it does, it will have to be decided by the court from first principles and in the light of facts which, whatever the investigation by the arbitrators are yet to be determined on the evidence by the court. That is the learning of Azov shipping, approved by the Supreme Court in *Dallah*, where I said this. This was perhaps a case where the parties might well have come to Court, either by agreement or upon the application by one side or the other for the Court to determine the issues of jurisdiction, on the ground that it was likely to produce substantial sayings in cost and that there was good reason why the matter should be decided by the Court. With hindsight it seems to me that even if the parties could not agree on that course, the Court would be persuaded to allow such a determination if, of course, the tribunal had given its own permission, which is a sine qua non in the absence of the agreement of the parties. It might be assumed that the arbitrator may have been the more willing to give his agreement inasmuch as the question of jurisdiction in this case involved the prior question of whether Azov had ever become a party to the agreement as a whole.

I can quite see that there is an interest in encouraging parties to put their arguments on jurisdiction before the arbitrator himself under Section 30. In many cases, and perhaps in the ordinary and normal case of such a challenge, where, for instance, there is simply an issue as to the width of an arbitration clause and no issue a to whether a party is bound to the relevant contract in the first place, the arbitrator's view may be accepted. If it is not, a challenge to the court is likely to be a limited affair raising, essentially, a point of construction on the clause and thus no problem arises. Where, however, there are substantial issues of fact as to whether a party has made the relevant agreement in the first place, then it seems to me that, even if there has been a full hearing before the arbitrators the court, upon a challenge under Section 67, should not be placed in a worse position than the arbitrator for the purpose of determining that challenge ...'

82. Thus a question of jurisdiction may come before the court in a number of different situation. It might arise where one party goes to court with a claim and the defendant seeks a stay for arbitration the claimant may say there is no contract or no arbitration agreement, and the court will have to investigate that question for the purpose of dealing with the application to stay. Or a party may commence an arbitration, that the other party may say there is no agreement or no agreement to arbitrate, in which case the matter is prima facie for the arbitrators to decide in the first instance pursuant to Section 30. In a plain case the arbitrators may proceed to determine their own jurisdiction, but equally the parties may agree to come straight to

court to determine the question, or the arbitrators may give permission for the issue to be taken to court and the court may agree to accept the issue at that stage. Or the respondent in the arbitration may stand aloof, and come to Court under Section 72, or, following an award, under Section 67. Or, a party may start proceedings in another country and the defendant there then comes to the English Court to ask it to uphold their arbitration agreement by granting an anti-suit injunction. That is the equivalent of a party seeking a stay where an action is begun in England. Where the action in breaches or alleged breach of an arbitration agreement is begun in a foreign country, the respondent may or may not seek a stay there, but here he may ask for an anti-suit injunction.

83. There are further variations thrown up by the cases. In some cases, it is reasonably plain that an arbitration agreement has been made, but there maybe an issue as to its scope, or as to whether there has been a repudiation of it, or, as here, as to its surviving effectiveness. IN other cases, there is a factual dispute as to whether any agreement has ever been made in the first place, or a legal dispute as to whether an arbitration clause has been incorporated into the parties' contract. Moreover, in some cases, what is sought from the Court is an interim injunction, which is among the subject matters of Section 44, and in other cases what is sought is a final injunction, which is not within Section 44 but, subject to contrary agreement by the parties, may be within the powers of an arbitral tribunal in a final award.

84. Moreover, a distinction may have to be made between a declaration as to the existence or effectiveness of an arbitration agreement about which parties are in dispute, which is a form of final relief as to the parties' legal rights, and an anti-suit injunction which, at any rate in its interim form, is only intended to hold the ring until some tribunal, whether it is the Court itself at some later date, or an arbitral tribunal, can grapple with the merits of the parties' dispute.

85. This variety of situations suggests to my mind that is not possible to be dogmatic about where the principle in Section 1(c) of the AA 1996 leads. It is also relevant to observe that the Saville Report has nothing to say about anti-suit injuctions, even though it was written in February 1996, which is comfortably after The Angelic Grace had been decided in this Court, and even though the report's discussion of Section 44 includes a reference to Mareva or Anton Piller relief.

98. Fourthly, it seems to me to be going too far to say that because an arbitral tribunal ‘may rule on its own substantive jurisdiction’ (emphasis added), therefore the Court ought always to regard the position as though there is an obligation on the parties and/or on the arbitrators for the arbitrators to rule on any dispute about their substantive jurisdiction. Anything may happen. The potential dispute may not be passed. The disputing pary may stand aloof and come to court. The parties may join issue in the arbitration, but agree to go to court for a preliminary issue on jurisdiction. The parties may not be able to agree on such a preliminary issue, but an application may be made to the court with the permission of the arbitrators for such a preliminary issue. The court may or may not accept such an application.

99. In such circumstances, I do not with respect agree with an interpretation of Vale do Rio which regards it as laying down a rule for jurisdiction that it is in all circumstances necessary for a party who wishes to raise with the court an issue of the effectiveness of an arbitration clause first to commence an arbitration and go through the procedures and provisions of sections 30 to 32 and/or section 67 and/or section 72. If, however, that is what Thomas J was saying in Vale do Rio, then I would not with respect agree with that view. In any event, since the alleged party to the charter and the arbitration agreement in that case was not as yet a party to the court proceedings (not having been served) and only a non-party (the brokers) were involved in the court proceedings, I would not regard any view expressed there as

other than obiter. Thomas J did not in any event there consider the role of section 37 of the SCA 1981. In my judgment, at any rate in a case where no arbitration has been commenced and none is intended to be commenced, but a party goes to court to ask it to protect its interest in a right to have its disputes settled in accordance with its arbitration agreement, it is open to the Court to consider whether, how best, if at all, to protect such a right to arbitrate. Whether it will assist a claimant at all, and if so, how, is a matter for its discretion: but it would to my mind be an error of principle and good sense for the Court to rule that as a matter of jurisdiction, or even as a matter of the principled exercise of its discretion, it has no possible role in the protection and support of arbitration agreements in such a context.

100. Thus I do not consider that Section 1 (c) of the AA 1996, which in any event is a general principle intended to assist in the constriction of the Act rather than a legal rule which binds the Court even in terms of another statute, assists much in answering the question which is before the Court in this case. First, the principle in Section 1 (c) necessitates the asking of the question: 'should not intervene' in what? In the conduct of an arbitration? That would seem to be the essential purpose of such a principle. In the conduct of litigation, here or abroad, which threatens the safty of an arbitration agreement or any possible arbitration pursuant to it? There seems no reason in principle why the Court might not want to intervene in such a case, so as to support arbitration and not to interfere in it. Therefore, it seems to me that Section 1(c) does not drive the answer to the issue in our case. Secondly, section 1(c) is only one of three principles stated in section 1. The first two principles are (a) that "the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense" and (b) that "the parties should be free to afree how their disputes are resolved, subject only to such safeguards as are resolved, subject only to such safeguards as are necessary in the public interest". As for the first of these (section 1(a) it is not really concerned with a dispute of substantive jurisdiction which arises from a fundamental disagreement as to whether the parties have ever agreed to arbitrate at all. For if they have not agreed to arbitrate then the arbitral tribunal can have no proper and certainly no definitive role in resolving their disputes: and whether they have argeed to arbitrate or not, that issue of substantive jurisdiction can only ultimately (if the issue is alive and taken and not lost by any procedural bar) be resoved by the court and not by the arbitral tribunal. Moreover, I have already explored above (at para 81) the issue of uncessary delay and expense in this context, which may well push in favour of a preliminary issue in the courts even ewhere an arbitration reference is itself up an running. As for the second of these principles (section 1b) where parties may have agreed an arbitration agreement but are in dispute as to whether they have done so the pirciple of party autonomy suggests that the court should be prepared to assist in finding ways for that dispute to be resolved. Thus a consideration of all three of these princiles may well suggest that a balancing exercise has to be pereformed in which the private and public interest involved,. And the purposes of the AA 1996 might well weigh in faovur of the court playing a necessary role" Then in paragraphs 66 and 67 the court proceeds to hold:

66. of course, in the AES case Rix LJ was not dealing with a foreign arbitration, but his analysis clearly supports the proposition that in circumstances such as the present the court has jurisdiction to decide whether itself to resolve the issue as to whether an arbitration agreement exists.

67. Moreover in a situation converse to the one before the court ie where a defendant is proceeding before the court applies for a stay in faovur of foreign arbitration proceeding pursuant to section 9 of the Arbitration act if the issue is whether an arbitration agreement was ever concluded then the court can clearly determine such an issue, if it considers it appropriate to do so: see *Al-Naimi* (supra) at page 524. Indeed if the stay is sought pursuant to section 9, the court has to be

satisfied in order to exercise its powers under the section to grant a stay, that an arbitration agreement has in fact been concluded. If the court decides that the arbitrators should decide the issue, and therefore, ex hypothesi is not satisfied as to the existence of such an agreement then the stay is granted pursuant to the inherent jurisdiction as now set out in CPR 3.1(2) (f): see ibid, pages 525 and 527. The court looks for the most economical way to decide where the real dispute should be resolved. That seems to me to be the correct approach here. But that is a matter of discretion, not jurisdiction.

The provision of the English Prohibition Act was analysed and it was held:

"I also reject Excalibur's argument that, as a matter of jurisdiction, it is for the tribunal, and not the English court, to determine the arbitrability of Excalibur's claims against the Gulf Defendants. The scheme set out in the Act shows that the court undoubtedly has jurisdiction to determine the issue of arbitrability in circumstances very similar to the present case.

In the case of an English arbitration, section 72 of the Act expressly provides that the court may determine whether there is an arbitration agreement binding on a person alleged to be a party to arbitral proceedings, so long as that person has no taken part in the arbitral proceedings.

The fact that Section 30 of the Act (on which Excalibur relies) permits, in the case of an English arbitration (but does not require), an arbitral tribunal to decide questions of jurisdiction is of no consequence. The Act does not require a party who maintains that there is no arbitration agreement to have that question decided by an arbitral tribunal *Dirse Construction Ltd.* v. *St David Ltd.* (1999) BLR 194 as approved in *Al Naimi* v. *Islamic Press Agency Inc* (2000) 1 Lloyd's Rep 522 at page 525, Mr. Panayides contention that "…..the English court would, pursuant to s 30 of the Arbitration Act 1996, defer to the tribunal on questions of jurisdiction in first instance" is wrong as a matter of law. In Dallah the Supreme court quoted with approval Fouchard, Gailard, Goldman, International Commercial Arbitration, to the following effect:

"Even today, the competence competence principle is all to often interpreted as empowering the arbitrators to be the sole judges of their jurisdiction. That would be neither logical nor acceptable. In fact, the real purpose of the rule is in no way to leave the question of the arbitrators jurisdiction in the hands of the arbitrators alone. Their jurisdiction must instead be reviewed by the courts if an action is brought to set aside or to enforce the award".

Lord Mance went on to say at para 26 "An arbitral tribunal's decision as to the existence of its own jurisdiction cannot therefore bind a party who has not submitted the question of arbitrability to the tribunal….. Domestically, there is no doubt that, whether or not a party's challenge to the jurisdiction has been raised, argued and decided before the arbitrator, a party who has not submitted to the arbitrator's jurisdiction is entitled to a full judicial determination on evidence of an issue of jurisdiction before the English Court, on an application made in time for that purpose under Section 67 of the Arbitration Act, 1996, just as he would be entitled under Sec. 72 if he had taken no part before the arbitrator: see eg. *Azov Shipping Co.* v. *Baltic Shipping Co.* (1999) 1 AII ER 476".

"The nature of the present exercise is in my opinion, also unaffected where an arbitral tribunal has either assumed or, after full deliberation, concluded that it had jurisdiction".

Although there may not be same and/or similar provisions in the Indian Arbitration Act, 1996 but he jurisdiction of the Court to interfere in such a situation is not completely obliterated as one could found that in Sec.45 powers have been given to the Court to refuse reference in case it is found that the said agreement is null and

void, inoperative or incapable of being performed. Even under the domestic arbitration in a reference being sought under Section 11 of the Act the Court would be required to decide the question of arbitratrability of the claim, validity of the arbitration agreement and other jurisdictional matter. (*SBP & Co.* v. *Patel Engineering Ltd.* (2005) 8 SCC 618)

In a subsequent decision in *Swiss Timing Ltd.* v. *Common Wealth Games 2010 Organising Committee* reported at (2014) 6 SCC 677 it was held that while exercising jurisdiction under Section 11, the court can decline to refer disputes to arbitration if contract is patently void or where it reaches a conclusion that the contract is void on a meaningful reading of contract document without requirement of any further proof. The court cannot decline reference to arbitration on the allegations of fraud, coercion, unsoundness of mind, undue influence and misrepresentation since all of the above defects result in voidable and not void contracts. A word of caution was given in the said judgment against misuse of the provisions of Section 5 in paragraph 25 of the said report relevant portion whereof reads:-

"5. Section 5 of the Arbitration Act provides that the Court shall not intervene in the arbitration process except in accordance with the provision contained in Part OI of the Arbitration Act. This policy of lest interference in arbitration proceedings recognizes the general principle that the function of Courts in matters relating to arbitration is to support the arbitration process. A conjoint reading of Section 5 and Section 16 would make it clear that all matters including the issue as to whether the main contract was void/voidable can be referred to arbitration. Otherwise, it would be a handy tool available to the unscrupulous parties to avoid arbitration, by raising the bogey of the underlying contract being void."

The instant BIT is similar to other BIT's and certain domestic legislation provide not only for International arbitration of disputes, but also substantive rights that investors may invoke in such proceedings. The substantive rights are varied and overlap but there are common threads that run through them. One of those threads is that host countries seek investors who would contribute to the development of the host country and in exchange receive certain guarantees. One of those guarantees the investor would seek is a fair and equitable treatment by the host country. Another related provision is that the investor would receive full security of the investments and there would be no discrimination against the foreign investor in comparison with the other investors. The fair and equitable treatment standard relates to the investor's legitimate expectations as to the transparency, stability and procedural fairness and investor reasonably expected when the investor made the investment. However, in considering such standard the investor is not to be protected from normal commercial risks that one assumes in making the investment. However, where assurances have been received that cover what in some circumstances would otherwise be normal commercial risks, those may give rise to a claim of breach of the fair and equitable treatment standard. The issue therefore, arises in many cases is what the legitimate expectation of foreign investor was when the investment was made and whether that expectation has been frustrated by the host State. (See Handbook of UNCITRAL Arbitration, Thomas H. Webster Sweet & Maxwell 2010 Edition). The proven breach of such obligation by the host nation may result in pecuniary compensation. In the Indian Arbitration HBT has also made a claim on account of loss and damages arising out of same and the similar set of facts. While the claim of HBT is arising out of the contract dated 16th October 2009, the claim of LDA is under the treaty. This is where the arbitral tribunal would be required to take a conscious decision if notwithstanding a substantive progress being made in the Indian Arbitration Proceeding the tribunal would proceed with the reference at this stage when the parties are yet to file their pleadings, after the respondent no. 1 could overcome the initial resistance by the Union of India about the maintainability of the said reference.

This is however, my understanding in dealing with such a situation.

In *Gujarat Nre Coke Ltd.* v. *Gregarious Estates Incorporated* reported at 2014 (1) CHN (CAL) 64 it was held that the Court would be competent enough to proceed with the suit under clause 12 is not revoked. The Hon'ble Division Bench were considered the power of the Court to grant injunction in relation to for an arbitration proceedings as relied upon an earlier Division Bench Judgment in the case of *LMJ International Limited* (in which I was a party) and referred to the following observation of the said Division Bench: "in absence of any demonstrable injustice or harassment being caused by reason of initiation of the arbitration proceedings or participation in such proceedings and having regard to the fact that the agreement is not in dispute, in our view, the plaintiff is not entitled to an order of injunction".

The Hon'ble Division Bench observed that: "The parties by consent agreed to resolve their dispute through alternate dispute resolution, meaning thereby they agreed to avoid the regular process of disposal of controversy through Court of Law. The parties in their wisdom agreed, they would resolve their dispute through arbitration in London in terms of the procedure laid down therein and the English Law would guide the said arbitration. We fail to appreciate, how the suits filed by the appellants in this regard would be maintainable. We however, stop there without making further deliberation on the issue as Mr. Mitra would caution us and in our view, very rightly in absence of leave being revoked granted under Article 12 the suit would be maintainable in this Court. Similarly, the second suit being brought on the cause of action pleaded in the plaint and once entertained by the Court, would always be maintainable unless it was held otherwise that too, through an appropriate process known in law".

The principle the court is required to keep in mind is that if there is a valid arbitration agreement between the parties there is no escape from arbitration and the parties shall be referred to arbitration and resolve their dispute through the mechanism of arbitration. It is only in exceptional circumstances as held in Excalibur and the principle which has been followed both by the English and Indian Courts no anti arbitration injunction can be granted by a court of law. Mr. Sarkar has referred to the various sections of the English Arbitration Act and more particularly Section 9 of the English Arbitration Act and Section 8 of the Indian Arbitration Act and submitted that there is no comparable section to Section 8(3) of the Indian Arbitration Act in the English Arbitration Act.

Unless the facts and circumstances of a particular case demonstrate that continuation of such foreign arbitration would cause a demonstrable injustice in my view the civil court in India would not exercise its jurisdiction to stay foreign arbitration. The invocation of the arbitration clause under the treaty at the instance of the defendant no. 1 as it has come out from the argument of the defendant no. 1 appears to be on a perception that the Indian Legal Machinery is not adequate to protect the interest of foreign investor. The delay in the pending arbitration proceeding between the plaintiff and the defendant no. 3 arising out of the same contract of 16th October, 2009 which also is a contract referred to in the notification to the claim appears to be the main reason for invocation of the arbitration clause under the treaty. The plaintiff cannot question the treaty entered by the two soverign nations creating rights for investor of a contracting party. There cannot be any doubt that the notification of claim has referred to KOPT as an organ of Union of India. The issues that are likely to arise in the proposed arbitration proceedings may overlap and likely to overlap with the issues to be decided in the Indian Arbitration proceedings. The defendant no. 1 cannot be a party to the Indian arbitration proceedings, so as the plaintiff under the BIT. The defendant no. 1 has also admitted the said position. Since the plaintiff is not a party to BIT the plaintiff cannot challenge the arbitration

agreement. If any one at all is aggrieved is the Union of India. KOPT cannot espouse the cause of Union of India in this proceeding.

The defendant no. 1 is only a shareholder of the defendant no. 2. The shareholder under the said contract of October 16, 2009 cannot invoke the arbitration clause for espousing his own right under the treaties although in my view he could ask for joinder and with the consent of the KOPT the matter can proceed. Mr. Mitra has pointed out that the respondent no. 1 being only a 49 per cent stake holder in the defendant no. 2 could not have invoked the arbitration clause under the treaty as he is not coming within the purview of investor appears to be some substance and significance in absence of any evidence to the contrary as the respondent no. 1 has voluntarily decided not to use any affidavit as it possibly could have exposed his inherent lack of locus to invoke the arbitration clause under the bilateral treaty which objection Union of India has already urged before the arbitral tribunal. HBT also in spite of notice did not appear. The Arbitral tribunal which has been duly constituted would surely consider such objection with all seriousness as it deserves along with the objection as to the commercial nature of dispute between KOPT and HBT as urged by the Union of India before proceeding with the matter on merits Although a distinction is sought to be raised by Mr. Sarkar about the subject of international law and subject of domestic law and that the same set of facts could give rise to different causes of action, the very fact that the interest of the French national in so far as the pending proceeding is concerned, as borne out from the pleadings filed by the parties before the arbitral tribunal in India appears to have been urged and adequately represented in the said proceeding.

The circumstances under which an anti-arbitration injunction can be granted are summarised below:-

(i) If an issue is raised whether there is any valid arbitration agreement between the parties and the Court is of the view that no agreement exists between the parties.

(ii) If the arbitration agreement is null and void, inoperative or incapable of being performed.

(iii) Continuation of foreign arbitration proceeding might be oppressive or vexatious or unconscionable.

Although an argument is sought to be made that the respondent No. 1 is not bound by any order that might be passed in this proceeding and could have ignored any order passed in this proceeding with impunity this Court is of the view that the said stand of the respondent No. 1 would not be beneficial in the interest of the said respondent. Under the present circumstances where there is a growing trend and need to respect the jurisdiction of other Courts LDA could not have avoided this proceeding. It could not be ignored that LDA is the shareholder in a company which holds a substantial share in HBT against whom an arbitration proceeding is pending. The inextricable connection of LDA with the other defendants belonging to its group cannot be ignored. However, in the instant case, the Court is seized with an issue as to the invocation of the arbitration clause under the treaty at the instance of the LDA. The initiation of the said proceeding by LDA appears to be on perception that the Indian Legal Machinery is inadequate to protect the interest of foreign investor which argument I refuse to accept not because of any national feeling but as a judge I consider that all legal systems in the world always strive to deliver the best in the shortest possible time and there cannot be quick justice as justice hurried is justice buried. I reiterate that with the explosion of litigations the Indian Courts have performed significantly well.

Mr. Mitra submits that the parallel and concurrent proceeding may result in conflicting judgments. This Court has no doubt that if the tribunal on the basis of the materials on record find that such events are likely to happen then on a principle of

comity of court and the avoidance of inconsistent judgments might stay its hand till the Indian proceeding is concluded as otherwise it would be a recipe for confusion and injustice as Justice Cooke observed in Enercon GNBH v. Enercon (India) Ltd. *reported at 2012 EWHC 3711 (Comm).:*

"56. Comity and the avoidance of inconsistent judgments require that I should refrain from deciding matters which are possibly going to be decided further in India. It would be a recipe for confusion and injustice if I were not to do so. Issue estoppel is already said to arise on the question of the seat of arbitration and curial law, and that raises very difficult questions for the court to decide. If the stay was lifted, then I could decide the matter differently from Savant, J. or from a later final decision on appeal in the Supreme Court of India, if that matter went ahead. The Indian courts are seised and should reach, in my judgment, a concludeded decision, albeit on an expedited basis.

Mr. Sarkar is correct in submitting that the approach of the Court should be towards pro-arbitration. In Enercon (supra) in paragraph 90 it has been held

"90. It is a well-recognized principle of aribtration jurisprudence in almost all the jurisdictions, especially those following the UNCITRAL Model Law, that the courts play a supportive role in encouraging the arbitration to proceed rather than letting it come to a grinding halt. Another equally important principle recognized in almost all jurisdiction is the least intervention by the courts. Under the Indian Arbitration Act, 1996, Section 5 specifically lays down that:

"5. Extent of judicial intervention. - Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this part."

Although the defendant No. 1 is not a party to the said proceeding in the strict sense of the term as he has not been physically made a party but the fact remains that the interest of the defendant No. 1 has been duly represented and canvassed by HBT in the Indian arbitration proceeding.

The bilateral treaty is between the two sovereign nations. An investor under the treaty has been given certain special rights and privileges which is enforceable under the treaty. Whether the notification of claim falls within such parameters and the defendant No. 1 could be treated as an investor is a matter to be decided by the arbitral tribunal duly constituted under the relevant rules. In the event, the preliminary objections are overruled and the arbitral tribunal is of the opinion that the matter can proceed and continuation of such proceeding would not be a recipe for confusion and injustice.

The Union of India would be required to contest the matter on merits.

As observed in *City of London* (supra) that "the fact that under certain circumstances the State may be responsible under International Law for the acts of one of its local authorities, or may have to take steps to redress wrong committed by one of its local authorities" is also applicable in the instant case.

The arbitration agreement is only enforceable against the Union of India and not against KOPT. The continuation of any proceeding against KOPT at the instance of the defendant no. 1 would be oppressive for the reasons mentioned above. In view thereof KOPT would not be bound to participate in the said proceeding.

The respondent no. 1 is restrained from proceeding with the arbitral proceeding only against the petitioner.

The Application succeeds.

However there shall be no order as to cost.

Urgent xerox certified copy of this judgment, if applied for, be given to the parties

on usual undertaking.