

2020 SCC OnLine Del 901 : (2020) 268 DLT 548 : (2020) 2 Arb LR
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In the High Court of Delhi at New Delhi
(BEFORE RAJIV SAHAI ENDLAW, J.)

CS(OS) 84/2020 & IA No. 2760/2020 (u/O XXXIX R-1&2 CPC)

Dr. Bina Modi ... Plaintiff;

Versus

Lalit Modi and Others ... Defendants.

And

CS(OS) 85/2020 & IA No. 2762/2020 (u/O XXXIX R-1&2 CPC)

Charu Modi and Another ... Plaintiffs;

Versus

Lalit Modi and Another ... Defendants.

CS(OS) 84/2020, IA No. 2760/2020 (u/O XXXIX R-1&2 CPC), CS
(OS) 85/2020 and IA No. 2762/2020 (u/O XXXIX R-1&2 CPC) ^s

Decided on March 3, 2020

Advocates who appeared in this case:

Mr. Mukul Rohatgi, Mr. Rajiv Nayar, Mr. Arvind Nigam and Mr. Sandeep Sethi, Sr. Advs. with Mr. Gyanendra Kumar, Ms. Amita Katragadda, Ms. Shikha Tandan, Mr. Robin Grover, Nikhil Rohatgi, Mr. Shashank Khurana and Mr. Shivanshu Bhardwaj, Advocates;

Mr. Abhishek Manu Singhvi, Sr. Adv. with Ms. Anuradha Dutt, Ms. Fereshte D. Sethna, Mr. Swadeep Hora, Ms. Ekta Kapil, Mr. Haaris Fazili, Mr. Kunal Dutt, Mr. Shobhit Ahuja, Ms. Madhvi Khanna and Mr. Abhishek Singh, Advs. for D-1;

Mr. Arvind Nigam, Sr. Adv. with Mr. Mahesh Agarwal, Mr. Rishi Agarwal, Ms. Niyati Kohli, Mr. Karan Luthra and Mr. Pratham Vir Agarwal, Advocates;

Mr. C.A. Sundaram, Sr. Adv. with Ms. Anuradha Dutt, Ms. Fereshte D. Sethna, Mr. Swadeep Hora, Ms. Ekta Kapil, Mr. Haaris Fazili, Mr. Kunal Dutt, Mr. Shobhit Ahuja, Ms. Madhvi Khanna and Mr. Abhishek Singh, Advs. for D-1.

The Judgment of the Court was delivered by

RAJIV SAHAI ENDLAW, J.:— Both suits seek the reliefs of, (i) declaration as null and void, inoperative, unenforceable and contrary to public policy of India of the arbitration agreement contained in Clause 36 of the Restated Trust Deed dated 9th April, 2014 (Trust Deed); (ii) declaration as null and void, unenforceable and contrary to public policy

of India of the Application for Emergency Measures filed by defendant No. 1 in both the suits and referred to as ICC Case No. 25137/HTG (EA); (iii) permanent injunction restraining the defendant No. 1 Lalit Modi, in both the suits, from prosecuting or continuing with the Application for Emergency Measures and/or from instituting or proceeding with any arbitration proceedings against the plaintiff/plaintiffs in both the suits, under Clause 36 of the Trust Deed; and, (iv) directing the International Chambers of Commerce to enforce the order passed in terms of the aforesaid prayers.

2. The suits, being in the nature of anti-arbitration injunction suits and, (A) a three Judge Bench of the Supreme Court in *Kvaerner Cementation India Limited v. Bajranglal Agarwal*, (2012) 5 SCC 214, followed by the undersigned in several judgments, having taken a view that "bearing in mind the very object with which the Arbitration and Conciliation Act, 1996 has been enacted and the provisions thereof contained in Section 16 conferring the power on the Arbitral Tribunal to rule on its own jurisdiction, including ruling on any objection with respect to existence or validity of the arbitration agreement, we have no doubt in our mind that the civil court cannot have jurisdiction to go into that question"; (B) the suits being accompanied with applications for interim relief seeking to restrain the defendant No. 1 from instituting or continuing with ICC arbitration; and, (C) the counsel for the defendant No. 1 having appeared on caveat to oppose the very admission of the suits, the senior counsels for the plaintiff/s and the senior counsels for the defendant No. 1 were heard from 1030 hours to 1320 hours and again from 1600 hours to 1640 hours, orders on admission of suits were reserved on 27th February, 2020, when the suits had come up first before this Court.

3. The facts, insofar as necessary on the aspect of maintainability of the suits, may be recorded as under:

- (i) Charu Modi (Charu), Lalit Modi (Lalit) and Samir Modi (Samir) are the children of K.K. Modi (KK) and Bina Modi (Bina);
- (ii) CS(OS) 84/2020 has been filed by Bina against Lalit, with Charu and Samir as proforma parties thereto;
- (iii) CS(OS) 85/2020 has been instituted by Charu and Samir against Lalit, with Bina as a proforma party thereto;
- (iv) both suits are otherwise identical and the counsels have been heard with reference to CS(OS) 84/2020;
- (v) the Trust Deed was executed at London by KK as settlor/managing Trustee and Bina, Lalit, Charu and Samir as Trustees, and in pursuance to oral family settlement recorded in the Oral Family Settlement dated 10th February, 2006 between them and in supersession of the earlier Trust Deed dated 10th

February, 2006 (Original Trust Deed) of constitution of K.K. Modi Family Trust (Trust);

(vi) Clauses 3.2, 3.3, 4 & 36 of the Trust Deed were/are as under:

"3.2. In the event of Mr. K.K. Modi ceasing to be the Managing Trustee on his demise or in accordance with Clause 26 hereof, Miss. Bina Modi shall forthwith and without any further action assume the office of the Managing Trustee.

3.3 Save and except where it is specifically provided otherwise, both Mr. K.K. Modi and Mrs. Bina Modi as the Managing Trustees shall have the powers the day to day administration, execution and management of the Trust, the assets forming part of the Trust fund including Family Controlled Businesses, to execute all documents, writing, deeds agreements etc. that may be required to be executed for and on behalf of the Trust; to assign, sell, exchange, distribute or dispose of any of the properties or income or any part thereof of the Trust and generally all other powers in relation to the Trust. So long as Mr. K.K. Modi and after him, Mrs. Bina Modi continue to be the Managing Trustee, the Trust, the assets forming part of the Trust Fund including Family Controlled Businesses shall be administered, executed and managed in accordance with the decisions taken by them and powers exercised by them as provided in this Deed. Any decision taken by Mr. K.K. Modi and in his absence by Mrs. Bina Modi in relation to the Trust, the Trust Fund, the Family Controlled Business and generally in relation to any matter for administration, execution, management of the Trust shall be final and binding on all parties concerned, including the Trustees and the Beneficiaries of the Trust. During their tenure as the Managing Trustees, none of the powers of the Board of Trustees shall become applicable and any power given to the Board of Trustees requiring either their unanimous consent or a majority consent shall become applicable and shall be exercised by the Board of Trustees only after both, Mr. K.K. Modi and Mrs. Bina Modi cease to be the Managing Trustees of the Trust and only in the event of there being no Managing Trustee, appointed under Clause 3.5.3 hereunder to manage the affairs of the Trust.

4. Meeting the Trustees upon Mrs. Bina Modi becoming Managing Trustee

4.1 Within 30 (thirty) days of the earlier of:

- a. Mrs. Bina Modi assuming the office of a Managing Trustee, or*
- b. Mr. K.K. Modi vacating the office of the Managing Trustee*

and where Mrs. Bina Modi has predeceased Mr. K.K. Modi,

a meeting of the Board of Trustees shall be convened by Mrs. Bina Modi, or if Mrs. Bina Modi is not a Trustee, the Board of Trustees shall meet, wherein the Board of Trustees shall decide unanimously, in relation to the Trust Fund (which includes the Family Controlled Businesses), whether:

4.1.1 to continue to own and manage all assets of the Trust Fund including the Family Controlled Businesses; or

4.1.2 to sell a part of the Trust Fund (including the Family Controlled Businesses) and continue to own and manage the remaining assets comprising of the Trust Fund; or

4.1.3 to sell the whole of the Trust Fund comprising of various assets including Family Controlled Businesses.

The written consent of all Trustees to the decisions taken at the meeting would be required for the resolution to be unanimously passed for the purpose of this Clause 4.1.

4.2 If the Board of Trustees is unable to take any decision as stated in Clauses 4.1.1 to 4.1.3 above unanimously, then the entire Trust Fund including all Family Controlled Businesses shall be sold off in the manner provided in Clause 11.

4.3 Notice of intent to dispose off Assets

So long as Mrs. Bina Modi continues to act as a Managing Trustee, any decision to dispose of the Trust Fund (including Family Controlled Businesses), either under Clause 4.1.2 or under Clause 4.1.3, shall be taken only at the meeting convened by Mrs. Bina Modi in accordance with Clause 4.1 above, provided however that in the event that any Trustee is unable to attend the meeting personally and vote (including through video conferencing or other electronic means) his/her written approval to the decisions taken would have to be obtained for the purpose of passing the unanimous resolution will have to be obtained within 3 days thereof, failing which the resolution will not be deemed to have been passed unanimously. After both Mr. K.K. Modi and Mrs. Bina Modi cease to be the Managing Trustee, such decision shall be taken only at a meeting of the Board of Trustees which shall be convened specifically to decide on the action to be taken in terms of the options listed in 4.1.1, 4.1.2 and 4.1.3 above. Such a meeting shall be convened only once at the end of every three year period; the first period of three years to commence 30 days after both, Mr. K.K. Modi and Mrs. Bina Modi shall have ceased to be the Trustees.

4.4 The agenda for the meeting of the Board of Trustees

mentioned in Clause 4.3 above, should include all relevant information in relation to the Trust Fund (including Family Controlled Business), the proposed business plans of the respective Family Controlled Businesses for the next 3 years, the tax and other implications etc. to give the Trustees adequate information to enable them to take the appropriate decision. Any decision unanimously taken by the Board of Trustees in and pursuant to any of the meetings convened under Clause 4.3 would be absolute, final and binding on all the parties. It is clarified that if the Board of Trustees cannot decide unanimously, then the business/asset of the Trust Fund proposed to be sold under the notice provided under clause 4.3 above, shall be disposed off in the manner provided under clause 11 hereof.

4.5 Decision to continue whole or part of the business

After Mr. K.K. Modi vacates the office of the Managing Trustee and so long as the Trust continues to own and manage the whole or part of the Trust Fund including Family Controlled Businesses then:

4.5.1 Mrs. Bina Modi shall continue to be the managing Trustee and shall have complete authority to take all decisions on any matter relating to the Trust Fund including Family Controlled Businesses and her decisions shall be final and binding on all the Beneficiaries and Trustees provided that it has been agreed to continue to keep the Trust and not dispose of all the assets at the meeting to be held within 30 days in accordance with clause 4.1; and

4.5.2 Upon Mrs. Bina Modi ceasing to be the Managing Trustee, the Managing Trustee appointed unanimously in accordance with Clause 3.5.3 above and in his/her absence the CEO, if any, appointed in accordance with Clause 3.5.4 above, acting under supervision and direction of the Board of Trustees acting by majority consent, shall manage the Trust Fund.

4.6 In the event that it is decided to sell the whole or part of the Trust Fund including Family Controlled Businesses or in the absence of unanimity between the Trustees to continue to hold and operate the assets forming part of the Trust Fund including Family Controlled Businesses, the Trust Fund (or part thereof as decided by the Board of Trustees) shall be sold and the process of sale as described in paragraph 11 shall be followed.

36. In the event of:

- a) any question arising as to the true import or interpretation of this Deed or otherwise in relation to their execution or implementation; or*

- b) any difference of opinion amongst the Trustees touching the execution and exercise of any of the Trustees' powers and provisions herein declared and contained or the true intent, meaning or construction of any of the clauses herein; or*
- c) or any dispute arising between the Settlor and the Trustees or between the Trustees inter se' or between the Trustees and the Beneficiaries out of or in connection with any provision made in this Deed; or*
- d) breach of any provision of the Deed by any Trustee, any other non-defaulting Trustee or Beneficiary, as the case may be can give a notice of the breach along with the reasons thereof to the defaulting Trustee, Managing Trustee and the Secretary. In the absence of the Managing Trustee, such notice shall be given to all the other Trustees, the CEO and the Secretary of the Trust, apart from the defaulting Trustee. An opportunity shall be given to the defaulting party(ies) to rectify the breach within a period of 90 days from the date of the breach.*

The Trustees may try to amicably resolve the difference, dispute or breach of the provisions of the Deed as stated above.

In case the dispute or the breach continues for a period of more than 90 days, then all such disputes shall be settled under the Rules of Arbitration of the International Chamber of Commerce, Singapore ("ICC") by one or more arbitrators appointed in accordance with the said Rules.

The arbitration will be governed in accordance with the laws of India and ICC will follow Indian law as the substantive law for deciding the dispute arising between the parties under/pursuant to this Deed.

Each party shall bear its own cost of arbitration.

The award given by the arbitrator shall be final and binding and will not be challenged in any court by any of the parties hereto.

The Beneficiaries shall agree that by executing the Deed of Adherence they agree to and are bound by the provisions of this arbitration clause.";

- (vii) KK passed away on 2nd November, 2019, leaving Bina as his widow and Lalit, Charu and Samir as his children;*
- (viii) upon the demise of KK, dispute has emerged amongst the Trustees of the Trust; while Lalit contends that after the demise of KK, in view of lack of unanimity amongst the Trustees regarding sale of Trust assets, a sale of all assets of the Trust has been triggered and distribution to beneficiaries has to occur within one*

- year thereof, Bina, Charu and Samir contend that on a true construction of the Trust Deed, no such sale has been triggered;
- (ix) on the demise of KK, in accordance with Clause 3.2 of Trust Deed, Bina on 5th November, 2019 wrote to the Secretary of the Trust to transfer in her name, the equity and preference shares jointly held by KK as the sole holder of those shares and that the equity and preference shares held by KK jointly with others, had to be also transferred in her name to be jointly held with the existing second holder, on behalf of the Trust;
 - (x) Lalit, vide letter dated 13th November, 2019 to Bina, Charu and Samir requested for convening of a meeting of the Board of Trustees in terms of Clause 4.1 of Trust Deed;
 - (xi) a meeting of the Board of Trustees was called on 30th November, 2019 at Waldorf Astoria Dubai;
 - (xii) in the meeting held on 30th November, 2019 of the Trustees of the Trust, viz. Bina, Lalit, Charu and Samir, while Lalit expressed desire to sell the whole of Trust Fund comprising of various assets including family controlled businesses, in terms of Clause 6.2 of the Trust Deed, Bina, Charu and Samir decided to continue to own and manage all assets of the Trust Fund; the draft minutes of the meeting recorded that no unanimous decision was reached regarding the sale of assets of the Trust;
 - (xiii) Bina, in an attempt to amicably settle, asked Lalit for a fair proposal; Lalit, in response thereto disputed the appointment of Bina as the President and the Managing Director of Godfrey Philips India Ltd. and Indofil Industries Ltd. in place of KK and also insisted on sale of assets of the Trust;
 - (xiv) Lalit, on "without prejudice" basis, participated in the settlement talks but at every step kept on changing his stand and ultimately vide communication dated 27th January, 2020 alleged that Bina, Charu and Samir had breached the provisions of the Trust Deed; Lalit also released statements on social media to the effect that assets of K.K. Modi Family Trust including Godfrey Philips India Ltd. are for sale and also released certain confidential correspondence between Godfrey Philips India Ltd. and Jupiter Asset Management, a shareholder of Godfrey Philips India Ltd., in relation to the governance of Godfrey Philips India Ltd;
 - (xv) after some other correspondence between the parties, Lalit on 18th February, 2020 filed an Application for Emergency Measures before the International Court of Arbitration (ICA) of the International Chambers of Commerce (ICC), impleading Bina, Charu and Samir as respondents thereto and seeking, (a) to

restrain Bina from holding herself out as Managing Trustee of K.K. Modi Family Trust and in the alternative of suspension of powers and authority of Bina to hold the office of Managing Trustee of K.K. Modi Family Trust; (b) appointment of an administrator of the Trust Fund; (c) to restrain Bina, Charu and Samir from acting in relation to K.K. Modi Family Trust and from transferring, alienating or creating any encumbrance in relation to the assets, businesses and investments of the Trust Fund and from exercising voting rights in the K.K. Modi Family Trust controlled business forming part of the Trust Fund; and (d) suspension of Titus & Company as the Secretary of K.K. Modi Family Trust;

(xvi) ICC has appointed one Mr. Matthew Sccomb as the Emergency Arbitrator and who, besides giving other directions, scheduled a preliminary call/meeting of the Emergency Arbitration proceedings on 22nd February, 2020; on 22nd February, 2020, Bina, Charu and Samir, without waiving any of their rights and objections, participated in the hearing before the Emergency Arbitrator and in the said hearing the Emergency Arbitrator issued procedural timelines and set a date for physical hearing of the Application for Emergency Measures on 7th March, 2020.

4. It is the pleading/contention of Bina, Charu and Samir,

(i) Clause 36 of the Trust Deed providing for arbitration is not an Arbitration Agreement between the parties, and in the alternative, is null and void because of vagueness; no "Rules of Arbitration of the International Chamber of Commerce, Singapore" exist, the rules of arbitration under which ICC conducts institutional arbitration are referred to as the 'Rules of Arbitration of the International Chamber of Commerce';

(ii) even if such a Clause was to be given effect, the same provides that the Arbitral Seat is in India;

(iii) since all the signatories to the Trust Deed containing the impugned Arbitration Clause are Indian Nationals, having permanent residence in India, choice of foreign seat of arbitration is null and void, unenforceable and contrary to public policy;

(iv) Clause 36 provides for the dispute to be decided in accordance with the laws of India; the law of India as enunciated in *Vimal Kishor Shah v. Jayesh Dinesh Shah*, (2016) 8 SCC 788 is that disputes *inter se* Trustees or between Trustees on the one hand and beneficiaries on the other hand or between beneficiaries *inter se*, are not arbitrable and are subject to the exclusive jurisdiction of the Courts under the Indian Trusts Act, 1882 which is a complete Code for the purposes of the said disputes;

(v) *Vimal Kishor Shah* supra represents the public policy of India and

the issue of arbitrability goes to the root of the eventual enforceability of any award that may be passed and it would not be appropriate that the issue of arbitrability is left to be decided by the Arbitral Tribunal or by the Courts in Singapore or by the Emergency Arbitrator;

- (vi) such forums would also be *forum non conveniens*, oppressive, manifestly unfair, unreasonable and prejudicial to the interest of Bina, Charu and Samir;
- (vii) while hardships would be caused to Bina, Charu and Samir, who are all residents of India, in litigating in Singapore, no hardship would be caused to Lalit if were to file proceedings in India;
- (viii) Lalit has approached the ICC to evade the jurisdiction of this Court to decide the disputes because Lalit left India after he was accused of gross violations of Indian laws and a non-bailable warrant has been issued against him in proceedings under the Prevention of Money Laundering Act, 2002 pending against him.

5. *Vimal Kishor Shah* supra referred to in the complaints having held that disputes relating to Trust, Trustees and beneficiaries arising out of a Trust Deed and the Trusts Act are not capable of being decided by the arbitration tribunal despite existence of Arbitration Agreement to that effect between the parties, it was felt that the only question to be adjudicated was, whether the said objection to the very arbitrability of the dispute be permitted to be decided by the Arbitral Tribunal or notwithstanding the bar enunciated by the Supreme Court in *Kvaerner Cementation India Limited* supra, it is open to this Court to injunct arbitration commenced by Lalit at Singapore or injunct Lalit from proceeding with the said arbitration.

6. Being aware of the long litigation between the earlier generation of the parties, before commencing hearing, I enquired from the senior counsels, whether not the disputes were easily resolvable and why should this generation also repeat the mistake of the earlier generation, which has cost the larger family of the parties dearly. However finding that the parties presently are not in a mood to settle, and are ready to litigate, attempt at that was not taken further. I however still implore the parties to instead of, settling after litigating for years giving regard to their relationship with each other, attempt amicable settlement even now, to nip this litigation in the bud.

7. Mr. Mukul Rohatgi Senior Advocate, before proceeding to address on the aforesaid controversy, has drawn my attention to *Vidya Drolia v. Durga Trading Corporation*, 2019 SCC OnLine SC 358, also holding that arbitrability of disputes arising under the Indian Trusts Act is excluded by necessary implication, reasoning that (i) under Section 34 of the Trusts Act, a Trustee, without instituting a suit, is entitled to apply by petition to Principal Civil Court of Original Jurisdiction for its opinion,

advice or direction on any present questions respecting management or administration of Trust property; obviously the arbitral tribunal cannot possibly give such opinion, advice or direction; (ii) under Section 46, a Trustee who has accepted the Trust cannot afterwards renounce it except with the permission of the Principal Civil Court of Original Jurisdiction; this again cannot be subject matter of arbitration; (iii) Section 49 of the Trusts Act vests the jurisdiction in Principal Civil Court of Original Jurisdiction to control the exercise of power conferred on a Trustee, again making it clear that a private consensual adjudicator has no part in the scheme of the Act; (iv) Section 53 of the Trusts Act bars the Trustee from, without permission of the Principal Civil Court of Original Jurisdiction, buying or becoming mortgagee or lessee of the Trust property or any part thereof and which permission can also be granted only by an arm of the State; and, same is the position under Section 74 of the Trusts Act.

8. Mr. Rohatgi, Senior Counsel has next drawn attention to the dicta of the Division Bench of this Court in *Mcdonald's India Pvt. Ltd. v. Vikram Bakshi*, (2016) 232 DLT 394. The Division Bench was concerned with an appeal against an ad-interim anti-arbitration injunction granted by a Single Judge of this Court on the grounds of (a) the dispute subject matter of arbitration before the London Court of International Arbitration overlapping with the dispute pending before the Company Law Board; (b) the London Court of International Arbitration being a *forum non conveniens* since all parties save one were carrying on business in India, and, (c) the arbitration before the London Court of International Arbitration was oppressive and vexatious. The Division Bench, without noticing *Kvaerner Cementation India Limited supra*, held that anti-arbitration injunction can be granted in extreme circumstances, where the existence of the Arbitration Clause was in peril because of the "properly arguable" case of the agreement to arbitrate having been forged in order to defeat the proceedings properly brought before the Courts. It was held that the Courts have jurisdiction to determine the question as to whether the Arbitration Agreement was void or a nullity. However having so enunciated the law, the Division Bench held that the facts of that case did not qualify for injuncting the arbitral proceedings and thus vacated the stay of arbitral proceedings granted by the Single Judge.

9. Mr. Rohatgi Senior Counsel on the basis of the aforesaid, contended that the law laid down by the Larger Bench of this Court being, that anti-arbitration injunction suits are maintainable and the Court has the power to grant such injunctions, I need not hesitate on the said aspect and consider the case on merits. Mr. Rohatgi, Senior Counsel in this context also drew my attention to *Union of India v. Vodafone Group PLC United Kingdom*, 2018 SCC OnLine Del 8842, also

holding that there is no unqualified or indefeasible right to arbitrate and that the National Courts in India do have and retain the jurisdiction to restrain International Treaty Arbitrations which are oppressive, vexatious, inequitable or constitute an abuse of legal process. However, I may mention, that having held so, in the facts of that case also, injunction was declined.

10. It was thus sought to be contended that it was not open to the undersigned, in view of *Mcdonald's India Pvt. Ltd. supra* and *Vodafone Group PLC United Kingdom supra*, to foray into the question of maintainability of the suit. It was also contended that there is neither any express bar nor any implied bar to this Court exercising jurisdiction to grant injunction against arbitration or against a party, restraining such party from proceeding with the arbitration. It was argued that implied bar can be inferred only when a full machinery is available and which is not so in the present case. Else it was reminded that the Civil Courts have all-embracing jurisdiction, as held in *Dhula Bhai v. State of Madhya Pradesh*, AIR 1969 SC 78.

11. On merits, it was argued (i) that all the assets of the K.K. Modi Family Trust are in Delhi, India; (ii) the parties are residing in Delhi; (iii) Lalit has a permanent place of residence in Delhi; and, (iv) the procedural law as well as the substantive law to be applied for adjudication of disputes, is of India.

12. It was also contended that the Arbitration Clause is vague and in the year 2014, when the Trust Deed was executed there was no ICC Singapore. Copy of dicta of the Single Judge of the High Court of Calcutta in the *Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS*, 2014 SCC OnLine Cal 17695 injuncting the respondent therein from proceeding with the arbitral proceedings against the petitioner therein, was also handed over.

13. Before Dr. Abhishek Manu Singhvi, Senior Counsel appearing on behalf of Lalit commenced his arguments, I drew his attention to the amendment to Section 8 of the Arbitration Act, with effect from 23rd October, 2015 i.e. after the pronouncement of *Kvaerner Cementation India Limited supra*, a judgment of 21st March, 2001, though reported after eleven years, as (2012) 5 SCC 214, limiting the power of the judicial authority to refer the parties to arbitration unless the judicial authority finds that prima facie no valid Arbitration Agreement exists. It was enquired from him that if owing to *Vimal Kishor Shah and Vidya Drolia supra*, there is no valid Arbitration Agreement between the parties, why *Kvaerner Cementation India Limited supra* should continue to hold the fray. It was enquired, whether not the said amendment to Section 8 is indicative of the legislative intent, to not vex the parties by compelling them to arbitrate and take objections to arbitrability before

the Arbitral Tribunal, when it was writ large that the disputes were not arbitrable.

14. Dr. Singhvi, Senior Counsel argued, (i) that Section 8 contained in Part I of the Arbitration Act applied only to domestic arbitration and not to International Arbitration; (ii) that the Rules of ICC Arbitration provide for the objection, as raised here to arbitrability, being raised before the Arbitral Tribunal; (iii) that the present is not a Part I Arbitration but a Part II Arbitration because the Seat of Arbitration is outside India; (iv) that the Original Trust Deed was executed at New Delhi and provided for arbitration at Delhi; however in the Trust Deed executed at London, the parties intentionally opted for arbitration of ICC; attention is invited to Section 2(2) of the Arbitration Act, providing for Part I provisions to apply where the place of arbitration is in India; (v) once the Arbitration Clause is undisputed, it is the Arbitral Tribunal alone which should decide objections as to arbitrability; (vi) that Section 8, being for Part I arbitrations, and the subject arbitration hereof being not a Part I arbitration, the amendment thereto is irrelevant; (vii) even otherwise, the amendment to Section 8 only requires the Court to satisfy itself of the 'existence', as distinct from 'interpretation' of the Arbitration Agreement; (viii) in the present case, the existence of the Arbitration Clause is not in dispute and has been admitted in the plaint itself; (ix) that Clause 4 of the Trust Deed required a meeting of the Trustees to be held within 30 days of Bina becoming the Managing Trustee and Clause 4.1 provides that if the Board of Trustees is unanimously unable to take any decision as stated in Clauses 4.4.1 to 4.1.3, then the entire Trust Fund including the family controlled businesses shall be sold in the manner provided therein; (x) once no unanimous decision has been arrived at, the K.K. Modi Family Trust is hollow and the assets earlier held by Trust are being held by the Trustees as tenants-in-common; (xi) since the sale of the assets has been triggered, the Trust has ceased to exist; and, (xii) this is also evident from Clause 4.5.1 of the Trust Deed which provides for Bina to continue as Managing Trustee and to have complete authority to take all decisions "provided that it has been agreed to continue to keep the Trust and not dispose of all the assets at the meeting to be held within 30 days in accordance with Clause 4.1"; upon no agreement to continue the Trust having been arrived at, as evident from the minutes of the meeting dated 30th November, 2019 of the Trustees, Bina ceased to be the Managing Trustee of the Trust.

15. Attention was drawn by Dr. Singhvi, Senior Counsel to my judgment dated 3rd July, 2018 in CS(OS) No. 1769/2003 titled *Bharti Tele-Ventures Ltd. v. DSS Enterprises Pvt. Ltd.* wherein I have referred to my earlier judgments in *Roshan Lal Gupta v. Parasram Holdings Pvt. Ltd.*, (2009) 157 DLT 712, *Spentex Industries Ltd. v. Dunavant SA*,

2009 SCC OnLine Del 1666 (RFA(OS) No. 69/2009 preferred whereagainst was dismissed on 29th August, 2009), *Shree Krishna Vanaspati Industries (P) Ltd. v. Virgoz Oils & Fats Pte Ltd.*, 2009 SCC OnLine Del 1665, *M. Sons Enterprises Pvt. Ltd. v. Suresh Jagasia*, 2011 SCC OnLine Del 82 and *Ashok Kalra v. Akash Paper Board Pvt. Ltd.*, 2013 SCC OnLine Del 3299, all holding a suit for declaration of invalidity of Arbitration Agreement or of arbitration commenced, and for permanent injunction to restrain arbitration, to be not maintainable and also referring to *A. Ayyasamy v. A. Paramasivam*, (2016) 10 SCC 386, though not directly concerned with the issue, but citing *Kvaerner Cementation India Limited* supra with approval. It was contended that *A. Ayyasamy* supra is post-amendment to Section 8 of the Arbitration Act, though it was admitted that the same does not notice the said amendment.

16. Dr. Singhvi also drew attention to the recent judgment dated 10th December, 2019 of the Supreme Court in *BGS SGS Soma JV v. NHPC Ltd.*, 2019 SCC OnLine SC 1585, on the aspect of Seat and 'venue' of Arbitration and to *Chatterjee Petrochem Company v. Haldia Petrochemicals Ltd.*, (2014) 14 SCC 574, also referred to by me in *Bharti Tele-Ventures Ltd.* supra, declining the relief of declaration as null and void of the Arbitration Clause, but after holding the Arbitration Clause to be valid.

17. Mr. C.A. Sundaram, Senior Counsel also appearing for Lalit, in response to my query qua Section 8 of the Arbitration Act, contended (i) that the reliefs claimed in the plaints in the present suits are of declaration of the Arbitration Agreement and the arbitration commenced as null and void and of permanent injunction to restrain arbitration; (ii) that Section 8 is not attracted in the present suit; Section 8 applies when an action is brought in a matter which is the subject matter of an Arbitration Agreement and it is not so here; thus Section 8 does not apply; (iii) that in the present suit, there is no dispute before the Court which is subject matter of arbitration and the only claim is of the declaration of the Arbitration Agreement as null and void; (iv) thus there is no need for Lalit to apply under Section 8; (v) alternatively, the amendment to Section 8 requires the Court to only prima facie satisfy itself of the 'existence' as distinct from 'scope' of the Arbitration Agreement; (vi) in the present case the Arbitration Agreement is not in dispute; (vii) reliance is placed on *Hema Khattar v. Shiv Khera*, (2017) 7 SCC 716, where the Court dealt with the plea of the Arbitration Agreement ceasing to exist for the reason of the main contract in which the arbitration agreement was incorporated, having been terminated, and held that the arbitration agreement continued to exist; (viii) reliance was also placed on *Bhushan Steel Ltd. v. Singapore*

International Arbitration Centre, 2010 SCC OnLine Del 2236 relying on *Kvaerner Cementation India Limited* supra and *Roshan Lal Gupta* supra holding, that once it is held there is a valid Arbitration Agreement between the parties, a suit for declaration that the Arbitral Tribunal has no jurisdiction or for permanent injunction to restrain arbitration would not be maintainable; (ix) the ICC Rules are akin to Section 16 of the Arbitration Act; and, (x) that *Kvaerner Cementation India Limited* supra has recently been cited with approval in *National Aluminum Company Ltd. v. Subhash Infra Engineers Pvt. Ltd.*, 2019 SCC OnLine SC 1091 holding that if the plaintiff therein wanted to raise an objection with regard to existence or validity of the Arbitration Agreement, it was open for it to move an application before the Arbitrator but with such plea he cannot maintain a suit for declaration and injunction.

18. Mr. C.A. Sundaram, senior counsel further contended that the plea of the plaintiff, of the disputes, owing to the dicta of this Court in *Vimal Kishor Shah* and *Vidya Drolia* supra, being not arbitrable, can also be decided by the Arbitral Tribunal. However to satisfy this Court that, notwithstanding *Vimal Kishor Shah* and *Vidya Drolia* supra, the disputes urged before the Arbitral Tribunal are arbitrable, attention was invited to Section 5 of the Trusts Act to contend that when the Trust is in relation to immovable property provisions thereof i.e. the Trusts Act, are applicable only when the writing is registered. It is contended that though the Trust is with respect to immovable as was movable properties, but is not registered in India. It is again emphasised that the Trust Deed itself was executed at London and it is contended that the Indian Trusts Act does not apply. It is argued that though all the said questions arise for adjudication but today the question is, who is to decide the said questions, whether the Arbitral Tribunal or the Courts in India.

19. Mr. C.A. Sundaram, senior counsel also invited attention to the case of *Lalit* before the Arbitral Tribunal in the Application for Emergency Measures, particularly to paragraph 124 thereof where it is pleaded that "The Trust Deed has, upon the death of KK Modi, created an identity between interests of Trustees and Beneficiaries, in that, each of the Trustees is also a beneficiary of its branch. There is now a contractual relationship between the parties to the Trust Deed and those deriving an interest through them, in that the rights of Trust Fund have devolved, and the beneficiaries are each tenants in common with defined interest in the Trust Fund (including the businesses)" and to paragraph 125 as "Each of the Branches has an equal interest in the corpus of the Trust Fund, and upon the expression of intention to sell the assets (which includes all businesses and investments), the entrustment has come to an end, with each of them now contractually bound, including under and through the aegis of Deeds of Adherence

(by those who were minors at the time of execution of Restated Trust Deed in 2014), to act in accordance with the procedure set forth in the Trust Deed". It is argued that the disputes cannot be decided under the Indian Trusts Act and the bar of jurisdiction of *Vimal Kishor Shah* and *Vidya Drolia* supra does not apply.

20. Mr. C.A. Sundaram, senior counsel has also drawn attention to the time table drawn up by the Emergency Arbitrator and has handed over a copy of the communication of the representative of Bina to the Emergency Arbitrator to the effect that pending the determination of these suits, Bina "will of course continue to participate fully" in the emergency arbitration proceedings. It is thus argued that no case for grant of even any interim relief, if at all the suits are held to be maintainable, is made out and at best it can be ordered that award, if any of the arbitrator will not be given effect to.

21. Mr. C.A. Sundaram, senior counsel has lastly referred to *Imax Corporation v. E-city Entertainment (India) Pvt. Ltd.*, (2017) 5 SCC 331 to contend that the present arbitration does not qualify as a domestic arbitration.

22. Mr. Mukul Rohatgi, senior counsel, in rejoinder has stated that Bina was served with notice of emergency arbitration on 21st February, 2020 and was required to respond the very next day. It is contended that there is no agreement to arbitrate in Singapore and from the arbitration clause, it is evident that the Arbitration Act will apply. It is contended that as per the arbitration clause, even curial law is the law of India. It is argued that the arbitration clause does not say that the seat of arbitration is in Singapore. It is again contended that there is no ICC, Singapore. It is further argued that ICC has an office in India as well and once the seat of arbitration is not defined in the arbitration agreement, it has to be determined from the bundle of facts. It is also argued that the venue of arbitration has to be a place of convenience. Reference is made to *Enercon (India) Limited v. Enercon GMBH*, (2014) 5 SCC 1 where it was held that when all the parties are Indian, the venue of the arbitration proceedings at London is not convenient. It is contended that since the seat of arbitration has not been agreed to be at Singapore and is not at Singapore, Part I of the Arbitration Act will apply. It is argued that Part II of the Arbitration Act applies only to International Commercial Arbitration and the present arbitration, all the parties whereto are nationals of and/or habitually resident of India, does not qualify as an International Commercial Arbitration within the meaning of Section 2(1)(f) of the Arbitration Act. It is thus contended that the principle of Section 8 of the Arbitration Act would apply. Attention is drawn to Section 2(3) of the Arbitration Act, which provides that Part I shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration. It

is contended that *Vimal Kishor Shah* and *Vidya Drolia* supra qualify as "other law for the time being in force" within the meaning of Section 2 (3) of the Arbitration Act, under Article 142 of the Constitution of India and the disputes cannot be resolved by arbitration. It is contended that thus, within the meaning of Section 8, it has to be held that there is no valid arbitration agreement. It is contended that the Trust Deed is of the year 2014 i.e. of prior to *Vimal Kishore Shah* supra and when, as per the parties' understanding, the disputes were arbitrable. However, Supreme Court subsequently in the year 2016 in *Vimal Kishor Shah* supra held disputes arising out of the Trust Act to be not arbitrable and added to the same to the list of non-arbitrable disputes as laid down in *Booz Allen and Hamilton Inc. v. SBI Home Finance Limited*, (2011) 5 SCC 532. It is argued that invocation of arbitration by Lalit is invalid. It is further argued that the arbitration proceedings qualify as vexatious and oppressive, within the meaning of *McDonald's India Private Limited* supra. Principle of forum non-conveniens is also invoked and it is contended that the arbitral award, even if any, will be inexecutable because it would be contrary to public policy. It is further contended that *Kvaerner Cementation India Limited* supra does not qualify as precedent, as contains no discussion and no reasoning. It is argued that in fact, the facts on which it was pronounced are also not disclosed and the same in any case, does not notice Section 2(3) of the Arbitration Act.

23. Mr. Mukul Rohatgi, senior counsel, with respect to the contention of Mr. C.A. Sundaram, senior counsel, on Section 5 of the Indian Trusts Act has contended that, (a) the Trust deed also relates to movable properties and the value of immovable properties therein is a pittance in value in comparison to the value of movable properties; it is emphasized that a Trust with respect to movable properties does not require any registration; (b) that once it is the contention of Lalit that the Trust Deed is not valid, Lalit also cannot rely on the same; attention in this regard is drawn to the Application for Emergency Measures filed by Lalit and it is contended that Lalit himself is relying on the same; (c) on an interpretation of the Trust Deed, it cannot be said that the Trust has disappeared. Thus, it is contended that the disputes arise out of the Trust Deed.

24. Mr. Mukul Rohatgi, senior counsel has further contended that the Arbitration Act has certain derogable provisions which cannot be ousted by the parties by contract; the Arbitration Act does not provide for emergency arbitration, the manner in which it is being done, by giving one day's time. Alternatively, it is argued that Clause 36 of the Trust Deed providing for arbitration, at best can be interpreted as meaning that the Rules of ICC qua timelines will apply. Else, it is stated that the Arbitration Act provides for timelines and the hastily carried

out/commenced arbitration is invalid and not in accordance with the public policy of India. Reference is also made to the provisions of the Trust Deed to contend that Bina, on demise of KK has automatically become the managing trustee and during her lifetime, the Trust cannot be dissolved. Attention in this regard is invited to Clause 3.33 of the Trust Deed.

25. Mr. C.A. Sundaram, senior counsel for Lalit, during the arguments of Mr. Mukul Rohatgi, senior counsel, contended that Lalit, within the meaning of Section 2(1)(f)(i) of the Arbitration Act, is habitually resident of a country other than India and also stated that it is not as if the arbitration is getting over on 7th March, 2020. It is contended that regular arbitration has also been invoked by Lalit and the proceedings with respect where to are also underway and it is only the emergency arbitration which is scheduled on 7th March, 2020.

26. Mr. Arvind K. Nigam, senior counsel, also appearing for Bina, Samir and Charu, to controvert the contention of the Trust coming to an end, besides relying on Clause 3.3 of the Trust Deed, also referred to Clause 2.11 defining the 'Dissolution of Trust' and Clause 2.30 defining 'Trust Period'. It was reiterated that after the pronouncement in *Vimal Kishor Shah* supra, arbitration in accordance with the arbitration clause in the Trust Deed, qualifies as vexatious because the result thereof would be inexecutable and unenforceable and the arbitral award will not be worth the paper it is scribed on. It is also contended that once disputes arising out of the Trust Deed are non-arbitrable, the Arbitral Tribunal has no jurisdiction to also decide the objection as to arbitrability; the principle that jurisdiction cannot be conferred by consent is invoked. It is contended that any adjudication will be 'still born'.

27. Mr. Arvind K. Nigam, senior counsel, responding to the arguments of Mr. C.A. Sundaram, senior counsel, pertaining to Section 5 of the Trusts Act, also drew attention to Sections 6 and 77 thereof to contend that the Trust does not stand extinguished as contended. Attention is drawn to the list of beneficiaries of the Trust at page 112 of Part III-A file. It is contended that if the disputes are non-arbitrable "what is the fun of going ahead with arbitration" and that there is lack of inherent jurisdiction in the Arbitral Tribunal and the same is *coram non judice*.

28. Mr. Rajiv Nayar, senior counsel, also appearing for Bina, Charu and Samir has argued that the jurisdictional fact is to be determined by the Court and not by the Arbitral Tribunal. Attention is drawn to *Natraj Studios (P) Ltd. v. Navrang Studios*, (1981) 1 SCC 523 holding, in the context of applicability of the rent control statute, that the jurisdictional fact is to be decided either by the Rent Controller (in that case Court of

Small Causes) or the ordinary Civil Court and that if the jurisdictional question is decided in favour of the Court of exclusive jurisdiction, the suit or proceedings before the ordinary Civil Court must cease to the extent its jurisdiction is ousted. With respect to *Kvaerner Cementation India Limited* supra, it is contended that the same was considered by the Division Bench of this Court in *Dr. Devinder Kumar Gupta v. Realogy Corporation*, 2011 SCC OnLine Del 3050.

29. Mr. C.A. Sundaram, senior counsel for Lalit responded to the aforesaid contentions, (a) by referring to the language of Clauses 3.3, 4.1, 4.5, 4.5.1 and 6.1 and Schedule B to the Trust Deed at page 117 of Part IIIA file to contend that it is only "so long as the Trust continues..." and thus the Trust Deed does not provide that the Trust, notwithstanding unanimous decision having not been arrived at within one month of demise of KK, continues; (b) attention is invited to Clause 10.4 in relation to minors; (c) it is argued that the contention, that the jurisdictional fact is to be determined only by the Court, would make Section 16 of the Arbitration Act otiose.

30. I have considered the rival contentions and am unable to take a view different from that taken by me consistently in *Roshan Lal Gupta, Spentex Industries Ltd.*, *Shree Krishna Vanaspati Industries (P) Ltd.*, *M. Sons Enterprises Pvt. Ltd.*, *Ashok Kalra* and *Bharti Tele-Ventures Ltd.* supra i.e. that suits such as the present one, to declare the invalidity of an arbitration clause/agreement and to injunct arbitration proceedings, whether falling in Part I or Part II, are not maintainable. My reasons therefor are as under:

(A) The contention, that *Kvaerner Cementation India Limited* supra (a dicta of the three Hon'ble Judges of the Supreme Court), is not a binding precedent for the reason of having no facts, no discussion and citing no precedent, at least before this Bench, cannot be sustained. It has been recently reiterated in *Peerless General Finance and Investment Company Ltd. v. Commissioner of Income Tax*, 2019 SCC OnLine SC 851 that a pronouncement of the Supreme Court, "even if it cannot be strictly called the *ratio decidendi* of the judgment would certainly be binding on the High Court". Similarly, in *Oriental Insurance Co. Ltd. v. Meena Variyal*, (2007) 5 SCC 428 it was held that even an observation or an obiter of the Supreme Court is binding on the High Court in the absence of a direct pronouncement on that question, of the Supreme Court and in *Sanjay Dutt v. State*, (1994) 5 SCC 402 it was held that even the obiter dicta of the Supreme Court is binding on other Courts in the country. Of course, the counsels have the privilege to contend so, to build a case for finally arguing before the Supreme Court itself.

(B) The aforesaid argument cannot also be accepted because of

Kvaerner Cementation India Limited supra having been cited with approval in *A. Ayyansamy* supra and very recently in *National Aluminium Company Limited* supra. It is thus not as if *Kvaerner Cementation India Limited* supra running into less than one page and pronounced on 21st March, 2001 but published as (2012) 5 SCC 214 has remained hidden and no other bench of the Supreme Court has had an occasion to go into the same.

- (C) It is also not as if there is any contrary view of the Supreme Court qua suits for declaration of invalidity of the Arbitration Agreement/proceeding and for injuncting arbitration, for this Court being required to match the facts of the present case with the facts of two different views of the Supreme Court, to consider which one of the two to follow. *Kvaerner Cementation India Limited* supra holds the fray for the last nearly twenty years and binds the undersigned. It is just, reasonable and the need of the hour, that a view which has held fort for the last twenty years and on which parties have acted be not disturbed. It has been held in *State of Himachal Pradesh v. Ashwani Kumar*, (2015) 15 SCC 534, *Sakshi v. Union of India*, (2004) 5 SCC 518, *Union of India v. Paras Laminates (P) Ltd.*, (1990) 4 SCC 453 and *Bangalore Water Supply and Sewerage Board v. A. Rajappa*, (1978) 2 SCC 213 that an interpretation of statute which has stood for long and on which parties have acted, and based their dealings, should not be readily interfered with.
- (D) That brings me to the reliance on behalf of Bina, Charu and Samir, on *McDonald's India Private Limited* and *Vodafone Group PLC United Kingdom* supra. Both do not notice *Kvaerner Cementation India Limited* supra. Though *McDonald India Pvt. Ltd.* supra being a dicta of the Division Bench of this Court would be binding on me but once the same is found to be *per incuriam* qua *Kvaerner Cementation India Limited* supra, a dicta of the three Judges Bench of the Supreme Court, it has been held in *Pal Singh v. National Thermal Power Corporation Limited*, 2002 SCC OnLine Del 178 that a dicta of a larger bench of the High Court does not bind when the law even if earlier in point of time pronounced by the Supreme Court is otherwise and especially when the larger bench of the High Court has not noticed the law as declared by the Supreme Court.
- (E) Interestingly, both *McDonald's India Private Limited* and *Vodafone Group PLC United Kingdom* supra, though hold the Court to be vested with the jurisdiction to injunct arbitration, do not on facts injunct arbitration. I may in this context address an interesting facet of judicial decision making experience by the undersigned and inferred by the undersigned in other judgments.

The Court is reluctant to denude itself of jurisdiction, especially when, in the facts before it, not opting to exercise jurisdiction. This is for the fear of such denudation of jurisdiction in future coming in the way of granting relief in a deserving case. Though I admit, the same to have governed my judicial decision making also, but find that the reluctance to return a finding of the Court having no jurisdiction, though for good reasons as aforesaid, results in the Courts being flooded with cases with each litigant taking a chance, that in the facts of his case, the Court which has not declined to be having jurisdiction, may grant the relief of injuncting arbitration.

- (F) The Division Bench of this Court in *Mcdonald's India Pvt. Ltd.* supra, though held that under the Arbitration Act, whether Part-I thereof or Part-II thereof is applicable, the focus seems to have shifted towards directing the parties to arbitration rather than deciding the same subject matter as a civil suit, by referring to Sections 8 and 45 of the Arbitration Act, thereafter noticing *LMJ International Ltd. v. Sleepwell Industries Co. Ltd.*, 2012 SCC OnLine Cal 10733 (DB), dicta of the Division Bench of the Calcutta High Court which was concerned with the power and jurisdiction of a Civil Court to restrain a party from making a reference to an International Commercial Arbitration and to have the said dispute resolved by such international arbitration and which in turn referred to a dicta of the Supreme Court in *Modi Entertainment Network v. W.S.G. Cricket Pte Ltd.*, (2003) 4 SCC 341 pertaining to anti suit injunction, proceeded to hold that the principles laid down therein would apply to anti-arbitration injunction suits as well. The Division Bench of this Court in *Mcdonald's India Pvt. Ltd.* supra, noticed that since the case involved an anti-arbitration injunction, the governing principles could not be the same as governing an anti-suit injunction, reasoning that the principles of autonomy of arbitration and competence-competence (kompetenz-kompetenz), still without considering that the alternative remedy under Section 16 of the Arbitration Act and as stated to be available under the ICC Rules also, is available in relation to anti-arbitration injunction suits as distinct from anti-suit injunctions, proceeded to hold that the Court would have jurisdiction to grant anti-arbitration injunction, where the party seeking the injunction can demonstrably show that the agreement is null and void, inoperative or incapable of being performed, especially referring to cases where it was evident that the Arbitration Agreement had been forged and fabricated. It would thus be seen that the reasoning which prevailed with the Supreme Court in *Kvaerner Cementation India Limited* supra for holding the anti-arbitration

injunction suit to be not maintainable, i.e. owing to the availability of the same remedy under Section 16 of the Arbitration Act, was not even argued before the Division Bench. Perhaps had the same been argued, a Google search would have taken also to *Kvaerner Cementation India Limited* supra.

(G) That brings me to another relevant aspect concerning the suits of the present nature i.e. for the reliefs of declaration and injunction. The grant of such reliefs by the Indian Courts is governed by the provisions of the Specific Relief Act, 1963, that of grant of declaratory decrees being governed by Section 34 thereof and that of grant of injunction being governed by Sections 38 to 42 thereof. The grant of relief of declaration to any person entitled to any legal character or to any right as to any property, is discretionary, with the proviso that declaration shall not be granted where the plaintiff being able to seek further relief than a mere declaration of title, omits to do so. Section 41(h) bars grant of injunction when equally efficacious relief can certainly be obtained any other usual mode of proceeding. It has been held in *Pushpa Saroha v. Mohinder Kumar*, 2009 SCC OnLine Del 57 and *Roshan Lal Gupta* supra that declaration with consequential relief shall not be granted if there is alternative efficacious remedy available by any other usual mode of proceeding to the person seeking such declaration and consequential relief. The Scheme of the Arbitration Act of the year 1996 as noticed by the Division Bench in *Mcdonald's India Pvt. Ltd.* supra also is to direct the parties to arbitration rather than deciding the same subject matter as a civil suit. The Arbitration Act, 1996 in a major change from the 1940 Act empowers the Arbitral Tribunal to rule on its own jurisdiction. It is not the contention of any of the senior counsels for the Bina, Charu and Samir that the Arbitral Tribunal constituted by ICA of ICC is not empowered to decide any of the objections which have been taken by them for injuncting arbitration. Once the statute has provided for the mode of obtaining the same relief before the Arbitral Tribunal, the Court under Section 41(h) would not grant the same relief i.e. of anti-arbitration injunction. Once the relief of permanent injunction cannot be granted, the grant of declaration would not serve any purpose and in any case cannot be made when consequential relief though prayed cannot be granted by the Court.

(H) The Arbitration Act is a complete code in itself (see *Morgan Securities and Credit (P) Ltd. v. Modi Rubber Ltd.*, (2006) 12 SCC 642, *Fuerst Day Lawson Limited v. Jindal Exports Limited*, (2011) 8 SCC 333 and *Pam Developments Private Limited v. State of West Bengal*, (2019) 8 SCC 112). The Courts cannot interfere with

the code pertaining to arbitration laid down in the statute, by exercising jurisdiction to do, for which equally efficacious relief can certainly be obtained before the Arbitral Tribunal.

- (I) As far as the contention of the senior counsels for Bina, Charu and Samir, of them being situated at Delhi, the Trust assets being at Delhi, the arbitration proceedings at Singapore being costly and thus oppressive and vexatious, are concerned, all that may be observed is that the parties, notwithstanding the same, deemed it fit to execute the Trust Deed at London and to consciously provide for arbitration of ICC, Singapore and when required, after the demise of KK, to hold a meeting of the Board of Trustees, of their own volition chose to hold it at Waldorf Astoria Dubai. They certainly cannot now be heard to contend that arbitration proceedings at Singapore are vexatious/oppressive to them. Even in the context of anti-suit injunction, in *Modi Entertainment Network* supra it was held that normally anti-suit injunction restraining the defendant would not be granted when parties have agreed to submit to the exclusive jurisdiction of a Court, including a foreign Court, a forum of their choice, in regard to the commencement or continuance of proceedings in the Court of choice, save in a exceptional case for good and sufficient reasons, in circumstances which permit a contracting party to be relieved of the burden of a Court. No such exceptional circumstances have been pleaded.
- (J) Coming back to the judgments, relied upon by senior counsel for plaintiffs, a reading of *Vodafone Group PLC United Kingdom* supra shows that the same was concerned with Bilateral Investment Treaty arbitration, outside the scope of Arbitration Act. What has been held therein, cannot apply to the present controversy which is fully covered by *Kvaerner Cementation India Limited* judgments supra.
- (K) As far as the contentions of the counsels on the merits of the objection to arbitrability are concerned, once I have held that this Court does not have jurisdiction to decide the said merits, it would not be proper for the undersigned to foray into the same. All that needs to be observed is that the senior counsels for Lalit have made out an arguable case qua the non-applicability of *Vimal Kishor Shah* and *Vidya Drolia* supra.
- (L) Reliance by Mr. Rajiv Nayar, Senior Advocate for Bina, Charu and Samir on *Natraj Studios (P) Ltd.* supra is not apposite. All that the same holds is that the Civil Court retains the jurisdiction to decide whether the Rent Act applies to the tenancy, notwithstanding the Rent Controller also being authorized to do so. Reliance on the said judgment loses sight of the fact that in a lis brought before

the Civil Court, on the plea of the suit being maintainable owing to the Rent Act being not applicable, on the plea by the opposite party of the Rent Act being applicable, Civil Court cannot direct the Rent Controller to be approached if it is still to be decided whether the Rent Act applies and only in which case the Rent Controller would have jurisdiction. However as aforesaid the Scheme of the Arbitration Act is to direct the parties to arbitration, rather than deciding the same subject matter as a civil suit. The decision, whether *Vimal Kishor Shah* and *Vidya Drolia* supra are applicable or not and owing thereto disputes not arbitrable, will be much more expeditious before the Arbitral Tribunal than before the Civil Court.

- (M) No merit is also found in the contention, of the procedure being followed by ICC being repugnant to Arbitration Act. The Arbitration Act is governed by the principle of freedom of the parties and Section 19 thereof expressly provides that the parties are free to agree on the procedure to be followed by the Arbitral Tribunal in conducting the proceedings. The parties, though in the original Trust Deed provided for arbitration in New Delhi, while re-stating the Trust Deed, consciously changed the same to arbitration of ICC, Singapore. Considering the status of the parties, who belong to a business family and are well alive to litigations and arbitration of all kinds, it cannot be said that they were not aware of the procedure of ICC. Thus the ground of haste makes waste, cannot be invoked. A party, after having expressly agreed to a particular state of affairs, cannot raise the argument of forum *non conveniens*, which is available only in case of concurrent jurisdiction. Reliance on *Mcdonald's India Pvt. Ltd.* supra in which argument of forum *non conveniens* was rejected, also negates the said argument.
- (N) The principles pertaining to anti-suit injunction suits, as held in *Mcdonald's India Pvt. Ltd.* supra also, are not attracted to anti-arbitration injunction suits, for the reason of the Arbitration Act being a complete code in itself and the 1996 Act as distinct from the 1940 Act, empowering the Arbitral Tribunal itself to rule on its own jurisdiction. The reliance on the judgment of the High Court of Calcutta in *Louis Dreyfus Armatures SAS* supra which though records the argument qua *Kvaerner Cementation India Ltd.* supra, does not in the decision/discussion deal with the same and in any case concerned Arbitration Rules of the United Nations Commission on International Trade Law, 1976, on the basis of a Bilateral Treaty Agreement between Govt. of India and the Government of France, is also apposite.
- (O) With respect to *Enercon (India) Limited* supra, I may state that

the same was referred to generally in the arguments, without even citing or relying on the same and the need thus to deal therewith is not felt.

- (P) With respect to the query posed by me qua the amendment to Section 8 of the Arbitration Act, I am satisfied with the contentions noticed above of Mr. C.A. Sundaram, senior counsel, that Section 8 or amendment thereto would have no application. The amendment to Section 8, does not change the bar to the jurisdiction of this Court vide Section 5 of the Act and which, notwithstanding the amendment to Section 8, remains unchanged. No window has been opened therein to permit a judicial authority to intervene, if finds no valid arbitration agreement existing, to injunct arbitration. It is only when a substantive action is brought before the Court and a plea of Section 8 is taken, that the Legislature has permitted the Court to go into the question of existence of a valid arbitration agreement, before referring the parties to arbitration.

31. Mr. Mukul Rohatgi, Senior counsel for Bina, Charu and Samir has also contended that Lalit is a fugitive from the country. In the plaint also, it is pleaded that Lalit is accused of several gross violations of Indian law and is accused of offences under Sections 409, 420, 468, 477A and 120B of Penal Code, 1860 and proceedings under Prevention of Money Laundering Act, 2002 are also pending against him. Therefrom a thought occurred to the undersigned, that Lalit may be interested in keeping the proceedings outside the country, to be able to reap benefits of his share in the Trust Fund outside India, to escape the liability from the proceedings already pending in this Country against him, and whether this qualifies as a reason for this Court to entertain the suit. However on a deeper consideration, I am of the view that the Constitution of India, though has vested this Court with jurisdiction, while exercising powers under Article 226 of the Constitution of India to grant relief which law does not entitle a party to or to not grant relief to which a person is entitled to in law, but has not vested this Court with such discretion while exercising Ordinary Original Civil Jurisdiction and has vested such powers only in the Supreme Court under Article 142 and this Court should thus refrain from acting on such considerations.

32. Being of the view that this Court does not have the jurisdiction to adjudicate a plea which can be adjudicated by the Arbitral Tribunal relating to its own jurisdiction, I have not gone into the same and the said pleas remain open to the parties to take before the Arbitral Tribunal.

33. Once the conclusion hereinabove reached is that an anti-arbitration injunction suit does not lie, the suits are not maintainable and are dismissed. However in view of *Mcdonald's India Pvt. Ltd.* and

Vodafone Group PLC United Kingdom supra singing a different tune and
Kvaerner Cementation India Limited supra remaining unpublished for
nearly twelve years, no costs.

34. Decree sheet be drawn up.

§ 2020: DHC: 1497

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