IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 26TH DAY OF SEPTEMBER 2025

PRESENT

THE HON'BLE MR. VIBHU BAKHRU, CHIEF JUSTICE

AND

THE HON'BLE MR. JUSTICE C M JOSHI

COMMERCIAL APPEAL NO. 261 OF 2025
C/W
COMMERCIAL APPEAL NO. 279 OF 2025

IN COMAP NO. 261 OF 2025

BETWEEN:

1. L AND T INFRA INVESTMENT
PARTNERS ADVISORY PRIVATE LIMITED
(ACTING ON BEHALF OF L&T INFRA
INVESTMENT PARTNERS AS ITS
INVESTMENT MANAGER)

A COMPANY REGISTERED UNDER
THE COMPANIES ACT, 1956 AND HAVING ITS
REGISTERED OFFICE AT PLOT NO. 177
CTS NO. 6970, 6971
VIDYANAGARI MARG, CST ROAD
KALINA, SANTACRUZ (EAST)
MUMBAI CITY, MUMBAI, MAHARASHTRA - 40098.

REPRESENT BY ITS
AUTHORIZED REPRESENTATIVE
MR. ASHWINI SHARMA

…APPELLANT

(BY SRI DHYAN CHINNAPPA, SENIOR ADVOCATE A/W
SRI MOHAMMED SHAMEER, ADVOCATE,
MS. LAVANYA B. ANANTH, MS. NIDHI &
MR. SUDHEESH KESARKAR, ADVOCATES)

AND:

1. BHORUKA POWER CORPORATION LIMITED
A COMPANY INCORPORATED UNDER

THE COMPANIES ACT, 1956
HAVING ITS REGISTERED OFFICE AT NO. 48
HITANANDA - II, LAVELLE ROAD
BANGALORE - 560 001
REPRESENTED BY ITS
AUTHORIZED REPRESENTATIVE.

…RESPONDENT

(BY SRI UDAYA HOLLA, SENIOR ADVOCATE A/W
MR. PRADEEP DARA K., MR. YAJIT SARNA &
MR. SUDEV JUNEJA, ADVOCATES FOR C/R No.1)

THIS COMMERCIAL APPEAL IS FILED UNDER SECTION 13 OF THE COMMERCIAL COURTS ACT, 2015 PRAYING TO SET ASIDE THE IMPUGNED ORDER DATED 28.04.2025 PASSED IN I.A.NO. 2 IN COM. OS NO. 384 OF 2025 BY THE LD. LXXXII ADDITIONAL CITY CIVIL AND SESSIONS JUDGE, COMMERCIAL COURT, (CCH-83) BENGALURU & ETC.

IN COMAP NO. 279 OF 2025

BETWEEN:

1. L & T INFRA INVESTMENT PARTNERS
ADVISORY PRIVATE LIMITED
(ACTING ON BEHALF OF L&T INFRA INVESTMENT
PARTNERS AS ITS INVESTMENT MANAGER)
A COMPANY REGISTERED UNDER
THE COMPANIES ACT, 1956 AND HAVING ITS
REGISTERED OFFICE AT PLOT NO. 177
CTS NO. 6970, 6971, VIDYANAGARI MARG
CST ROAD, KALINA, SANTACRUZ (EAST)
MUMBAI CITY, MUMBAI, MAHARASHTRA - 40098
REPRESENT BY ITS AUTHORIZED REPRESENTATIVE
MR. ASHWINI SHARMA

…APPELLANT

(BY SRI DHYAN CHINNAPPA, SENIOR ADVOCATE A/W
SRI MOHAMMED SHAMEER, ADVOCATE,
MS. LAVANYA B. ANANTH, MS. NIDHI &
MR. SUDHEESH KESARKAR, ADVOCATES)

AND:

1. BHORUKA POWER INVESTMENTS
INDIA PVT. LIMITED
A COMPANY REGISTERED UNDER
THE COMPANIES ACT, 1956 AND
HAVING ITS REGISTERED OFFICE
AT TULSIANI CHAMBERS NARIMAN POINT
MUMBAI - 400 021
REPRESENTED BY ITS
AUTHORIZED REPRESENTATIVE
MR. MAHADHANAPURAM
SUBRAMANYAN SREENIVAS.

2. MR. SATYANARAYANA AGARWAL
AGED MAJOR, RESIDING AT NO. 11/3
NANDIDURGA ROAD
BANGALORE - 560 046.

3. MS. UMAH AGARWAL
AGED MAJOR
WIFE OF MR. SATYANARAYANA AGARWAL
RESIDING AT NO. 11/3, NANDIDURGA ROAD
BANGALORE - 560 046.

4. MR. SIDDHARTHA AGARWAL
AGED MAJOR
SON OF MR. SATYANARAYANA AGARWAL
RESIDING AT NO. 11/3, NANDIDURGA ROAD
BANGALORE - 560 046.

5. MR. VIVEK AGARWAL
AGED MAJOR
SON OF MR. SATYANARAYANA AGARWAL
RESIDING AT NO. 11/3
NANDIDURGA ROAD, BANGALORE - 560 046
REP. BY GPA HOLDER
MR. M.S. SREENIVAS.

…RESPONDENTS

(BY SRI C.K. NANDAKUMAR, SENIOR ADVOCATE A/W
MR. HARIKRISHNA PRAMOD, ADVOCATE
MS. AISHWARYA V. RAVINDRANATH, ADVOCATES)

THIS COMMERCIAL APPEAL IS FILED UNDER SECTION 13 OF THE COMMERCIAL COURTS ACT, 2015 PRAYING TO SET ASIDE THE IMPUGNED ORDER DATED 28.04.2025 PASSED IN I.A. NO. 2 IN COM. OS NO. 385/2025 BY THE LD. LXXXII ADDITIONAL CITY CIVIL AND SESSIONS JUDGE COMMERCIAL COURT, (CCH 83) BENGALURU & ETC.

THESE COMMERCIAL APPEALS HAVING BEEN HEARD AND RESERVED FOR JUDGMENT, COMING ON FOR PRONOUNCEMENT THIS DAY, JUDGMENT WAS PRONOUNCED AS UNDER:

CORAM: HON'BLE MR. VIBHU BAKHRU, CHIEF JUSTICE
and
HON'BLE MR. JUSTICE C M JOSHI

CAV JUDGMENT

(PER: HON'BLE MR. VIBHU BAKHRU, CHIEF JUSTICE)

INTRODUCTION

1. The appellant has filed the present appeals under Section 13(1A) of the Commercial Courts Act, impugning orders dated 28.04.2025 [**impugned orders**] passed by the learned LXXXII Addl. City Civil & Sessions Judge, Bengaluru [hereafter '**the commercial court'**] in interim applications filed under Order XXXIX Rules 1 & 2 CPC in Com.O.S.No.384/2025 and Com.O.S No. 385/2025. The impugned orders are identically worded.

2. Bhoruka Power Corporation Limited [hereafter referred to as '**BPCL**'] has filed Com.O.S. 384/2025 and Bhoruka Power Investments India Pvt. Limited [**BPIIPL**], along with Mr.

Satyanarayana Agarwal, Ms. Umah Agarwal, Mr. Siddhartha Agarwal, and Mr. Vivek Agarwal [hereafter '**the promoter shareholders**'] have filed Com.O.S.385/2025 for identical reliefs. The said parties – BPCL and the promoter shareholders – are hereafter collectively referred to as '**the Plaintiffs**'.

3. In terms of the impugned orders, the learned Commercial Court had restrained the appellant from continuing with the arbitration request dated 10.01.2025 lodged by the appellant with the London Court of International Arbitration [hereafter **the LCIA**] and instituting or continuing any arbitration proceedings against the Plaintiffs under the LCIA Rules in respect of disputes arising from or in connection with the CCD subscription and Securities Holders Agreement dated 21.06.2013 [hereafter referred to as '**the CCD Agreement'**].

4. According to the Plaintiffs, the arbitration clause under the CCD Agreement, does not contemplate resolution of disputes by arbitration administered by the LCIA or in accordance with the LCIA Arbitration Rules, 2020 [hereafter **'the LCIA Rules 2020'**]. The appellant disputes the aforesaid contention. The appellant also challenges the maintainability of the suits on the ground that no

action for restraining a domestic arbitration, is maintainable outside the framework of the Arbitration & Conciliation Act, 1996 [**A&C Act**], by virtue of Section 5 of the A&C Act.

PREFATORY FACTS

5. L&T Infrastructure Finance Company Limited [**LTIFL**], Mr. S.N. Agarwal and BPCL, entered into a share purchase agreement [**the SPA**] dated 30.07.2010, whereby Mr. S.N. Agarwal, described as a promoter of BPCL, agreed to sell 5,87,850 equity shares of BPCL held by him, to LTIFL, which was referred to as the Investor, for consideration of ₹49,99,99,787/- on the terms and conditions as set out in the SPA.

6. Subsequently, on 21.06.2013, LTIFL and L&T Fincorp and, BPCL, Bhoruka Power Holding Private Limited [BPHPL] and the individual Promoter Shareholders (listed in Schedule-I to the CCD Agreement), entered into the CCD Agreement. Under the CCD Agreement, LTIFL and L&T Fincorp Limited, were referred to as Investors and BPHPL and other persons listed in Schedule-I to CCD Agreement were referred to as promoter shareholders. BPHPL merged with BPIIPL. Thus, essentially the CCD Agreement

was between the L&T on one part and the Plaintiffs on the other part.

7. The recital of the CCD Agreement records that the BPCL had requested each of the investors to collectively invest an amount upto ₹3,250,000,000/- (Three billion two hundred and fifty million only), by subscribing to 32,500 zero coupon compulsorily convertible debentures of ₹1,00,000/- (Rupees One Hundred Thousand) each in one or more tranches.

8. In terms of the CCD Agreement, LTIFL and L&T Fincorp, jointly subscribed to 32,500 zero coupon compulsorily convertible debentures [**CCDs**] of BPCL at a total value of ₹325,00,00,000/- (Rupees three hundred and twenty five crores). In terms of the CCD Agreement, the maturity date of the CCDs is 28.06.2033. On the same date on which the CCD Agreement was executed, that is on 21.06.2013, BPCL, BPIIPL, LTIFL and L&T Fincorp entered into a share pledge agreement [**the Pledge Agreement**]. It is stated that in terms of the Pledge Agreement, BPIIPL pledged 27,13,517 equity shares of BPCL held by it, in favour of LTIFL and L&T Fincorp. On 25.07.2019, the said parties also entered into a supplemental share pledge agreement [**Supplemental Pledge**

Agreement], in terms of which 29,62,763 shares of BPCL were pledged in favour of LTIFL and L&T Fincorp.

9. BPCL states that subsequently, the pledge of 11,70,998 number of its shares were released by LTIFL. Resultantly, 45,05,282 number of shares of BPCL [Pledged shares] held by BPIIPL remained pledged with LTIFL and L&T Fincorp.

10. The appellant acts as an Investment Manager on behalf of L&T Infra Investment Partners [**the FUND**], which is an irrevocable trust set up under the Indian Trusts Act, 1882 and is registered as a Category-I Alternate Investment Infrastructure Fund, under the Securities and Exchange Board of India (Alternative Investment Fund) Regulations, 2012.

11. On 12.09.2013, the appellant acting on behalf of the Fund, entered into a Deed of Adherence with LTIFL and L&T Fincorp, BPCL and the promoter shareholders under the CCD Agreement. In terms of the said Deed of Adherence, the Fund acquired 6,729 zero coupon CCDs out of 32,500 CCDs which was subscribed by LTIFL and L&T Fincorp. It also purchased 5,87,750 equity shares of BPCL held by LTIFL. The appellant states that in terms of the Deed of Adherence, the Fund is entitled to all rights available to

LTIFL and L&T Fincorp under the CCD Agreement and it is entitled to exercise its rights, independently.

12. The appellant claims that in terms of clause 9.5(a) of the CCD Agreement dated 21.06.2013, BPCL along with the Plaintiffs are obliged to provide an exit to LTIFL & L&T Fincorp [also referred to L&T parties or L&T] prior to the Exit Date, that is, within 60 (sixty) months from the completion date of the subscription to the first tranche of the CCDs, which was completed on 28.06.2018.

13. On 04.09.2018, L&T issued a buy back notice under clause 9.5 (i) and 9.5(j) of the CCD Agreement calling upon the BPCL to buy back these investor securities and further to the Promoter Shareholders to cause BPCL to buy back the investor securities or to purchase the same at a price resulting in returns as agreed under the CCD Agreement. The appellant claims that since the buy back notice was not complied with, within a period of 60 (sixty) days after the issuance of the said notice - that is by 03.11.2018 - an event to default occurred on the said date, in terms of clause 9(5)(i) and 9(5)(j) of the CCD Agreement. Thereafter, L&T issued separate notices dated 13.12.2018 to BPCL and Promoters Shareholders declaring the occurrence of an event of default under

the CCD Agreement and calling upon BPCL and the Promoter Shareholders to discharge the obligations within a period of 30 days from the said notice, that is, on or before 12.01.2019 and to take necessary action to buy back/redeem/purchase investors securities at prices that provides the agreed returns. The appellant states that since the BPCL and Promoter Shareholders were unable to meet their obligations under the CCD Agreement and were in continuous default, certain correspondences were exchanged between the parties regarding the resolution and payment of the outstanding amounts. It is stated that BPCL and the Promoter Shareholders commenced negotiations with third parties for acquisition of shares of BPCL and providing exit to the L&T parties. However, the parties were unable to conclude the negotiations.

14. The L&T parties entered into an agreement dated 28.09.2023 with Phoenix ARC Private Ltd. [Phoenix], whereby it assigned its rights in respect of 25,771 number of CCDs along with the underlying securities, out of 32,500 CCDs of BPCL. Consequentially, 6,729 CCDs continued to be held by the Fund.

15. The appellant states that thereafter various mails were exchanged proposing the restructuring of financial assets and waiver of the CCDs. However, the appellant/Fund declined the proposal to waive the CCDs and called upon the Plaintiffs to buy back 6729 (six thousand seven hundred and twenty-nine) number of CCDs and equity shares of BPCL in accordance with the CCD Agreement.

16. The Plaintiffs admitted their inability to service the debts in various correspondences that were exchanged in the years 2023 and 2024. According to the appellant, the same amounts to a Material Adverse Effect (MAE) under the CCD Agreement.

17. In the circumstances, the Fund exercised its rights under Clause 18.4(A)(a) of the CCD Agreement and on 03.04.2004, addressed a letter to the Promoter Shareholders as well as to BPCL, calling upon them to jointly and severally purchase the equity shares in question and 6729 CCDs for an aggregate value of ₹13,24,77,22,608/- within 60 days from the issuance of the said notice (sale notice). The appellant claims that the Plaintiffs were required to purchase the investor securities at a price, which would

provide an IRR (Internal Rate of Return) of 22% p.a. from the date of investment till the date of completion of the sale.

18. BPIIPL responded to the said notice by a letter dated 16.09.2024 contending that the sale notice was barred by limitation.

19. On 11.12.2024, the appellant issued a notice under Section 21 of the A&C Act invoking the Arbitration Agreement under the CCD Agreement and nominating Justice (retired) R.V. Raveendran, a former Judge of the Supreme Court of India, as an Arbitrator. The appellant also called upon Plaintiffs (BPCL and Promoter Shareholders) to jointly nominate an Arbitrator within a period of ten days of receiving the said notice.

20. BPCL responded to the said notice *inter alia* stating that the claims of the appellant LTIIPAL under the CCD Agreement were barred by limitation and the BPCL and the Promoter Shareholders stand discharged of their obligation under the CCD Agreement. BPCL did not respond to the notice to appoint an arbitrator by stating that the same did not merit a response.

21. On 15.10.2024, the appellant filed an application under Section 9 of the A&C Act, being Com.A.No.355/2024, *inter alia* seeking interim measures of protection. Pursuant to this application, the learned Commercial Court passed an ad-interim ex-parte order *inter alia* restraining the Promoter Shareholders from dealing with the shares of BPCL.

22. Thereafter, on 10.01.2025, the appellant filed a request for arbitration with the LCIA against the Plaintiffs (BPCL, BPIIPL, Mr. Satyanarayan Agarwal, Ms. Umah Agarwal, Mr. Siddhartha Agarwal and Mr. Vivek Agarwal).

23. The LCIA registered the said request for arbitration and called upon the Plaintiffs to respond to the said request. It also called upon the parties to make an advance against payment of costs.

24. On 15.01.2025, the learned Commercial Court passed an order under Section 9 of the A&C Act, granting the following interim measures of protection in favour of the appellant.

> "(a) BPCL and the Promoter Shareholders or anybody claiming through them are restrained from alienating or encumbering 45,05,282 shares which have been pledged to Appellant to secure their obligations under

the CCD Subscription and Securities Holders Agreement dated 21 June 2013 (CCD Agreement).

(b) BPCL and the Promoter Shareholders are directed to disclose their assets and properties. to the extent of INR 1462.59 crores (the claim amount in the Section 9 Application) by filing an affidavit within a period of four weeks from the date of pronouncement of the Section 9 Order.

(c) While BPCL is restrained from alienating or encumbering the properties as specified in Schedule A(I) and A(III) to the Section 9 Application, Appellant No. 1 is restrained from alienating or encumbering the properties described in Schedule B(II) to the Section 9 Application, and Appellant Nos. 2 to 5 are restrained from alienating or encumbering the properties described in Schedules C to F to the Section 9 Application.

(d) BPCL and the Promoter Shareholders are further directed to furnish security to the extent of INR 1,462.59 crores, upon the deposit of which, the above-mentioned interim reliefs shall stand vacated.

(e) Further, liberty is granted to Appellant to seek reliefs in respect of any other properties of BPCL and the Promoter Shareholders which can be traced by Appellant or any other property which may be disclosed by BPCL and Promoter Shareholders, by way of application under Section 9 of the Arbitration Act".

25. The Promoter Shareholders appealed against the order dated 15.01.2025 by filing an appeal being Com.A.No.70/2025, in this Court. The said appeal is pending.

26. Thereafter, on 07.02.2025, the Plaintiffs sent a letter to the LCIA stating that they did not agree to arbitration under the aegis of

the LCIA and had never consented for such an arbitration. They also claimed that there was no underlying cause of action as the dispute was barred by limitation and they were discharged of the obligations under the CCD Agreement.

27. The appellant issued a letter dated 20.02.2025 disputing the contentions raised by the Plaintiffs in their response dated 07.02.2025 to the LCIA. Thereafter, BPCL issued a letter dated 26.02.2025 seeking deferment of the arbitration proceedings. This request was also contested by the appellant. On 05.03.2025, LCIA referred the matter to the LCIA Court for its decision on constitution of the Arbitral Tribunal.

28. Following the same, on 11.03.2025, the plaintiffs filed separate commercial suits, being Com.OS.No.384/2025 and Com.OS.No.385/2025, *inter alia* seeking a declaration that the arbitration clause under the CCD Agreement (Article 16) was null and void and further seeking an order restraining the appellant from proceeding with the arbitration under the aegis of the LCIA.

29. On 18.03.2025, the LCIA decided to proceed with the appointment of the arbitrator for constitution of the Arbitral Tribunal.

30. The Plaintiffs failed to make any payment to the LCIA towards their share of advance payment of costs. Therefore, on 21.03.2025, the appellant proceeded to make payments of the plaintiffs' share of the advance cost.

31. On 27.03.2025, the LCIA appointed Justice (retired) R.V. Raveendran and Dr. Justice (retired) D.Y. Chandrachood as co-arbitrators and on 02.04.2025 called upon them to appoint a third arbitrator. Thereafter the said arbitrators sought an extension of time for selecting the third arbitrator. The said request was conveyed to the parties on 14.04.2025 by LCIA and the time was extended till 30.04.2025.

32. In the meantime, the appellant filed an application under Order VII Rule 11 CPC before the learned Commercial Court, challenging the maintainability of the commercial suits, *inter alia,* on the ground that the same was not maintainable under Section 5 of the A&C Act. The Plaintiffs also filed applications seeking interim orders restraining the appellant from proceeding with the arbitration.

33. The learned Commercial Court passed the impugned orders restraining the appellant or any other person acting on its behalf, in

any manner pursuant to the request for arbitration lodged with the LCIA and/or instituting a proceeding or continuing with any arbitration proceeding against BPCL and Promoter Shareholders as per the LCIA Rules (LCIA Arbitration Rules, 2020) under Article 16 of the CCD Agreement.

34. The appellant appealed the said decision before this Court. On 29.07.2025 this Court passed an ad interim order staying the impugned order. And, also issued directions for completion of the pleadings and listed the appeals on 18.08.2025. On the said date, the learned counsel appearing for BPCL sought an adjournment on account of his personal difficulty and accordingly the appeals were listed on 02.09.2025. In the meantime, BPCL preferred a Special Leave Petition before the Supreme Court [Special Leave to Appeal (C) No.21709/2025] impugning the *ad-interim* order dated 29.07.2025. The said petition was disposed of on 25.08.2025 with direction to dispose of the appeals.

THE DISPUTE

35. The dispute between the parties is centered around the arbitration agreement embodied in Article 16 of the CCD

Agreement. Articles 16 and 26 of the CCD Agreement are set out below.

> "16. ARBITRATION
>
> 16.1. If there is any dispute, claim or controversy arising from, related to or in connection with this Agreement, or the breach, termination or invalidity hereof, the Parties shall first attempt to resolve such dispute, controversy or claim through good faith consultations. If the dispute, claim or controversy is not resolved through good faith consultations within thirty (30) days after a Party has delivered a written notice to another Party requesting the commencement of consultation, then the dispute, claim or controversy shall be finally settled under the London Court of International Arbitration India Rules then in effect and as may be amended by the rest of this Clause 16.1 (the "Rules"). There shall be three arbitrators of whom the Investor shall nominate one (1) and the Promoter Shareholders and the Company shall jointly nominate one (1) in accordance with the Rules. The two named arbitrators shall nominate the third arbitrator within thirty (30) days of the nomination of the second arbitrator. If any arbitrator has not been named (or, in respect of the third arbitrators, the two named arbitrators have been unable to agree a nomination) within the time limits specified in the Rules, such appointment shall be made in accordance with the Rules upon the written request of either Party within thirty (30) days of such request.
>
> 16.2. The arbitration shall be held and the award shall be rendered in Mumbai or Bengaluru as may be decided by the Investor in its sole discretion. The arbitration proceeding shall be conducted and the award shall be rendered in the English language. Each Party shall cooperate in good faith to expedite (to the maximum extent practicable) the conduct of any arbitral proceedings commenced under this Agreement.

16.3. The arbitral tribunal appointed under Clause 16.1 shall in its award determine the costs of the arbitration (including the fees and expenses of the arbitrators, the administrative expenses, the fees and expenses of any experts appointed by the arbitration panel, and the reasonable legal and other costs incurred by the parties for the arbitration) and decide which of the parties shall bear them or in what proportion they shall be borne by the parties on the general principle that costs should reflect the parties' relative success and failure in the award or arbitration.

16.4. The award shall be final and binding upon the Parties, and shall be the exclusive remedy between the Parties regarding any claims, counterclaims, issues, or accountings presented to the arbitral tribunal, Judgment upon the award may be entered in any court having jurisdiction thereof, and for purposes of enforcing any arbitral award made hereunder, each Party irrevocably submits to the jurisdiction of any court sitting where any of such Party's material assets may be found.

16.5. Subject to the award of the arbitration tribunal, neither the existence of any dispute or claim nor the fact that any arbitration is pending hereunder shall relieve any of the Parties of their respective obligations under this Agreement. Subject to any award of the arbitration tribunal, the pendency of a dispute or claim in any arbitration proceeding shall not affect the performance of the obligations under this Agreement.

** ** ** **

26 GOVERNING LAW AND JURISDICTION

26.1. This agreement is governed in all respects by the laws of India.

26.2. Subject to Clause 16.1, each Party submits to the non exclusive jurisdiction of the courts of Bengaluru."

36. It is the case of the Plaintiffs that in terms of Article 16 of the CCD Agreement (the arbitration clause), arbitration is required to be conducted under the London Court of International Arbitration India Rules which were in effect at the time when the parties had entered into the CCD Agreement. They contend that the arbitration was required to be conducted under aegis of London Court of International Arbitration – India [LCIA India], which was set up as a domestic Arbitral Institution. LCIA India began its operations in New Delhi in the year 2009 and the Plaintiffs claim that it was operationally independent of the LCIA as its operations were managed under an Indian company namely, London Court of International Arbitration (India) Private Company. The Plaintiffs state that in February 2016, LCIA London decided to end its India operations through the LCIA India. Thus LCIA India ceased to exist as an arbitral institution. They claim that there is no agreement between the parties for the arbitration to be administered by an institution outside India.

37. The Plaintiffs also contend that there is a serious likelihood of conflict of laws as to which law governing the administration of arbitration would apply.

38. In addition to claiming that Article 16 of the CCD Agreement stands frustrated and no arbitration agreement exists between the parties to the CCD Agreement, the Plaintiffs also claim that the arbitration proceedings conducted by the LCIA are vexatious and oppressive.

IMPUGNED ORDERS

39. Based on the rival contentions, the learned Commercial Court had framed the following points for consideration in Para 5:

> "5. Based on the contentions of the respective parties, submissions made by the learned Advocates for both parties, I formulate the following Points for my consideration:-
>
> (1) Whether the plaintiff proves the prima facie case?
>
> (2) Whether plaintiff proves that the balance of convenience lies in favour of the plaintiff company?
>
> (3) Whether plaintiff proves that if the TI is not granted the plaintiff company would suffer from irreparable loss?
>
> (4) Whether the Plaintiff entitled for relief of temporary injunction as prayed for?"

40. The learned Commercial Court referred to Article 16.1 of the CCD Agreement as well as decisions of the Supreme Court in ***S.B.P. and Co. v. Patel Engineering Limited and Others: (2005) 8 SCC 618; Balasore Alloys Ltd., v. Medima LLC: 2020 SCC***

Online Cal 1699; World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd.: (2014) 11 SCC 639; Modi Entertainment Network and anr. v. W.S.G Cricket Pte Ltd. : (2003) 4 SCC 341; McDonald's India Private Limited v. Vikram Bakshi and others : 2016 SCC Online Del 3949; Dr. Bina Modi v. Lalit Kumar Modi and Ors : 2020 SCC Online Del 1678 and Devi Resources Limited v. Ambo Exports Limited : 2019 SCC Online Cal 774. The learned Commercial Court held that an anti suit injunction would be granted if the court is satisfied that a) defendant against whom injunction is sought, is amenable to personal jurisdiction; and b) if the injunction is declined that the ends of justice would be defeated and injustice would be perpetuated. The Court observed that the principle of Comity of Courts is required to be borne in mind, while considering whether to grant an anti-suit injunction.

41. The learned Commercial Court accepted the contention that the parties never intended that disputes arising from the CCD Agreement would be subject to arbitration administered by the LCIA London and held as under:

> ”36. Since, the parties never agreed for arbitration under the AEGIS of the LCIA, London and defendant

> have given effect by unilateral amendment to eh LCIA India rules. So the defendant is estopped from institution of arbitration proceedings administered by the LCIA London. Hence, the plaintiff is proved a prima-facie case and balance of convenience also lies in favour of the plaintiff. If the injunction order is not granted the plaintiff will put into irreparable losses and hardship. However, the defendant has a right to approach the Hon'ble High Court of Karnataka under Section 11 of Arbitration and Conciliation Act, for seeking appointment of arbitrators. Hence, the plaintiff is entitle the relief of temporary injunction as prayed in this application. Hence, I answer these issues are Affirmative."

SUBMISSIONS

42. Mr. Dhyan Chinnappa, learned Senior Counsel appearing for the appellant advanced submissions on three fronts. First, he submitted that the suits are not maintainable by virtue of Section 5 of the A&C Act. He submitted that although the appellant had also filed an application under Order VII Rule 11 of the CPC on the aforesaid grounds, the said application has not been decided. But some of the submissions made in support of the said application are noted in the interim order.

43. Second, he submitted that anti arbitration injunction could be granted only in rare cases of certain foreign seated arbitrations if the court is satisfied that the proceedings are vexatious and oppressive. He contended that in the present case, apart from

stating that the arbitration costs are higher, the plaintiffs had not established any case of the arbitration being administered by the LCIA as being vexatious or oppressive. He referred to the schedule of fees and submitted that the Arbitrator's fee was in the range of approximately ₹71,000/- to ₹71,526/- per hour, which would translate to fees within the range of ₹1,00,000/- to ₹3,00,000/- for a three hour sitting. Given the stature of the arbitrators, the said fee could not be considered as oppressive. Third, he submitted that plain reading of the arbitration clause indicates the arbitration would be conducted under the Rules of LCIA India which are effect at the time of reference. He submitted that the expression "then in effect" would necessarily be the Rules as were in force at the time of invocation.

44. Mr. Nandakumar, learned Senior Counsel appearing for the respondents countered the said submissions. He also referred to Article 16 of the CCD Agreement and earnestly contended that parties have never agreed to the arbitration being administered by LCIA, London. He contended that since the parties were Indian and the Registered office of BPCL, which had issued the securities, is in Bangalore; the parties had chosen LCIA India as an Indian arbitral institution. He contended that LCIA London and LCIA India

were distinct entities and were operationally independent. He contended that the LCIA published LCIA India Rules, 2016 (London Amendment) amending the Rules of LCIA by providing that if arbitration agreement between the parties had referred to arbitration under the Rules of LCIA India, the same would be deemed to be LCIA Arbitration Rules 2020. He submitted that the parties could have never foreseen the substitution of one set of arbitral rules by another. He also pointed out that the learned Commercial Court had accepted the said contention.

45. He also referred to the decision of the United States District Court for Eastern District, Louisiana, whereby the court held that parties could not be compelled to arbitrate at Dubai International Arbitration Center (DIAC) without their consent (***Baker Hughes Saudi Arabia Company Limited v. Dynamic Industries Inc and others : Civil Action No.2: 23-cv-1396***).

46. He referred to the decision in the case of ***Newton Engineering and Chemicals Ltd. v. Indian Oil Corporation Ltd., & others: (2013) SCC* 44** and on the strength of the said decision submitted that since the parties had not agreed to arbitration to be administered by LCIA London, the arbitration agreement stood

frustrated. He also mentioned various decisions as were noted in the impugned order and submitted that, a) Civil Courts are empowered to issue injunctions to restrain the parties from participating in or proceeding with arbitration proceedings in cases where an arbitration agreement is entered into by fraud; b) the arbitration agreement is null and void, inoperative and incapable of being performed; or c) the continuation of such arbitration proceedings would be a vexations or oppressive or where the subject matter of disputes referred was incapable of being arbitrated.

47. He submitted that the appellant is estopped from pursuing the arbitration proceedings as the appellant had not mentioned LCIA London in its notice invoking arbitration. He pointed out that notice under Section 21 of the A&C Act was issued for arbitration under the A&C Act and therefore the same could not be commenced under the aegis of LCIA London. He also submitted that LCIA Rules 2020 also provide for emergency arbitration. However, the appellant has chosen to file an application under Section 9 of the A&C Act. This also indicated that the appellant did not propose that the arbitration be conducted under the aegis of

LCIA London. And, for this reason as well, the appellant is estopped from commencing the arbitration proceedings.

48. This court also pointedly asked Mr. Nandakumar whether there were any grounds, apart from the issue as to costs, for contending that arbitration under the aegis of LCIA London would be vexatious or oppressive. Mr. Nandakumar responded by submitting that the arbitration would be vexatious, as the Rules under which arbitration is to be conducted would be subject to laws in UK. He contended that the parties had not agreed to the arbitration being conducted under any other law. However, he was unable to dispute the *lex arbitri* is the A&C Act as the seat of arbitration is in India. Thus, the arbitration is required to be conducted under the A&C Act.

49. He however referred to clause 16.5 of the LCIA Rules 2020 and contended that the said Rules are subject to laws of UK.

REASONS AND CONCLUSION

50. As noted, at the outset, the appellant's challenge to the impugned order is essentially on three fronts. First, that interference with the arbitral proceedings are not permissible and

barred by Section 5 of the A&C Act. Second that LCIA Rules 2020 are applicable by virtue of the Rules incorporated by reference in the arbitration agreement (Article 16 of the CCD Agreement) being amended. And, third that the arbitration proceedings are neither vexatious nor oppressive. Thus, the grounds on which the impugned interim order has been passed are unsustainable.

Re-maintainability of the suit

51. It is specifically averred in the plaints that the arbitration under the aegis of LCIA London is not maintainable as the parties had not agreed to refer their disputes to arbitration administered by the said arbitral institution. The plaintiffs claim that Article 16 of the CCD Agreement is rendered void and the arbitration agreement stood frustrated on LCIA India ceasing to operate. Extracts of the relevant averments made in plaint are reproduced below:

> "32. By way of the 2016 London Amendment, the LCIA, London has *suo moto*, without seeking the consent of any of the parties, substituted a domestic arbitration procedure with a foreign arbitration procedure which is: (a) orders of magnitude more cost ineffective (b) lacking in necessary physical infrastructural support; (c) not contemplated by the parties to the CCD Agreement and the Deed of Adherence.
> 33. The arbitral institution initially contemplated by the parties was an Indian company called LCIA India Private Limited. The LCIA in London is an entirely different not-for-profit company. There is no process

known to law by which one arbitral institution may be substituted for another without the clear consent of the parties to the arbitration clause.

*** *** *** ***

Clause 16 of the CCD Agreement stands *prima facie* frustrated - no arbitration agreement exists

42. It is humbly submitted that as Clause 16 of the CCD Agreement is *prima facie* frustrated, Clause 16 of the CCD Agreement has become void, and as such no arbitration agreement exists between the parties to the CCD Agreement. When LCIA India Private Limited ceased to operate, the arbitration agreement stood frustrated."

52. It is relevant to note that the contention that the arbitration agreement stands frustrated – which is one of the main grounds on which the commercial suit is founded – has not been accepted by the learned Commercial Court. Whilst the impugned order restrains the appellant from continuing with the arbitration proceedings under the LCIA Rules; it does not proscribe the parties from taking recourse to arbitration for resolution of the disputes.

53. Mr. Nandakumar, learned counsel appearing for the plaintiffs had clarified during the course of hearing that the Plaintiffs do not dispute that there is no arbitration agreement. However, they dispute that there is any agreement for the arbitration to be administered by LCIA London. He also submitted that it is open for

the appellant to approach the court under Section 11 of the A&C Act for appointment of the arbitral tribunal.

54. According to the Plaintiffs the arbitral tribunal constituted by appointment of an arbitrator (on failure of the plaintiffs to do so) will not have the jurisdiction to enter upon the reference.

55. The Plaintiffs refute that the commercial suits instituted by them are not maintainable. They rely on Section 9 of the Code of Civil Procedure, 1908 [**the CPC**], which expressly provides that:

> "the courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred".

56. There is no cavil that the civil courts have jurisdiction to try all suits of a civil nature and the exclusion of such jurisdiction cannot be readily inferred. Thus, unless the jurisdiction in respect of certain actions is expressly or impliedly barred, the courts would have the jurisdiction to try those suits as well. However, the A&C Act does contain a specific provision, which proscribes a judicial authority from intervening in arbitral proceedings under Part-I of the A&C Act, except to the extent as provided under Part-I of the Act.

It is relevant to refer to Section 5 of the A&C Act, which reads as under:

> "**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.

57. Section 16 of the A&C Act expressly empowers the Arbitral Tribunal to rule on its own jurisdiction. It recognizes the rule of *kompetenz kompetenz*. All pleas that an Arbitral Tribunal does not have the jurisdiction are required to be raised before the Arbitral Tribunal. Thus, even in cases where the issue of existence or validity of an arbitration agreement is sought to be raised by a party, the same is required to be raised before the Arbitral Tribunal in the first instance.

58. In the present case, as noted above, the plaintiffs do no pursue their challenge to the existence or validity of the arbitration agreement. Thus, clearly any challenge as to jurisdiction of the Arbitral Tribunal either in regard to the merits or the procedure is required to be raised before the Arbitral Tribunal.

59. In terms of Section 5 of the A&C Act, interference by any judicial authority – which includes a court – in arbitral proceedings

governed by Part-I of the A&C Act is barred except to the extent as provided under Part I of the A&C Act.

60. It is open for the plaintiff to raise a challenge to the jurisdiction of the Tribunal under Section 16 of the A&C Act if it desires to pursue the said challenge. If the said challenge is made and is upheld, the appellant would have a right of an appeal under Section 37 of the A&C Act [***IFFCO vs Bhadra Products: (2018) 2 SCC 534***]. In certain circumstances, the decision regarding jurisdiction would amount to an award as defined under Section 2(1)(c) of the A&C Act. In such circumstances, an application to set aside the arbitral award would lie under Section 34 of the A&C Act.

61. In cases where the challenge is raised on the ground that there are justifiable doubts as to independence or impartiality of the arbitrators, the same is also required to be raised in the first instance before the Arbitral Tribunal in terms of Section 13 of the A&C Act. If such a challenge is rejected, the parties raising such challenge have to await the delivery of the arbitral award and pursue a challenge under Section 34 of the A&C Act. However, if an arbitrator is ineligible to act under Section 12(5) of the A&C Act or is *de jure* or *de facto* unable to perform his functions, a party has

recourse under Section 14 of the A&C of the Act for termination of the mandate of the Arbitrator without following the procedure under Section 13 of the A&C Act. [see ***HRD Corporation (Marcus Oil and Chemical Division) v. GAIL (India) Ltd.: (2018) 12 SCC 471.***

62. Except as stated above, it would be impermissible for the courts to interfere with the arbitral proceedings. Thus a suit to restrain arbitral proceedings under the A&C Act would not lie. This is because by virtue of Section 5 of the A&C Act, interference in arbitral proceedings governed by Part-I of the A&C Act, is expressly barred.

63. It is relevant to refer to the decision of the three Judges Bench of the Supreme Court in ***Kvaerner Cementation India Limited v. Bajranglal Agarwal and Another, (*2012) 5 SCC 214**. In that case, a suit was filed before the Civil Court, Bombay seeking a declaration that there exists an arbitration clause. The learned civil court had vacated the interim order of injunction granted earlier restraining the parties from proceeding with the arbitration proceedings. The learned Single Judge of the Bombay High Court had declined to interfere with the order of the civil court vacating the injunction order. A special leave petition was

preferred against the said order and in those proceedings, the Supreme Court held as under:

> "**2.** Mr Dave, the learned Senior Counsel appearing for the petitioner contends that the jurisdiction of the civil court need not be inferentially held to be ousted unless any statute on the face of it excludes the same and judged from that angle when a party assails the existence of an arbitration agreement, which would confer jurisdiction on an Arbitral Tribunal, the court committed error in not granting an order of injunction.
>
> **3.** There cannot be any dispute that in the absence of any arbitration clause in the agreement, no dispute could be referred for arbitration to an Arbitral Tribunal. But, 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.
>
> **4.** A bare reading of Section 16 makes it explicitly clear that the Arbitral Tribunal has the power to rule on its own jurisdiction even when any objection with respect to existence or validity of the arbitration agreement is raised, and a conjoint reading of sub-sections (2), (4) and (6) of Section 16 would make it clear that such a decision would be amenable to be assailed within the ambit of Section 34 of the Act.
>
> **5.** In this view of the matter, we see no infirmity in the impugned order so as to be interfered with by this Court. The petitioner, who is a party to the arbitral proceedings may raise the question of jurisdiction of the arbitrator as well as the objection on the ground

> of non-existence of any arbitration agreement in the so-called dispute in question, and on such an objection being raised, the arbitrator would do well in disposing of the same as a preliminary issue so that it may not be necessary to go into the entire gamut of arbitration proceedings."
>
> (emphasis added)

64. In a subsequent decision in ***National Aluminium Company Limited v. Subhash Infra Engineers Private Limited and Another: (2020) 15 SCC 557***, the appellant had invoked the arbitration clause and had called upon the respondent to select an Arbitrator from a panel of three names sent by it. The respondent had raised a challenge as to the existence of arbitration agreement. It claimed that no binding contract had come into existence between the parties and thus, the disputes could not be referred to arbitration. The appellant, proceeded to appoint the Sole Arbitrator. The respondent filed a suit before the civil court (Senior Civil Judge, Gurgaon), *inter alia*, praying for a decree of declaration that the appointment of a sole arbitrator was null and void. It also sought an injunction restraining the Arbitrator, arrayed as defendant No.2 from proceeding with the arbitration. The trial court declined to grant an interim injunction. However, the Appellate Court (Additional District Judge, Gurgaon) allowed the appeal and

had passed an order restraining the Arbitrator from proceeding further. The appellant impugned the appellate order before the High Court of Punjab and Haryana by filing a Civil Revision Petition, which was dismissed by an order dated 22.10.2016. The said order was carried in appeal before the Supreme Court. In the aforesaid context, the Supreme Court held as under:

> "**12.** It is a case of the appellant Company that even if the first respondent disputes the jurisdiction of the arbitrator, it is open for the first respondent to move an application before the arbitrator under Section 16 of the Act, but at the same time, the suit filed by the first respondent, for declaration and injunction is not maintainable.
>
> **13.** In the judgment of this Court, in *Kvaerner Cementation (India) Ltd.* v. *Bajranglal Agarwal* [*Kvaerner Cementation (India) Ltd.* v. *Bajranglal Agarwal*, (2012) 5 SCC 214] , this Court has examined the similar issue and held that any objection with respect to existence or validity of the arbitration agreement, can be raised only by way of an application under Section 16 of the Act and the civil court cannot have jurisdiction to go into such question.
>
> **14.** Having regard to aforesaid judgment of this Court and various communications between the parties, we are in agreement with the submission made by the learned Senior Counsel for the appellant that, if the first respondent wants to raise an objection with regard to existence or validity of the arbitration agreement, it is open for the first respondent to move an application before the arbitrator, but with such plea, he cannot maintain a suit for declaration and injunction. Though the trial

> court rightly rejected the interim injunction sought for by the first respondent, the same is erroneously reversed by the learned Additional District Judge and such order is confirmed by the High Court, by the impugned order [*NALCO Ltd.* v. *Subhash Infraengineers (P) Ltd.*, 2016 SCC OnLine P&H 19317] .
>
> **15.** As we are of the view that the order passed by the Additional District Judge and the High Court are not in conformity with the law on the subject and are contrary to judgment of this Court as referred above, the impugned order is liable to be set aside by vacating the injunction orders."

65. Mr. Nandakumar contended that the decisions are no longer good law. He contended that the decision in the case of ***Kvaerner Cementation*** (supra) was implicitly overruled and the decision in ***National Aluminium Company Limited (supra)*** had followed the decision in ***Kvaerner Cementation***. He supported the said contention by relying the decision of the learned Single Judge of the Calcutta High Court in ***Balasore Alloys Limited v. Medima LLC: 2020 SCC OnLine Cal 1699*** and drew attention of this Court to the following observations:

> "In light of the majority opinion rendered in *SBP & Co*. (supra), it may therefore be interpreted that the dictum in *Kvaerner Cementation (supra),* relied on by Mr. Mookherjee, learned senior advocate, stands implicitly overruled for two reasons: *firstly*, the case was reportedly decided on March 21, 2001, i.e. prior to the ruling in *SBP &*

> *Co. (supra)* and *secondly,* it was decided by a three Judges Bench of the Supreme Court. I hold as such."

66. As is apparent from the above, the observations have been made on the strength of the decision of the Constitution Bench of the Supreme Court in ***SBP and Co. v. Patel Engineering: (2005) 8 SCC 618***. Mr. Nandakumar neither citer nor referred to the said decision. He rested his contention that the decision of the three Judges Bench of the Supreme Court in ***Kvaerner Cementation*** (supra) stood implicitly overruled solely on the observations of the learned Single Judge of the Calcutta High Court.

67. We are, respectfully, unable to concur with the said view for more than one reason. A plain reading of the decision of the Supreme Court in ***SBP Co****. (supra)* indicates that it does not support the proposition that the courts can interdict arbitral proceedings. On the contrary, the said decision supports the view that no interference with the arbitration proceedings is permissible once an arbitration has commenced without reference to the court. In the said case, the principal question that fell for consideration of the court was regarding the nature and function of the Chief Justice or his designate under Section 11 of the A&C Act. The Constitution

Bench of the Supreme Court in ***Konkan Railway Corporation Ltd. & Anr v. Rani Construction Pvt. Ltd.: (2002) 2 SCC 388*** had taken a view that function of the Chief Justice or his designate under Section 11 of the A&C Act was a pure administrative function, which is neither judicial nor quasi judicial. Thus, the Chief Justice or his nominee could not decide any contentious issue between the parties. The said view was a subject matter of contestation before the Supreme Court. In the aforesaid context, the Supreme Court explained as under:

> "12. Section 16 of the Act only makes explicit what is even otherwise implicit, namely, that the arbitral tribunal constituted under the Act has the jurisdiction to rule on its own jurisdiction, including ruling on objections with respect to the existence or validity of the arbitration agreement. Sub-section (1) also directs that an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. It also clarifies that a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. Sub-section (2) of Section 16 enjoins that a party wanting to raise a plea that the arbitral tribunal does not have jurisdiction, has to raise that objection not later than the submission of the statement of defence, and that the party shall not be precluded from raising the plea of jurisdiction merely because he has appointed or participated in the appointment of an arbitrator. Sub-section (3) lays down that a plea that the arbitral tribunal is exceeding the scope of its authority, shall be raised as soon as the matter alleged to be beyond the scope of its authority is

raised during the arbitral proceedings. When the Tribunal decides these two questions, namely, the question of jurisdiction and the question of exceeding the scope of Page 1804 authority or either of them, the same is open to immediate challenge in an appeal, when the objection is upheld and only in an appeal against the final award, when the objection is overruled. Sub-section (5) enjoins that if the arbitral tribunal overrules the objections under sub-section (2) or sub-section (3), it should continue with the arbitral proceedings and make an arbitral award. Sub-section (6) provides that a party aggrieved by such an arbitral award overruling the plea on lack of jurisdiction and the exceeding of the scope of authority, may make an application on these grounds for setting aside the award in accordance with Section 34 of the Act. The question, in the context of Sub-Section (7) of Section 11 is, what is the scope of the right conferred on the arbitral tribunal to rule upon its own jurisdiction and the existence of the arbitration clause, envisaged by Section 16(1), once the Chief Justice or the person designated by him had appointed an arbitrator after satisfying himself that the conditions for the exercise of power to appoint an arbitrator are present in the case. Prima facie, it would be difficult to say that in spite of the finality conferred by sub-Section (7) of Section 11 of the Act, to such a decision of the Chief Justice, the arbitral tribunal can still go behind that decision and rule on its own jurisdiction or on the existence of an arbitration clause. It also appears to us to be incongruous to say that after the Chief Justice had appointed an arbitral tribunal, the arbitral tribunal can turn round and say that the Chief Justice had no jurisdiction or authority to appoint the tribunal, the very creature brought into existence by the exercise of power by its creator, the Chief Justice. The argument of learned Senior Counsel, Mr. K.K. Venugopal that Section 16 has full play only when an arbitral tribunal is constituted without intervention under Section 11(6) of the Act, is one way of

reconciling that provision with Section 16 of the Act, especially in the context of sub- section (7) thereof. We are inclined to the view that the decision of the Chief Justice on the issue of jurisdiction and the existence of a valid arbitration agreement would be binding on the parties when the matter goes to the arbitral tribunal and at subsequent stages of the proceeding except in an appeal in the Supreme Court in the case of the decision being by the Chief Justice of the High Court or by a Judge of the High Court designated by him.

18. It is true that the power under Section 11(6) of the Act is not conferred on the Supreme Court or on the High Court, but it is conferred on the Chief Justice of India or the Chief Justice of the High Court. One possible reason for specifying the authority as the Chief Justice, could be that if it were merely the conferment of the power on the High Court, or the Supreme Court, the matter would be governed by the normal procedure of that Court, including the right of appeal and the Parliament obviously wanted to avoid that situation, since one of the objects was to restrict the interference by Courts in the arbitral process. Therefore, the power was conferred on the highest judicial authority in the country and in the State in their capacities as Chief Justices. They have been conferred the power or the right to pass an order contemplated by Section 11 of the Act. We have already seen that it is not possible to envisage that the power is conferred on the Chief Justice as persona designata. Therefore, the fact that the power is conferred on the Chief Justice, and not on the court presided over by him is not sufficient to hold that the power thus conferred is merely an administrative power and is not a judicial power.

19. It is also not possible to accept the argument that there is an exclusive conferment of jurisdiction on the arbitral tribunal, to decide on the existence or validity of the arbitration agreement. Section 8 of the

Act contemplates a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement, on the terms specified therein, to refer the dispute to arbitration. A judicial authority as such is not defined in the Act. It would certainly include the court as defined in Section 2(e) of the Act and would also, in our opinion, include other courts and may even include a special tribunal like the Consumer Forum (See Fair Air Engineers (P) Ltd. and Anr. v. N.K. Modi.) When the defendant to an action before a judicial authority raises the plea that there is an arbitration agreement and the subject matter of the claim is covered by the agreement and the plaintiff or the person who has approached the judicial authority for relief, Page 1809 disputes the same, the judicial authority, in the absence of any restriction in the Act, has necessarily to decide whether, in fact, there is in existence a valid arbitration agreement and whether the dispute that is sought to be raised before it, is covered by the arbitration clause. It is difficult to contemplate that the judicial authority has also to act mechanically or has merely to see the original arbitration agreement produced before it, and mechanically refer the parties to an arbitration. Similarly, Section 9 enables a Court, obviously, as defined in the Act, when approached by a party before the commencement of an arbitral proceeding, to grant interim relief as contemplated by the Section. When a party seeks an interim relief asserting that there was a dispute liable to be arbitrated upon in terms of the Act, and the opposite party disputes the existence of an arbitration agreement as defined in the Act or raises a plea that the dispute involved was not covered by the arbitration clause, or that the Court which was approached had no jurisdiction to pass any order in terms of Section 9 of the Act, that Court has necessarily to decide whether it has jurisdiction, whether there is an arbitration agreement which is valid in law and whether the dispute sought to be raised is covered by that agreement. There is no

indication in the Act that the powers of the Court are curtailed on these aspects. On the other hand, Section 9 insists that once approached in that behalf, "the Court shall have the same power for making orders as it has for the purpose of and in relation to any proceeding before it". Surely, when a matter is entrusted to a Civil Court in the ordinary hierarchy of Courts without anything more, the procedure of that Court would govern the adjudication [See R.M.A.R.A. Adaikappa Chettiar and Anr. v. R. Chandrasekhara Thevar (AIR 1948 P.C. 12)]

20. Section 16 is said to be the recognition of the principle of Kompetenz - Kompetenz. The fact that the arbitral tribunal has the competence to rule on its own jurisdiction and to define the contours of its jurisdiction, only means that when such issues arise before it, the Tribunal can and possibly, ought to decide them. This can happen when the parties have gone to the arbitral tribunal without recourse to Section 8 or 11 of the Act. But where the jurisdictional issues are decided under these Sections, before a reference is made, Section 16 cannot be held to empower the arbitral tribunal to ignore the decision given by the judicial authority or the Chief Justice before the reference to it was made. The competence to decide does not enable the arbitral tribunal to get over the finality conferred on an order passed prior to its entering upon the reference by the very statute that creates it. That is the position arising out of Section 11(7) of the Act read with Section 16 thereof. The finality given to the order of the Chief Justice on the matters within his competence under Section 11 of the Act, are incapable of being reopened before the arbitral tribunal. In Konkan Railway (Supra) what is considered is only the fact that under Section 16, the arbitral tribunal has the right to rule on its own jurisdiction and any objection, with respect to the existence or validity of the arbitration agreement. What is the impact of Section 11(7) of the Act on the

> arbitral tribunal constituted by an order under Section 11(6) of the Act, was not considered. Obviously, this was because of the view taken in that decision that the Chief Justice is not expected to decide anything while entertaining a request under Section 11(6) of the Act and is only performing an administrative function in appointing an arbitral tribunal. Once it is held that there is an adjudicatory function entrusted to the Chief Justice by the Act, obviously, the right of the arbitral tribunal to go behind the order passed by the Chief Justice would take another hue and would be controlled by Section 11(7) of the Act." [Emphasis added]

68. As is apparent from the above, the Supreme Court was considering the question as to the nature and the function of the Chief Justice or his designate under Section 11 of the A&C Act. One of the contentions advanced was that the nature of the power exercised was clearly administrative and non-judicial and therefore, the Arbitral Tribunal could exercise powers under Section 16 of the A&C Act to arrive at a conclusion contrary to the findings of the Chief Justice of the High Court or the Supreme Court, as the case may be, in exercise of its powers under Section 11 of the A&C Act. The Supreme Court was of the view that the powers conferred under Section 11, may not be administrative powers and thus, any finding was not an administrative decision. It is in this context, the Court held that the jurisdiction conferred on the Arbitral Tribunal,

was not exclusive. And, the Courts would also have the jurisdiction to address the question as to the existence of arbitration agreement and whether the disputes are arbitrable while considering an application under Sections 8 and 9 of the A&C Act. However, the Supreme Court also underscored the object of the scheme of the A&C Act is that interference by Courts in the arbitral proceedings, is restricted. It is material to note that Sections 11, 8 and 9 of the Act fall within Part-I of the A&C Act and thus within the express exception under Section 5 of the A&C Act. Section 5 does not bar the jurisdiction of the Courts, in entirety. It only confines the jurisdiction of the Courts to examine matters to the extent as provided under Part-I of the A&C Act. Thus, the decision of the Supreme Court in SPB &Co. is not an authority for the proposition that the courts can entertain actions challenging the jurisdiction of the Arbitral Tribunals in the first instance and intervene in arbitral proceedings governed by Part-I of the A&C Act other than as specifically provided under that part.

69. It is also important to note that by virtue of the Arbitration and Conciliation (Amendment) Act, 2015, the scope of examination of court is confined to the existence of the arbitration agreement by introduction of Sub-section (6A) to Section 11 of the A&C Act.

70. It is also material to note that the decision in ***National Aluminium Company Limited v. Subhash Infra Engineers Private Limited and Another*** *(supra)*, affirming the view in ***Kvaerner Cementation*** *(supra)* was rendered after the decision in ***SBP & Co***.(supra). Thus the contention that the decision in SBP & Co implicitly overruled the view in ***Kvaerner Cementation*** *(supra),* cannot be accepted on that ground as well.

71. It is also instructive to refer to the decision of the Constitution Bench of the Supreme Court in ***Interplay Between Arbitration Agreements under Arbitration and Conciliation Act, 1996 and Stamp Act, 1899 In Re.:*** **(2024) 6 SCC 1**. The Supreme Court had observed that Section 5 of the A&C Act is based on Article 5 of the Model Law. However, there is material difference between Article 5 of the Model Law and Section 5 of the A&C Act. The difference being that Section 5 also incorporates a non obstante provision, which curtails the scope of judicial intervention. Thus, the interference by the courts is confined to the extent expressly provided in Part I of the A&C Act. It would be relevant to refer to the following extract of the said decision:

> **"79.** This indicates that Article 5 of the Model Law emphasises on Arbitral Tribunal being the

> first instance to determine all issues relating to matters of law or construction as well as issues of jurisdiction and scope of authority. It exclusively determines the manner and form of judicial intervention in the arbitration process. National courts can intervene with respect to matters not expressly governed by the Model Law."

72. It is material to note that the issue that fell for consideration before the Constitution Bench in ***Interplay Between Arbitration Agreements under Arbitration and Conciliation Act, 1996 & Stamp Act, 1899 (supra),*** was whether Sections 33 and 35 of the Stamp Act, 1899 [**the Stamp Act**] would be applicable at the reference stage. In ***N.N. Global Mercantile (P) Ltd.*** **v.** ***Indo Unique Flame Ltd.:*** **(2023) 7 SCC 1**, the Supreme Court had by majority held that the arbitration agreement which is unstamped, could not be considered as in existence and the provisions of Sections 33 and 35 of the Stamp Act, 1899 were applicable at the referral stage. Hrishikesh Roy, J., has penned one of the dissenting opinions. The following observations from his opinion, are of some significance:

> "**344.** A collective reading of the Statement of Objects and Reasons of the Arbitration Act, 1996 read with Section 5 of the Act, and Article 5 of the Model Law, would make it abundantly clear that the legislative intent behind the enactment was to *inter alia*, minimise the intervention of the courts and provide for timely

resolution of disputes. By adding a non obstante clause, Parliament through Section 5 made a significant departure from Article 5 and gave an overriding effect over the provisions of any other law for the time being in force. It circumscribed the role of the judicial authority, especially in context of the courts exercising any residual power that may accrue to them through any provision in any law.

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407. At the cost of repetition, let us now refer to Section 5 of the Arbitration Act, 1996 to understand the special nature of the Act. As noted above, the Arbitration Act, 1996 is a special legislation and Section 5 begins with a non obstante clause which overrides powers of judicial authorities acting under any other law other than the Arbitration Act, 1996. As argued by the learned counsel for the intervener, Debesh Panda, the special nature of the Act is also established from the non obstante clause in Section 5 of the Arbitration Act, 1996. On the Arbitration Act being a self-contained code, Indu Malhotra, J. comments as under:

> "The Arbitration and Conciliation Act, 1996 is a self-contained code governing the law relating to arbitration, including Section 5 which gives it an overriding effect over statutes. Once it is held that the 1996 Act is a self-contained code and is exhaustive, it carries with it the negative import that only such acts which are permissible in the statute may be done, and none others."

408. The use of the expression "so provided" in Section 5, disregards all forms of intervention except that, which is specified in Part I. Such intention is apparent from the language of the non obstante clause. As noted earlier, this provision is yet another instance where Parliament went a step beyond the language employed in the UNCITRAL Model Law of 1985."

73. The said view was accepted by the Supreme Court in ***Interplay Between Arbitration Agreements under Arbitration and Conciliation Act, 1996 & Stamp Act, 1899, In Re*** *(supra)*. The Court was of the view that the scope of the non obstante clause under Section 5 of the A&C Act, excluded the operation of Sections 33 and 35 of the Stamp Act. We may refer to the following extract from the said decision:

> **"185.** In the above segments, we have dealt with the scope of Section 5 of the Arbitration Act. It restricts the extent of judicial intervention in various matters governed by Part I of the Arbitration Act. The non obstante clause in this provision is of particular significance. It indicates that the rule in Section 5 (and consequently, the provisions of the Arbitration Act) must take precedence over any other law for the time being in force. Any intervention by the Courts (including impounding an agreement in which an arbitration clause is contained) is, therefore, permitted only if the Arbitration Act provides for such a step, which it does not. Sections 33 and 35 cannot be allowed to operate in proceedings under Section 11 (or Section 8, as the case may be), in view of the non obstante clause in Section 5. This being the case, we are unable to agree with the decision in *N.N. Global*, that the Court in a proceeding under Section 11 must give effect to Sections 33 and 35 of the Stamp Act despite the interdict in Section 5. The Court held : (SCC p. 87, para 129)
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> > "*129*. Section 5 no doubt provides for a non obstante clause. It provides against judicial interference except as provided in the Act. The non obstante clause purports to proclaim so despite the presence of any law which may

> provide for interference otherwise. However, this does not mean that the operation of the Stamp Act, in particular, Sections 33 and 35 would not have any play. We are of the clear view that the purport of Section 5 is not to take away the effect of Sections 33 and 35 of the Stamp Act. The Court under Section 11 purporting to give effect to Sections 33 and 35 cannot be accused of judicial interference contrary to Section 5 of the Act."
>
> **186.** Section 5 is effectively rendered otiose by the interpretation given to it in *N.N. Global*. The Court failed to provide a reason for holding that Section 5 of the Arbitration Act does not have the effect of excluding the operation of Sections 33 and 35 of the Stamp Act in proceedings under Section 11 of the Arbitration Act. The non obstante clause in Section 5 does precisely this. In addition to the effect of the non obstante clause, the Arbitration Act is a special law. We must also be cognizant of the fact that one of objectives of the Arbitration Act was to minimise the supervisory role of Courts in the arbitral process."

74. In view of the above, we are unable to agree with the proposition that the Courts can entertain suits for examining the jurisdiction of Arbitral Tribunal or determine any question including as to arbitrability of the disputes in proceedings other than in A&C Act. The same would fall foul of Section 5 of the A&C Act.

75. The reliance placed by the plaintiffs on the decision of the Supreme Court in ***World Sport Group Mauritius Limited v. MSM Satellite (Singapore) Pte. Limited : (2014) 11 SCC 639*** *(supra)*, is

misplaced. In that case, the parties had executed the Deed for Provision of Facilitation Services dated 25.03.2009 [**Facilitation Deed**]. Clause 9 of the said deed contained an arbitration agreement, whereby the parties had agreed that the disputes arising in connection with or touching upon the Deed, would be submitted to the International Chamber of Commerce [**ICC**], for a final and binding arbitration under its rules of arbitration. It was agreed that the arbitration would be held in Singapore, before a Sole Arbitrator. It is, thus clear that the arbitration, which was called in question was an international commercial arbitration which was seated overseas. In terms of the agreement between the parties (Facilitation Deed), the parties had agreed that the same would be governed by and construed in accordance with the law of England and Wales. The respondent had instituted two suits, first that the Facilitation Deed was void and sought recovery of a sum of Rs.125 crores paid to the appellant. After the suit was instituted, the appellant had sent a request for arbitration to ICC, Singapore. ICC Singapore had issued a notice to the respondent to file its response to the request for arbitration. In the meanwhile, the respondent filed another suit before the Bombay High Court, seeking a declaration that the Facilitation Deed was rescinded and

the appellant was not entitled to invoke the arbitration clause. The respondent also filed an application for temporary injunction restraining the appellant from continuing with the arbitration proceedings. The learned Single Judge declined to grant any order of injunction. The order of the learned Single Judge was challenged before the Division Bench of the Bombay High Court. The Division Bench allowed the appeal and issued an order of temporary injunction, restraining arbitration by the ICC. The order of the Division Bench was appealed before the Supreme Court. In the aforesaid context, the Supreme Court considered the question whether the Division Bench of Bombay High Court, could have passed an order of injunction restraining arbitration in Singapore. In the aforesaid context, the Supreme Court referred to Sections 44 and 45 in Chapter-I of Part-II of the A&C Act and observed that any Civil Court in India, which entertains a suit, would have to follow the mandate of the said provisions.

76. The arbitration involved in the said case, was not an arbitration under Part-I of the A&C Act and therefore, the express bar of Section 5 of the A&C Act, did not apply. Notwithstanding the same, the Supreme Court had held that the Civil Courts would have to confine the examination to the grounds as set out under

Section 45 of the A&C Act, which require any judicial authority, when seized of an action in a matter in respect of which the parties had made an agreement to which the New York Convention (Convention as set forth in the First Schedule apply) applies would at the request of the parties, refer them to arbitration unless the Court found that the agreement is '*null and void, inoperative or incapable of being performed*'. The provisions of Section 45 expressly require a Judicial Authority to examine whether an agreement, which is covered under Section 44 of the A&C Act is null and void, inoperative or incapable of being performed. One of the contentions advanced before the Supreme Court was that the principles of Judicial Comity required the Bombay High Court to refrain from entertaining the suit. The Court rejected the said contention and observed that under Section 9 of the CPC, Courts in India have the jurisdiction to try all suits of civil nature excepting suits of which cognizance is either expressly or impliedly barred. The court ruled that the Bombay High Court had jurisdiction to entertain the suit and its jurisdiction could not be ousted. The Court also noted that Clause 9 of the Facilitation Deed provided that the parties could approach Courts of competent jurisdiction for equitable relief.

77. Mr. Nandkumar had also relied on the decision of a learned Single Judge of the Delhi High Court in ***Engineering Projects (India) Limited vs. MSA Global LLC (Oman) : 2025 SCC Online Del 5072***. In that case, the agreement between the parties contained an arbitration clause, which provided that the agreement would be governed by and construed in accordance with laws and regulations of Sultanate of Oman. The arbitration was required to be held in accordance with the rules of arbitration of International Chamber of Commerce and the jurisdiction of the agreement would lie with Courts at New Delhi. In the said case as well, the seat of arbitration was in Singapore. In the aforesaid context, the Delhi High Court referred to the decision of the Supreme Court in ***O.N.G.C vs. Western Co. of North America : 1987 (1) SCC 496***, and observed that the said decision lays down a precedent for restraining a party from proceeding before foreign seated arbitral tribunal provided the case is of such gravity that it warrants such extraordinary interference. The court observed as under:

> "58. Thus, the aforesaid decision categorically lays down a precedent for restraining a party from proceeding before a foreign-seated arbitral proceeding, provided the case is of such gravity that it warrants such extraordinary interference. It equally settles that such a restraining order could be passed by the High Court as well and Section 41(b) of the Specific Relief Act, 1963

> would have no bearing on this power of the High Court. No doubt, the case indicates that such a remedy is to be provided in extraordinary and rare situations wherein the denial of this relief would effectively result into a patently unjust and unconscionable outcome for the plaintiff. It be noted that at this stage, the Court is only dealing with the preliminary question of maintainability and whether the present case calls for this extraordinary and rare relief shall form part of the subsequent discussion, as it necessarily involves a factual enquiry."

78. The learned Single Judge, *prima facie*, found that the arbitration proceedings were vexatious and oppressive as there were justifiable grounds to question the independence and impartiality of one of the arbitrators, as he had failed to disclose his prior involvement in arbitration proceedings involving the Managing Director and Promoter of the defendant. The plaintiff in the said case had raised a challenge before the ICC Court under the ICC Rules, which was rejected on merits. The ICC Court had held that although non-disclosure was 'regrettable', the circumstances did not establish justifiable doubts as to the learned Arbitrator's impartiality or independence. The plaintiff had preferred an application under Article 13(3) of the UNCITRAL read with Section 3(1) of the Singapore International Arbitration Act, 1994, seeking determination of the validity of the learned Arbitrator's continued participation in the arbitral proceedings but had not prevailed. The

defendant had filed a petition under Section 47 read with 48 of the A&C Act, seeking enforcement of a partial award before the Court which is pending before the Delhi High Court. We have some reservations, whether in the given circumstances, an anti-arbitration injunction could have been granted. However, it is not necessary for this Court to consider the said view in any detail, as the said decision was also rendered in respect of an arbitration to which Part-I of the A&C Act and Section 5 of the A&C Act are inapplicable. Thus, the reliance placed by the plaintiffs on the said decision, is misplaced as well.

79. The decisions in ***Mc. Donald's India Private Ltd. vs. Vikram Bakshi & Ors.: 2016 SCC Online Del 3949*** and ***Union of India vs. Dabhol Power Company : 2004 SCC Online Del 1298***, are also equally inapplicable. In Mc.Donald India Private Limited (supra), the anti-arbitration injunction was sought in respect of arbitration proceedings seated at London. The arbitration agreement was one that was covered under Section 44 of the A&C Act. In **Dabhol Power Company's** case as well, the arbitration was not governed by Part-I of the A&C.

80. In none of the said cases, referred to by the learned senior counsel, the express bar of Section 5 of the A&C Act was applicable.

81. It is also relevant to note a vital difference between the provisions of Section 45, which falls in Part-II of the A&C Act; and Section 8 of the A&C Act. In terms of Section 45 of the A&C Act, the Judicial Authority (Court), is required to refer the parties to arbitration unless the Court *prima facie* finds the agreement to be "null and void, inoperative or incapable of being performed". Thus, an action in respect of the subject matter of disputes that are covered by arbitration agreement under Section 44 of the A&C Act may be maintainable, if the Court *prima facie* finds that the arbitration agreement is null and void, inoperative and incapable of performance. It is also important to note that there is no provision under Section 45 of the Act, which expressly provides that notwithstanding that an application has been made under Section 45 of the Act for referring the parties to arbitration, the arbitral proceedings would continue. However, sub-section (3) of Section 8 of the A&C Act expressly provides notwithstanding that an application under Section 8(1) of the A&C Act is pending, *"the arbitration may commence or continue and an arbitral award*

made". This also clearly indicates that in so far as arbitrations, which are governed by Part-I of the A&C Act, the Courts cannot interfere in the arbitration proceedings notwithstanding that an application to refer the parties to arbitration is pending before a Judicial Authority before which an action has been instituted.

82. In view of the above, the learned Commercial Court could not have proceeded to issue the impugned order restraining the parties from proceeding with arbitration, notwithstanding the merits or demerits of the respondent's contention that it had not agreed for an arbitration to be administered by the LCIA London. The commercial court's jurisdiction to try a suit questioning the arbitration proceedings governed by Part-I of the A&C Act is barred by virtue of Section 5 of the A&C Act.

83. In view of the above, it is not necessary to examine other contentions advanced by the learned counsel for the parties including as to the interpretation of the arbitration clause, since indisputably, the Arbitral Tribunal would have the jurisdiction to examine the same. However, for the sake of completeness, we consider it apposite to examine the other contentions as well.

II. Whether the arbitration proceedings are vexatious and oppressive.

84. The second question to be examined is whether in the given facts, an order restraining the parties from proceeding with arbitration is warranted. According to the Plaintiffs, the continuation of arbitration proceedings is vexatious and oppressive and therefore, they were entitled to an interim order to restrain the arbitral proceedings. As noted above, there is no cavil that an arbitration agreement exists between the parties and thus the disputes are required to be resolved through arbitration. The arbitration clause also expressly provides constitution of an Arbitral Tribunal of three (3) members. It is agreed that the Plaintiffs will nominate one Arbitrator and the Investor (L&T) would nominate one Arbitrator and both the Arbitrators shall nominate the third Arbitrator. Whilst the appellant has nominated an Arbitrator, the plaintiffs have declined to do so.

85. We may note that before the Commercial Court, the appellants had without prejudice indicated that they are agreeable for the Plaintiffs to appoint an arbitrator and for the arbitration to be conducted as an adhoc arbitration. However, the Plaintiffs had declined the said proposal. Thus, this is clearly not a case where

the respondents are vexed by the Arbitral Tribunal being constituted by appointment of Arbitrator by LCIA. We may recall that the Plaintiffs have averred that the arbitration agreement had ceased to exist. However, as noted hereinabove, it was conceded that this stand is without merit and arbitration agreement exists between the parties. The only contention advanced is that there is no agreement between the parties that the arbitration be administered by the LCIA (London).

86. We may now refer to the averments made in the plaint to examine the Plaintiffs case that the arbitral proceedings are vexatious and oppressive. The relevant extracts of the plaint are set out below:

> **Arbitration proceedings conducted by LCIA London are vexatious and oppressive**
>
> 36. As highlighted above, the LCIA India Rules, by undergoing the 2016 London Amendment, where substituted in a wholesale manner. What at the time of entry into the CCD Agreement was a substantive arbitration rule set, was amended to a paragraph long "rule", which states that where any agreement concluded prior to June 2016 provided for an arbitration to under the rules of LCIA India, the parties "shall be taken to have agreed in writing that the arbitration between them shall be administered by the LCIA, London, and shall be conducted in accordance with the LCIA Arbitration Rules, 2020". Such deeming fiction is created not by any statutory law in force which binds

the parties, but foreign arbitral institution sitting thousands of miles away. Agreements, especially arbitration agreements, are creatures of *consensus ad idem* and consent of the parties. Such salutary principles are discarded entirely by way of 2016 London Amendment.

*** *** *** ***

39. The Parties were conscious and alive to the fact that any arbitration proceedings arising from the CCD Agreement, administered by LCIA London, would be prohibitively expensive and cost ineffective. A comparison of the Schedule of Costs as provided in the rules of LCIA India, in effect immediately prior to the 2016 London Amendment, and the Schedule of Costs as provided in the LCIA Arbitration Rules, 2020 is provided below:

CATEGORY	**LCIA India Schedule of Arbitration Costs (effective 17 April, 2010)**	**LCIA London Schedule of Costs 2023 (effective 1 December, 2023)**
ADMINISTRATIVE CHARGES		
Registration Fee (non-refundable)	INR 30,000 + 12.36% Service Tax (then prevailing rate)	£1,950 (INR 2,14,580)
Registrar/Deputy Registrar	INR 5,000 per hour	£300 per hour (INR 33,012)
Counsel	INR 2,500 per hour	£285 per hour (INR 31,361)
Case administrators	N.A.	£220 per hour (INR 24,209)

Casework accounting functions	N.A.	£190 per hour (INR 20,907)
FEES AND EXPENSES OF THE ARBITRAL TRIBUNAL		
Hourly Fees range	Not exceeding INR 20,000	£250 to £650 (INR 27,510-INR 71,526)
EMERGENCY ARBITRATOR		
Application Fee	No provision	£10,000 (INR 11,00,440)
Emergency Arbitrator's Fee		£25,000 (INR 27,51,100)
TRIBUNAL SECRETARY		
Hourly rate	No such Position	£100-£200 per hour

*** *** *** ***

41. As such, in view of the costs imposed by way of the LCIA Arbitration Rules, 2020, *ipso facto* the arbitration proceedings Initiated by the Defendant are oppressive and vexatious.

87. In addition to the above averments, it was also contended that the arbitration is vexatious as the arbitration is not governed by Indian law. The said contention is *ex facie* erroneous as the CCD Agreement as well as the arbitration is governed by Indian law. Mr

Nandkumar conceded that there is no dispute that the arbitration would be governed by the A&C Act, as the seat of arbitration is in India. Undisputedly, Part-I of the A&C Act is applicable to the arbitration between the parties.

88. Next, it was earnestly argued on behalf of the Plaintiffs that conduct of the arbitration under the LCIA Rules is vexatious and oppressive as the Plaintiffs had not agreed to arbitration under the said LCIA Rules, 2020; they had agreed to the LCIA Rules which were in vogue at the time when the CCD Agreement was entered into.

89. We had called upon the learned counsel appearing for the plaintiffs to point out any material difference between the LCIA Rules that were in force at the time when the CCD Agreement was entered into by the parties and the LCIA Rules, 2020 under which the arbitration is being administered.

90. In response to the said query, Mr. Nandakumar contended that the fee structure of LCIA (London) was higher and the arbitration would be governed by the laws of United Kingdom. However, apart from the fee structure, he was unable to point out any material difference in the Rules that were in vogue at the time

of executing the CCD Agreement and the LCIA Rules, 2020, regarding the procedure for conducting the arbitration. He however contended that the LCIA Rules, 2020 are required to be interpreted according to the laws of United Kingdom. He has referred to Rule 16.5 of the LCIA Rules, 2020 and had contended that the laws of United Kingdom would be applicable with regard to the said rules.

91. Rule 16.4 and 16.5 of the LCIA Rules, 2020 are set out below:

> "16.4 Subject to Article 16.5 below, the law applicable to the Arbitration Agreement and the arbitration shall be the law applicable at the seat of the arbitration, unless and to the extent that the parties have agreed in writing on the application of other laws or rules of law and such agreement is not prohibited by the law applicable at the arbitral seat.
>
> 16.5 Notwithstanding Article 16.4, the LCIA Rules shall be interpreted in accordance with the laws of England."

92. A plain reading of Rule 16.5 of the LCIA Rules, 2020 indicates that the said Rules are required to be interpreted under the laws of United Kingdom. The seat of arbitrator is in India. Therefore in terms of Rule 16.4 (as well as the law as it stands today) the law governing arbitration in India, that is the A&C Act, is

applicable to the present arbitration. There is no dispute as to the interpretation of LCIA Rules, 2020. Moreover, Mr. Nandakumar was also unable to point out to any law of United Kingdom regarding interpretation, which is material difference from the principles of statutory interpretation followed in India.

93. The apprehension that apart from the question of fees, the LCIA Rules 2020 would work in any manner disadvantageous to the Plaintiffs, is without any basis. The contention that an arbitration under the LCIA Rules, 2020 is vexatious or oppressive, is illusory and contrived.

94. The only ground on which any of the Plaintiffs may have a grievance with the LCIA Rules, 2020, is the issue regarding the fee structure. Although it was averred that the fee that would be payable is thirty times the fee that was stipulated under the LCIA Rules as worded at the material time, also appears to be without basis.

95. We had called upon Mr. Nandakumar to point out as to how the fee structure is thirty times higher. However, we did not receive any satisfactory response.

96. There is no dispute that the fee structure under the schedule of fees under the LCIA Rules, 2020 as is currently applicable, is higher than the fee structure as applicable under the LCIA Rules that were in force and were when the parties had entered into the CCD Agreement. However, the difference does not appear to be large as contended.

97. It was contended on behalf of the appellant that the fees for Arbitral Tribunal was within the range of ₹30,000/- to ₹78,000/-. The arbitral fee for three hour sitting of the Arbitral Tribunal would be in the range of ₹90,000 to ₹2,34,000/-. If we consider that the value of the claims made is over 1500 crores, the said fee cannot be considered as oppressive or vexatious.

98. The Arbitral fee under the Fourth Schedule of the A&C Act would be over ₹30 lakhs. The Fee Schedule under the rules of Delhi International Arbitration Centre, for the given claim would be twice as much.

99. Black's Law Dictionary defines 'vexatious' as "without reasonable or probable cause or excuse; harassing; annoying". Butterworths defines the expression 'vexatious' as one "which has

little or no basis in law and is instituted to annoy or embarrass the opponent".

100. The word 'oppressive' is defined in Stroud's Judicial Dictionary as "that which is burdensome, unjust or harsh to the point of being unconscionable".

101. Considering that the Plaintiff's issue regarding arbitration being conducted under the A&C Act is essentially confined to the fees, we are not persuaded to accept that the arbitration under the LCIA Rules 2020, in the given facts of this case can be considered *as* vexatious or oppressive.

III. Re-interpretation of Article 16 of the CCD Agreement

102. The last question to be examined is, whether the arbitration being conducted under the LCIA Rules is contrary to the agreement between the parties. It is material to note that in terms of clause 16 of the CCD Agreement, the parties had agreed that *"dispute claim or controversy shall be finally settled under the London Court of International Arbitration India Rules then in effect".*

103. Admittedly, the London Court of International Arbitration India Rules were amended. The LCIA India, Rules, 2016, *inter alia* provide as under:

> "Effective 1 October 2024, where any agreement concluded before 1 June 2016, provides in writing and in whatsoever manner for arbitration under the rules of or by LCIA India, the parties shall be taken to have agreed in writing that the arbitration between them shall be administered by the London Court of International Arbitration (LCIA) and shall be conducted in accordance with the LCIA Arbitration Rules 2020 (or such amended rules as the LCIA or the LCIA Court may hereafter adopt to take effect before the commencement of the arbitration) and that such LCIA Arbitration Rules 2020 form part of their agreement (collectively, the Arbitration Agreement)."

104. Article 16.1 referred to the London Court of International Arbitration of India Rules, which stood amended to provide that the arbitration be conducted under the LCIA Rules, 2020. Thus, the arbitration under the LCIA Rules is required to be conducted in accordance with the LCIA Rules, 2020. According to the respondent, the said amendment as to the LCIA Rules, is inapplicable, as the same has virtual effect of substituting the rules in entirety as to provide for direct administration by LCIA London, which was not in contemplation of the parties.

105. A plain reading of Article 16.1 of the CCD Agreement indicates that the parties had agreed that the arbitration shall be conducted in accordance with *the London Court of Arbitration International India Rules* [LCIA Rules] *then in effect.*

106. According to the Plaintiffs, the words 'then in effect' imply that the rules that were prevalent on the date the parties had entered into the agreement, would be applicable. This is stoutly contested by the appellants. They contend that the words 'then in effect' imply that the rules which would be effective at the time of invocation, would be applicable.

107. The relevant extract of Article 16.1 of the CCD Agreement which falls for consideration is set out below:

> "16.1. If the dispute, claim or controversy is not resolved through good faith consultations within thirty (30) days after a Party has delivered a written notice to another Party requesting the commencement of consultation, then the dispute, claim or controversy shall be finally settled under the London Court of International Arbitration India Rules then in effect and as may be amended by the rest of this Clause 16.1 (the "Rules").
>
> (emphasis added)

108. A plain reading of clause 16.1 under the CCD Agreement clearly indicates the words ‘then in effect’ have to be read in connection with the preceding sentences which refer to delivery of a written notice requesting for commencing of consultation and the failure of resolution of dispute within 30 days of such written notice. If the disputes remain unresolved, the same were required to be settled under the London Court of International Arbitration India Rules then in effect. Clearly, the words ‘then in effect’ means that rules in effect on the date when the matters are required to be referred to arbitration, failing the resolution by consultation.

109. We may note, clauses in several statutes use the words “for the time being in force”. The words ‘then in effect’ as used in Article 16.1 of the CCD Agreement is synonymous to the expression ‘for the time being in force’.

110. The expression "law for the time being in force" has been the subject matter of debate in various cases. The weight of the judicial precedents is in favour of construing the said expression as not only covering law as in force at the time of enactment, but the law that may be enacted in future as well.

111. In ***Thyssen Stahlunion Gmbh v. Steel Authority of India Ltd.: (1999) 9 SCC 334***, the Supreme Court had considered the expression "for the time being in force" in the context of arbitration agreement and held that the said expression would mean that the provisions of the A&C Act which were applicable at the relevant time, when the arbitration proceedings are held, would be applicable. It is relevant to refer to the following passage from the said decision:

> "**35.** Parties can agree to the applicability of the new Act even before the new Act comes into force and when the old Act is still holding the field. There is nothing in the language of Section 85(2)(*a*) which bars the parties from so agreeing. There is, however, a bar that they cannot agree to the applicability of the old Act after the new Act has come into force when arbitral proceedings under the old Act have not commenced though the arbitral agreement was under the old Act. Arbitration clause in the contract in the case of *Rani Constructions* (Civil Appeal No. 61 of 1999) uses the expression “for the time being in force” meaning thereby that provision of that Act would apply to the arbitration proceedings which will be in force at the relevant time when arbitration proceedings are held. We have been referred to two decisions — one of the Bombay High Court and the other of the Madhya Pradesh High Court on the interpretation of the expression “for the time being in force” and we agree

with them that the expression aforementioned not only refers to the law in force at the time the arbitration agreement was entered into but also to any law that may be in force for the conduct of arbitration proceedings, which would also include the enforcement of the award as well. The expression “unless otherwise agreed” as appearing in Section 85(2)(*a*) of the new Act would clearly apply in the case of *Rani Constructions* in Civil Appeal No. 61 of 1999. Parties were clear in their minds that it would be the old Act or any statutory modification or re-enactment of that Act which would govern the arbitration. We accept the submission of the appellant Rani Constructions that parties could anticipate that the new enactment may come into operation at the time the disputes arise. We have seen Section 28 of the Contract Act. It is difficult for us to comprehend that arbitration agreement could be said to be in restraint of legal proceedings. There is no substance in the submission of the respondent that parties could not have agreed to the application of the new Act till they knew the provisions thereof and that would mean that any such agreement as mentioned in the arbitration clause could be entered into only after the new Act had come into force. When the agreement uses the expressions “unless otherwise agreed” and “law in force” it does give an option to the parties to agree that the new Act would apply to the pending arbitration proceedings. That agreement can be entered into even before the new Act comes into force and it cannot be said that agreement has to be entered into only after the coming into force of the new Act."

112. In ***Municipal Corpn. of Delhi v. Prem Chand Gupta, (2000) 10 SCC 115***, the Supreme Court considered the merit of the words "for the time being in force" as used in Regulation 4(1) of the Service Regulations of 1959. The Service Regulation of 1959 was framed by the Government of India under Section 98 of the Delhi Municipal Corporation Act, 1957. The Supreme Court rejected the contention that the Rules at the time when the Service Regulations were promulgated would be applicable and not the Rules that came into force subsequently. We consider it apposite to set out the following extract from the said decision:

> **"12.** But even that apart, Regulation 4(1) of the very same Service Regulations of 1959 clearly provides as follows:
>
> "4. (1) Unless otherwise provided in the Act or these regulations, the rules for the time being in force and applicable to government servants in the service of the Central Government shall, as far as may be, regulate the conditions of service of municipal officers and other municipal employees."
>
> Excepted matters mentioned therein are not relevant for our present purpose. It, therefore, becomes clear that on a combined operation of Regulation 2(*b*)(*ii*) and Regulation 4(1) of the Service Regulations, 1959, the relevant rules which were in force in 1966 when the respondent workman's services were terminated were the latter Rules of 1965 and could not be the earlier Rules of 1949 which had got superseded and had ceased to exist on the statute-book.

> **13.** In this connection, one submission of learned counsel for the respondent workman may be noted. He submitted that as laid down by Regulation 4(1), the rules for the time being in force as mentioned therein would refer to only those rules which were in force when the Service Regulations of 1959 were promulgated and not any latter rules. It is difficult to countenance this submission. Rules for the time being in force will have a nexus with the regulation of condition of service of the municipal officers at the relevant time as expressly mentioned in Regulation 4(1). Therefore, whenever the question of regulation of conditions of service of the municipal officers comes up for consideration, the relevant rules in force at that time have to be looked into. This is the clear thrust of Regulation 4(1). Its scope and ambit cannot be circumscribed and frozen only to the point of time in the year 1959, when the Service Regulations were promulgated. If such was the intention of the framers of the Regulation, Regulation 4(1) would have employed a different phraseology, namely, “rules at present in force” instead of the phraseology “rules for the time being in force”. The phraseology “rules for the time being in force” would necessarily mean rules in force from time to time and not rules in force only at a fixed point of time in 1959 as tried to be suggested by learned counsel for the respondent workman."

113. The aforesaid view regarding interpretation of the expression "law for the time being in force" resonated with the Supreme Court in ***Forum for People's Collective Efforts (FPCE) and Anr. v. The State of West Bengal and Anr.: (2021) 8 SCC 599***.

114. Mr. Chinnappa, learned Senior counsel appearing for the appellants had also referred to the decision of the Singapore High

Court in ***Cars & Cars Pte Ltd v. Volkswagen AG and Another: [2009] SGHC 233,*** which we find persuasive. In the said case, the Court was called upon to construe the Rules that would be applicable in the context of an arbitration clause which read as under:

> "This agreement herein shall be governed by and its provisions interpreted in accordance with the law of Singapore. Any disputes arising out of or in connection with this agreement herein shall be referred to arbitration in the Singapore International Arbitration Centre in accordance with the *Rules of the Singapore International Arbitration Centre for the time being in force.*"

The court held that the Rules as applicable at the time of invocation would be applicable.

115. In ***Peter Cremer v. Granaria BV: [1981] Lloyd's Rep 583***, the Queen's Bench Division (Commercial Court) considered a similar question whether the said Rules for the time being in force when the contract was entered into or when the arbitration had commenced, would be applicable. In this regard, the Court observed as under:

> "Indeed, if one looks at its as a matter of common-sense, I do not think it can be expected that arbitrators in any particular case should have to look at the date of the contract, ascertain the relevant procedure for arbitrations which were in

> force as at that date and then, regardless of the fact that new procedures, which may or may not be fundamental, may have been introduced and applicable and keing [*sic:* being] applied at the date when the arbitrators were appointed, go back to and apply the old procedure in force as at the date when the contract was made...."

116. The rules of arbitration are clearly procedural rules and do not affect the substantive rights of the parties. The plain language of the arbitration clause indicates that the parties had agreed that on failure of resolution of disputes by consultation, pursuant to the notice, the disputes would be referred to arbitration under the rules then in effect. The same clearly means that the Rules which would be in effect at the time of reference to arbitration will be applicable.

117. Mr. Nandakumar also referred to the decision of the United States District Court, Eastern District of Louisiana in ***Baker Hughes Saudi Arabia Co. Ltd. v. Dynamic Industries Inc.: Civil Action No.2:23-cv-1396***. In the said case, the learned Judge had considered the motion to dismiss the case on the *Forum Non Conveniens.* The contract between the parties required the disputes to be finally resolved by arbitration under the arbitration rules of Dubai International Financial Center London Court of International Arbitration [**DIFC LCIA**]. Dubai International Financial

Center applied international rules for arbitration based Rules as used by LCIA. However, the Government of Dubai had issued a decree abolishing the DIFC LCIA and replacing the same by Dubai International Arbitration Center [**DIAC**] to administer the existing cases. The learned Judge held that the parties had not agreed for an arbitration under the DIAC, therefore, the case was dismissed on the *forum non conveniens*.

118. It is settled law, arbitration rests on consent. The decision in ***Baker Hughes Saudi Arabia Co. Ltd. v. Dynamic Industries Inc*** (supra) proceeded on the basis that the parties had not agreed for the arbitration to be conducted under the *aegis* of the Dubai International Arbitration Centre. The transfer was effected not by consent between the parties but by a decree of the Government of Dubai. There was no agreement between the parties to the effect that they would be bound by the laws of Dubai. The plaintiff in that case thus questioned the authority and the Dubai Government to unilaterally alter the forum of arbitration.

119. In the present case, the parties have agreed to conduct the arbitration in accordance with the set of rules referred to in Article 16.1 of the CCD Agreement. Concededly, the said rules stand

amended. The LCIA India Rules, 2016 expressly provides that the arbitration "shall be administered by London Court of International Arbitration (LCIA) and shall be conducted in accordance with the LCIA Arbitration Rules, 2020".

120. Thus, the arbitration is being conducted under the rules as referred in Article 16.1 of the CCD Agreement. The fact that the Rules were amended subsequently does not, *prima facie,* frustrate the agreement of the parties that the arbitration would be conducted under the said Rules. More so, when the parties have expressly agreed that the arbitration would be under the Rules then in effect, that is, at the time of reference to arbitration.

121. Article 16.1 of the CCD Agreement does not specifically provide that arbitration will be administered by LCIA India. It merely refers to the Rules in accordance with which the arbitration is to be conducted. Since the Rules (as amended) provide the arbitration will be conducted by LCIA and in accordance with LCIA Rules, 2020; the arbitration is required to be conducted accordingly.

122. The contention that the parties had agreed that the arbitration would be conducted in accordance with the rules which were in force at the time the agreement was entered into, is *prima facie* flawed, for yet another reason. Once the rules are amended by an arbitration institution, further proceedings would necessarily have to be conducted in accordance with the rules which are in force when the reference is made. It is difficult to accept that an arbitration institution would administer an arbitration on the basis of rules that had existed in the past, that is at the time when the parties had entered into an agreement. In the present case, there were no disputes between the parties when they entered into CCD Agreement. The arbitration clause was included in the CCD Agreement for resolving any disputes that may arise in future. Thus, it stands to reason that the parties contemplated that the arbitration would be administered in accordance with the Rules as in force when the disputes are referred.

123. It is apparent from the pleadings and the contentions advanced before this Court that the Plaintiffs' strategy is to avoid arbitration commenced by the appellants and to compel the appellants to seek recourse to Section 11 of the A&C Act.

According to the learned Senior counsel for the appellants, the plaintiffs' claim is barred by limitation. And the plaintiffs are of the view that the said contention would necessarily require to be adjudicated under Section 11 of the A&C Act.

124. However, we note that in a recent decision in ***SBI General Insurance Company vs. Krish Spinning : 2024 SCC OnLine SC 1754***, the Supreme Court had clarified its observations made in ***M/s. Arif Azim Co. Ltd. v. M/s. Aptech Ltd. : 2024 INC 155*** and had held that, 'while determining the issue of limitation in exercise of powers under Section 11(6) of the Act, 1996, the referral court should limit its enquiry to examining whether Section 11(6) application has been filed within the period of limitation of three years or not'. It was further clarified that the referral courts, at the stage of deciding an application for appointment of an Arbitrator, must not conduct an intricate evidentiary enquiry into the question whether the claims raised by the applicant are time barred and should leave that question for determination by the Arbitrator.

125. However, it is not necessary for this Court to examine this question in these proceedings. The only question that falls for

consideration of this is, whether the appellants were required to be restrained from continuing with the arbitral proceedings.

126. In view of the above, the said question is answered in the negative. The impugned orders are accordingly, set aside.

Sd/-
(VIBHU BAKHRU)
CHIEF JUSTICE

Sd/-
(C M JOSHI)
JUDGE

AHB/SD/KS