***IN THE HIGH COURT OF DELHI**

IA Nos. 2758/2005, 3134/2005 & 5838/2006 in CS(OS) No. 386/2005

%Date of decision: 13th October, 2009

Lucent Technologies Inc. ... Plaintiff
through: Mr. Arun Jaitley and Mr. Rajiv Nayyar, Sr. Adv. with Mr. Darpan Wadhwa and Mr. Rajat Sethi, Adv.

VERSUS

ICICI Bank Limited & Ors. ....Defendants
through: Mr. Rakesh Dwivedi, Sr. Adv. with Ms. Nandini Gidwaney, Adv. for the defendant no. 1
Mr. Sandeep Sethi, Sr. Adv. with Mr. Subramonium Prasad, Adv. for the defendant nos. 2 to 6

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL

1. Whether reporters of local papers may be allowed to see the Judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

GITA MITTAL, J

1. By this judgment I propose to decide IA Nos. 2288/2005, 3134/2005 & 5838/2006 (all under Order 39 Rule 1 & 2 of the Code of Civil Procedure filed by plaintiff) and 2758/2005 (under Order 7 Rule 11 of the Code filed by defendant no.1).

2. On 4th March, 1998 the President of India acting through the Deputy Director General (Basic Services), Ministry of Communication of the Department of Telecommunications, awarded a non-exclusive licence under section 4 of the Indian Telegraph Act, 1885 to Shyam Telelink-defendant no. 2 herein, to establish, maintain and operate

telephone service upto the subscriber's terminal connectio[illegible] area of the “Rajasthan circle” for an initial period of 15 years.

3. The defendant no. 2 herein issued a letter of intent, dated 30th August, 1999 to the then Tata Lucent Technologies Ltd. (subsequently known as the 'Lucent Hindustan Technologies Pvt. Ltd.') for the supply and delivery of all the equipment and performing services necessary for it for the installation of the basic services telecom network project in the territory of Rajasthan, thus expressing their willingness to place orders for the equipment and services.

4. It is stated, that the letter of intent was issued on the plaintiff's representation to provide a total financing solution as it would have secured payment for the supply of the equipment. For this reason, in the letter of intent, an undertaking was included under the heading 'Contract Financing' contained as clause 3 of the letter. The defendant no. 2 has placed heavy reliance on the following clauses 3.1 & 3.2 in this letter of intent which reads as follows :-

> “Clause 3 – Contract Financing -
>
> 3.1 Tata Lucent Technologies Ltd. (TLTL) along with financial institutions and banks shall help STL (Shyam Telelink Ltd.) to structure and affect a total financing solution for the project.
>
> 3**.2 Subject to the agreement on a mutually acceptable term sheet and the conditions precedent contained therein, if required, TLTL through their sponsors will provide a credit enhancement support to structure and effect the debt for the project.”**

5. Pursuant to the above, the defendant no. 2 herein and Lucent Hindustan Technologies Pvt. Ltd. entered into four contracts on 14th December, 1999. These related to supply for indigenous equipment; supply for imported equipment; a services contract and an outside

plant construction contract (hereinafter referred to as ' contract). These contracts contained similar terms and conditions.

6. So far as the questions raised before this court are concerned, one such supply contract may be considered as a typical contract. It is clearly indicated that the contract has been entered into and executed between M/s Shyam Telelink Limited (defendant no.2 herein referred to as `Telelink') and M/s Tata Lucent Technologies Limited (referred to as the “supplier”).

7. Clause 4.1 of this supply contract stipulates that the supplier along with financial institutions and banks shall help the defendant no. 2 to structure and effect a total financing solution for the project, and that the supplier through their sponsors would provide a credit enhancement support to structure and effect the debt for the project.

8. Clause 7.1 described 'Lucent” to mean 'Lucent Technologies International Inc', a company incorporated under the laws of the State of Delaware. It was also clarified that Lucent is an affiliate of the supplier.

9. In clause 5.6, it was represented to the defendant no. 2 that Lucent had agreed to provide full support and back up to the supplier to enable the supplier to fulfil its obligations under this contract and that the supplier would provide to the defendant no. 2 such documentation/confirmation from Lucent as may be reasonably required.

10. The defendants submit that the conditions for contract financing agreed to under the letter of intent dated 30th August, 1999 were fundamental to the four contracts entered into between the parties.

The submission is that for this reason, under clause 9 supply contracts, Lucent Hindustan Technologies Pvt. Ltd. restricted the purchasing options by the defendant no. 2 from other suppliers in lieu of the onus taken by Lucent for providing a complete financial solution.

11. It is pertinent to note, that Tata Lucent Technologies Ltd., now Lucent Hindustan Technologies Pvt. Ltd., has not been impleaded as a party/defendant to the present suit.

12. The other agreement which requires to be considered is dated 5th October, 2001 and is titled as a “Warrant Agreement” entered into between M/s Shyam Telecom Limited; M/s Shyam International Private Limited; M/s Shyam Telelink Private Limited and persons who are named and cited as the “promoters” collectively referred to as the `Shyam Group', as parties of the first part and M/s Lucent Technologies Hindustan Private Limited as the parties of the second part.

13. This agreement was entered into in terms of Clause 4 of the afore-noticed contracts.

14. The defendant no. 2 appears to have approached the ICICI Bank for financial facility.

15. By the letter dated 13th September, 2000, addressed by the ICICI Bank to M/s Shyam Telelink Limited-defendant no.2 and copied to the plaintiff herein, the ICICI Limited conveyed that it was “agreeable in principle” to act as an exclusive provider/underwriter of the debt requirement of Rs.4840.0 million for the basic telephony project, by way of rupee loans, debentures, lease, bonds or any other

instrument". It was stated that this financial facility was s[illegible] the special terms and conditions set out in the enclosed term sheet and base case business plan.

So far as the enclosed term sheet was concerned, the ICICI Limited stated that the same was merely "indicative" and would be finalized after the completion of due diligence and at the time of document finalization. The ICICI Limited retained the right to specify such other terms and conditions as may be required at the time of definitive documentation.

The ICICI Limited also clearly indicated that its commitment and agreement to provide the services described therein, were subject to the agreement in the preceding paragraph and the satisfaction of each of the conditions precedent, mentioned in the attached term sheet, in a manner acceptable to it.

16. The letter that its contents as well as those of the term sheet and any other information in connection therewith or any transaction contemplated would be considered confidential and that any information given by or on behalf of the ICICI or STL or Lucent Technologies Inc would not be disclosed to any third parties without the express written approval of the parties providing the information. There was also a prohibition on assignment of the letter and it is urged that the same was intended solely for the benefit of the parties thereto. The terms of the letter required the plaintiff to communicate its acceptance of the terms and conditions set out in the letter within 30 days from the receipt thereof.

The defendants also place reliance on the stipulations made by

the ICICI Bank-defendant no.1 herein, in the term sheet enclosed with the letter dated 13th September, 2000. This document has to be considered in its entirety and any single term cannot be read in isolation.

17. It is noteworthy, that the term sheet enclosed with the ICICI letter dated 13th September, 2000 proposed a title Governing Law and Jurisdiction in the financing agreement, stipulating that it would be governed by Indian law while courts at Delhi would have jurisdiction in respect of all matters relating thereto. ICICI reserved a unilateral right to approach any other alternate dispute resolution forum with its venue at Delhi and all other parties were required to submit to such forum.

18. On 27th September, 2000, the plaintiff wrote a letter to defendant no. 1 stating that it would issue the proposed guarantee and accepted the terms and conditions set out in the term sheet whereby Lucent would provide guarantee upto 65% of the facility subject to the settlement of the summary of terms and conditions of the term sheet and negotiation of satisfactory documentation.

19. In the meantime, while negotiations were going on for the Rs.484 crore financing facility, on 27th September, 2000 the ICICI and the STL (defendant nos. 1 & 2) entered into an interim bridge loan agreement for an amount of Rs.50 crores. The plaintiff was not a party to this agreement. This loan of Rs.50 crores was secured by STL by a number of securities such as deposit of title deeds, mortgages by its director etc.

20. On the same date, at the request of STL, the plaintiff provided a

letter of comfort dated 27th September, 2000 to the defendar - ICICI Ltd. confirming the acceptance of the terms and conditions of the term sheet and, subject to satisfactory resolution of guarantee terms and the guarantee structure and guarantee release mechanism, committed issuance of an unconditional and irrevocable guarantee as provided in the term sheet. In this letter, the plaintiff also accepted that the defendant no. 1 was entering into an interim bridge loan financing agreement with the defendant no. 2 permitting them to avail credit to the maximum extent of Rs.500 million against security mentioned in the bridge loan agreement. However, the plaintiff clearly stated that the confirmation on the subject to satisfactory negotiation and resolution of the terms of the financing agreements and security documents as mentioned in the term sheet and the plaintiff would proceed to the execution of the guarantee and other document as would be required.

21. Again at the request of STL, on 30th November, 2000 plaintiff wrote a further letter of comfort to defendant no. 1 stating their acceptance to ICICI entering into a bridge loan financing agreement with STL subject to satisfactory negotiation and resolution of the financing terms of the agreement, the security documents, the guarantee terms, the guarantee structure and the guarantee release mechanism as provided in the term sheet. It was further stated that the plaintiff would proceed with the execution of the guarantee and other documents as required for completing the contemplated transaction on the terms agreed upon.

22. Based on such letter of comfort given by the plaintiff dated 30th

November, 2000, the ICICI entered into a second interim bridge financing agreement with the defendant no. 2 for credit upto additional Rs.50 crores on 12th December, 2000.

23. The parties continued their negotiations and discussions. Since the plaintiff is a foreign company, it required approval from the Government of India before it could provide the proposed guarantee. It is noteworthy that on the dates of the release of these amounts, there was no statutory or regulatory approval for guaranteeing the same to the plaintiff.

24. It is pointed out thereafter that by the letter dated 30th January, 2000 by defendant no. 2 and 12th January, 2001 from the plaintiff to the Department of Economic Affairs, Ministry of Finance, Government of India and to the Reserve Bank of India, the necessary statutory and regulatory approvals were sought.

25. The Ministry of Finance, Government of India approved the partial corporate guarantee facility from the plaintiff for partial credit enhancement of their domestic borrowings of Rs.483.75 crores that is up to 65% of the amounts sought from the ICICI only by its letter dated 16th March, 2001. It is only with this letter that the terms and conditions for the guarantee facility to be executed were approved by the Government of India which approval was valid for a period of six months from the date of the approval.

So far as the Reserve Bank of India was concerned, it granted permission for availing the partial corporate guarantee facility by Lucent only by its communication dated 22nd June, 2001, whereby it was also mandated that the terms of the Government approval dated

16th March, 2001 be strictly complied with. The validity of [illegible] approval was coterminus with the Government of India approval.

26. The ICICI Bank has stated that in terms of the term sheet, the plaintiff failed to maintain the minimum investment grade credit rating or a credit rating equivalent to India's sovereign rating by Standard and Poor and Moody's investor services and thereby committed a default in terms of the term sheet. Accordingly, by a letter dated 1st April, 2002, the defendant no. 1 wrote to the plaintiff Lucent Technologies Inc; Lucent Technologies Asia Pacific Ltd and Lucent Technologies Hindustan Pvt. Ltd. declaring an event of default in terms of the term sheet. The ICICI Bank Ltd. stated that the Bridge Loan Agreements were executed and the sum of Rs.100 crores was disbursed to the defendant no. 2 relying upon the plaintiff's promise to provide guarantees vide their letters dated 27th September, 2000 and 30th November, 2000; covenants, representations and warranties. In view of the event of default, the plaintiff was called upon to pay the sum of Rs.100 crores to the defendant no. 1.

27. By a response dated 9th April, 2002 sent to the ICICI, the plaintiff disputed any guarantee obligations in terms of the term sheet. It was stated that no guarantee had been executed by it and that the letters dated 23rd September, 2000 and 30th November, 2000 did not create any payment obligations.

28. The correspondence placed on record hereafter manifests a contradiction in the case set up by the defendants. On 1st April, 2002, the defendant no. 2 (STL) wrote a letter to (Lucent Technologies Hindustan Pvt. Ltd.) referring to clause 3.3 of the warrants agreement

dated 5th October, 2001 stating that clause 3.3 reveals that it is to discharge of obligation of Lucent to non-availment of facility and should not be construed in terms of extension of time period for meeting of conditions precedent. It further stated that the extension of time period upto 31st December, 2002 as per clause 3.3 of warrant agreement was an extension of period during which the obligation of Lucent would continue to subsist and the urgent confirmation of Lucent in the matter was sought. Thereafter on 4th April, 2002 a letter was written by STL to ICICI Bank claiming that STL had been approached by the plaintiff to approach ICICI on their behalf with a request and proposal to revise the terms of sanction so as to make the said term loan without recourse to the plaintiff and thus requesting ICICI to consider amending the terms of sanction so as to delete the clause pertaining to the guarantee of the plaintiff and make the said loan without recourse to the plaintiff.

29. On 9th April, 2002, Lucent Technologies Inc. wrote a letter to ICICI Ltd. in response to the letter dated 1st April, 2002 written by the ICICI to Lucent Technologies Inc., Lucent Technologies Asia Pacific Ltd. & Lucent Technologies Hindustan (Pvt.) Ltd., stating that no guarantee had ever been executed by any of the Lucent entities and stating that the letters of 27th September, 2000 and 30 th November, 2000 did not create any guarantee obligations on any Lucent entity with respect to the bridge loans as alleged.

30. On 12th April, 2002, the ICICI wrote to the plaintiff now seeking payment of Rs.100 crores or alternatively to provide a bank guarantee for the assignment of the facility which was to the tune of Rs.484

crores from a 'AAA' rated bank.

31. A grossly belated response was sent by the ICICI on 27th December, 2002 in answer to the defendant no. 2's letter of 4th April, 2002 whereby the defendant no. 1 demanded compensation payment of Rs.300 million from the plaintiff. The defendant no. 2 has urged that the ICICI Bank had also informed it that the plaintiff had approached the Bank with the intent to discuss a proposal whereby the ICICI Bank was to discharge Lucent Inc of any and every guarantee obligation pertaining to the term loan to the defendant no.2 and to sanction/disburse the term loan to Shyam Telelink without any recourse to the plaintiff.

32. The defendant no. 2 alleges that Lucent Hindustan Pvt. Ltd. had failed to discharge its financial obligation and responsibility for providing the facilities under the warrant agreement and had also committed breach of the other service and supply contracts dated 14th December, 1999.

33. In the meantime, by a communication dated 20th February, 2003 the defendant no. 2 notified Lucent Technologies Hindustan Pvt. Ltd., that disputes having arisen between them and on failure of the attempts to settle the matter within 30 days, it reserved its right to name its arbitrator. This letter was copied to the plaintiff as well as the Lucent Technologies Asia Pacific Ltd.

The defendant no. 2 had notified Lucent Technologies Hindustan Pvt. Ltd. that this communication was a formal notice under the following contracts :-

> "* Under clause 55.2 of the Service Contract dated December 14, 1999

* Under clause 58.2 of the Supply contra (imported equipment) dated December 14, 1999
* Under clause 55.2 of the Supply contract (indigenous equipment) dated December 14, 1999
* Under clause 52.2 of the Outside Plant Construction Contract dated December 14, 1999 and
* Under clause 9.4 of the Warrant Agreement."

34. This was followed up by a notice dated 24th March, 2003 from the defendant no. 2, this time addressed to Lucent Hindustan Technologies Pvt. Ltd. as well as the plaintiff, contending that as the disputes remained unresolved over the last 30 days, it was nominating Mr. Justice G.B. Patnaik (Retd. Chief Justice of India) as its arbitrator to the proposed arbitral tribunal and called upon the addressees to nominate their arbitrator as well so that the two arbitrators could meet and select the third arbitrator.

The position taken in the letter of 20th February, 2003 was reiterated and the details regarding the arbitration were mentioned.

35. It has been pointed out that in September, 2003, an arbitral tribunal was constituted by Shyam Telelink Ltd. and Lucent Technologies Hindustan Pvt. Ltd. comprising of Justice G.B. Patnaik, a nominee of Shyam Telelink Ltd.; Justice A.K. Srivastava, a nominee of Lucent Hindustan; and Justice G.T. Nanawati who was appointed as the presiding arbitrator.

36. The plaintiff has contended that it had not nominated any nominee as it disputed the factum of any concluded contract with the parties.

37. At this stage the ICICI Bank addressed a letter dated 26th March, 2004 to the plaintiff and the defendant no. 2, contending that the plaintiff was avoiding its obligations under the term sheet and was

disputing the same compelling it to invoke arbitral pro[redacted]s against the plaintiff. In this letter it was stated that the defendant no. 1 had agreed to finance the project as the plaintiff had assured and represented that it would guarantee the due repayment of the funds disbursed and that it would execute a guarantee as required under the contract. The blame for non-execution of the facility documents was totally apportioned to the plaintiff. It was stated that despite repeated assurances, the plaintiff had failed to specifically secure and guarantee the bridge loan aggregating to Rs.100 crores advanced by the ICICI Bank Ltd. and thus had failed to discharge its legally valid and binding obligations under the contract; that it was contractually required to take recourse to arbitration proceedings and it had decided to initiate arbitration proceedings against the plaintiff. The defendant no. 1 had stated that it was approaching the aforesaid arbitral tribunal to adjudicate the disputes/claims between ICICI Bank Ltd., Lucent Technologies Inc. and Shyam Telelink Ltd. It was stated that the plaintiff and Shyam Telelink Ltd. 'can have no objection to arbitration of the disputes by this forum as the same was constituted at the behest of Shyam Telelink Ltd., Lucent Technologies Hindustan Pvt. Ltd. and Lucent Technologies Inc.'

38. By a communication of the same date, i.e. 26th March, 2004, the ICICI Bank Ltd. sought the consent of the said three arbitrators 'to enter reference and adjudicate claims of the claimant' and the disputes/claims between the claimant and the respondents'.

The ICICI Bank Limited also wrote that it had the 'right to approach any alternate dispute forum' in Delhi and that this arbitral

tribunal was one such forum which was already hearing disputes related transactions between Shyam Telelink Ltd. and the Lucent Technologies Hindustan Pvt. Limited. A copy of this letter was also sent to Lucent Technologies Ltd., USA & Shyam Telelink Ltd.

39. In this letter of 26th March, 2004, the ICICI Bank stated that despite the repeated assurances, the plaintiff had failed to satisfactorily secure and guarantee the bridge loans aggregating to Rs.100 crores advanced by the bank and have thus failed to discharge their legally valid and binding obligations under the contract.

40. The plaintiff had responded by a letter dated 21st May, 2004 to the defendant no.1 stating out that the `Governing Law and Jurisdiction' clause in the term sheet which was relied upon by the defendant no. 1 as the arbitration agreement, only specified a dispute resolution mechanism for a proposed financing agreement which the plaintiff had not entered into. The plaintiff consequently sought a copy of such financing agreement as was relied upon by the defendant no. 1 to which it was allegedly a party which contained the dispute resolution/arbitration clause. It was stated that only thereafter would the plaintiff respond to the defendant's assertions in the letter of 26th March, 2004. A similar letter of the same date was also sent to the three members of the tribunal calling upon them not to take any steps pursuant to the bank's request until a copy of the financing agreement with the arbitration clause as alleged is provided by the bank. This letter was addressed to the tribunal without prejudice to the plaintiff's right to contend inter alia that the tribunal has no jurisdiction to act on the letter of the ICICI Bank Ltd. The plaintiff

also reminded the arbitral tribunal that by its letter of 9th [illegible], 2004, an objection had been raised to the tribunal's assuming jurisdiction over the plaintiff in proceedings pending before it involving Shyam Telelink Ltd. and the Lucent Technologies Hindustan Pvt. Ltd. to which the plaintiff was not a party. By a letter dated 15th of July, 2004, Lucent sent a reminder to the arbitral tribunal in this behalf.

41. The plaintiff also filed formal objections dated 30th August, 2004 before the Arbitral tribunal, under section 16 of the Arbitration & Conciliation Act 1996, objecting to the attempt of the ICICI Bank to commence arbitration proceedings against it contending that there was no agreement let alone an arbitration agreement between the parties. It was stated that the formal objection was being filed "without prejudice to its contention with respect to submission to jurisdiction of the hon'ble tribunal". The plaintiff assailed the defendant no. 1's submission that the term sheet created any binding rights or obligations submitting that the proposed financing agreement was never executed and that the ICICI Bank Ltd. had failed to produce such agreement despite notice. The plaintiff's further contention was that the "alternative dispute resolution forum" and the clause relied upon by the ICICI Bank could be construed as referring to the only alternative forum available to it, being the Debt Recovery Tribunal, and that reference to such forum could not be construed as one to any existing arbitral tribunal in India. It was stated that in any case, the tribunal stood constituted by third parties with regard to disputes between those parties and that the plaintiff

had no participation even in the constitution of the tribunal. The plaintiff submitted that it had never consented, either expressly or impliedly, to the constitution of the arbitral tribunal. The plaintiff also pointed out that by its letters of 9th February, 2004, 1st April, 2004 and 15th July, 2004, it had objected to the jurisdiction of the tribunal and requested it to adjudicate upon the same before proceeding further. It was clearly stated that no such arbitration agreement had been produced on record by either Shyam Telelink Ltd. or the ICICI Bank Limited which could bind the plaintiff.

It is noteworthy, that there were no submissions on the merits of the case in any of these objections.

42. The ICICI however filed a detailed reply dated 17th September, 2004 raising all kinds of contentions and submissions. In the rejoinder dated 7th October, 2004, the plaintiff reiterated its earlier stand. It was even that this should not, in any manner, be construed as acceptance by the plaintiff of the maintainability of the proceedings.

43. In the reference of Shyam Telelink Ltd., the arbitral tribunal passed an order on 28th December, 2004 inter alia holding that in the warrant agreement dated 5th October, 2001 entered into between Shyam Telelink Ltd. and Lucent Technologies Hindustan Pvt. Ltd., clause 2.1(f) stated that a party to the agreement includes party's affiliates and the respondent no. 2 (Lucent Technologies Inc) being an affiliate of the respondent no. 1 would be governed by clause 9 dealing with the dispute resolution and the dispute not having been resolved through negotiations, has to be settled by arbitration as

provided under clause 9.4. Reference was made to the documentation relied upon by the ICICI Bank Limited in this order and it was held that it would not be appropriate for the tribunal to delete the present plaintiff who was a key figure in the entire project on whose assurance such a large scale project was undertaken and the financial institutions like the ICICI Bank Limited also went ahead in sanctioning the loans on the guarantee of respondent no. 2 (plaintiff herein) who was a global figure.

It was therefore held that the plaintiff would not be deleted from the arbitration proceeding and the application for deletion filed by the plaintiff was rejected.

44. So far as the objections filed by the plaintiff dated 30th August, 2004 in the reference by the ICICI Bank Limited were concerned, by an order passed on 24th February, 2005, the arbitral tribunal rejected the same holding that the plaintiff was bound by the clause described as 'Governing Law & Jurisdiction' in the term sheet and that the expression 'alternate dispute resolution forum' includes arbitration. It was observed that a unilateral right had been conferred on the ICICI Bank Ltd. to make a reference to any alternate dispute resolution forum and it had chosen to approach the arbitral tribunal for the purposes of convenience. It was held that the tribunal has jurisdiction to entertain the application of the ICICI Bank Ltd.

Yet another order was passed by the Arbitral Tribunal dated 1st of March, 2005 holding that the plaintiff is a party to the four supply contracts and the warrants agreement. The plaintiff entered appearance in the proceedings between the defendant no. 2 and

Lucent Technologies Hindustan Private Ltd and without pre[illegible] its rights nominated an arbitrator on the tribunal.

45. In this background, the plaintiff instituted the present suit on 21st March, 2005 seeking the following prayers :-

> "(A) a decree of declaration declaring that :
> (i) there is no contract or agreement between the Plaintiff and defendant no. 1 as alleged in defendant no. 1's letters dated April 1, 2002 and April 12, 2002 addressed to the plaintiff, Lucent Technologies Asia Pacific Limited and Lucent Technologies Hindustan Private Limited, defendant no. 1's letter dated January 10, 2003 addressed to the plaintiff and Lucent Technologies Asia Pacific Limited and defendant no. 1's letter of notice dated March 26, 2004 addressed to the plaintiff and defendant no. 2;
> (ii) there is no contract or agreement between the plaintiff and defendant no. 1 with respect to the matters specified in defendant no. 1's letter of request dated March 26, 2004 addressed to the Arbitral Tribunal;
> (iii) no guarantee has been provided by the plaintiff to defendant no. 1 as alleged by defendant no. 1 in respect of the matters specified in the Letter of Notice and/or the request letter;
> (iv) the plaintiff's letters dated September 27, 2000 and November 30, 2000 do not create any guarantee obligations or any other obligations with respect to the plaintiff;
> (v) the plaintiff is not a party to the bridge loan agreements dated September 27, 2000 and December 12, 2000; and
> (vi) the loan, guarantee and security documents in connection with the term sheet attached to defendant no. 1's letter dated September 13, 2000 have never been finally negotiated or executed.
>
> (B) a decree of permanent injunction prohibiting and restraining the defendants and their respective agents, officers and employees from :
> (i) claiming in any proceedings that the plaintiff's letter dated September 27, 2000 and November 30, 2000 constitute a guarantee of the plaintiff or create any legal obligations of any nature whatsoever with respect to the plaintiff;
> (ii) seeking commencement of, acting upon or continuing any proceedings against the Plaintiff pursuant to defendant no. 1's letter of notice dated March 26, 2004 and/or request letter dated March 26, 2004; and

(iii) commencing, acting upon or continuing any oth proceedings against the plaintiff with respect to the matters specified in Defendant no. 1's letter of notice dated March 26, 2004 and/or request letter dated March 26, 2004;

(C) a decree of damages of an amount of Rs.21,00,00 (Rupees Twenty One Lakhs) or such other sum as this Hon'ble Court may deem fit against the defendants;"

Alongwith the plaint, an application was filed being IA No. 2288 of 2005 seeking interim reliefs including a prohibition from proceeding on the communication dated 22nd of March, 2004. For the reason that proceedings before the Arbitral Tribunal were not imminent, time was granted to the defendants to file their pleadings.

46. In the meantime, it is pointed out that Justice A.K. Srivastava, the nominee arbitrator of Lucent Hindustan Technologies Pvt. Limited resigned on 31st March, 2005 from the arbitral tribunal.

47. The plaintiff makes a grievance that thereafter, without any consent from any party, on 11th April, 2005, the ICICI Bank unilaterally constituted a new arbitral tribunal to hear the alleged disputes between the plaintiff and ICICI Bank consisting of Justice G.T. Nanawati, Justice G.B. Patnaik and Justice A.P. Chowdhary.

The plaintiff's submission is that the defendant no.1's reference to the defendant no. 2-Lucent Technologies Hindustan Private Ltd. tribunal thus stood abandoned and that this tribunal is not in continuation of the proceedings before the earlier arbitral tribunal; that the tribunal contains no nominee of the plaintiff or even of Lucent Technologies Hindustan Private Ltd. and its appointment is a unilateral act of the defendant no. 1 without the consent of any of the disputing parties.

48. On these facts, the plaintiff filed IA No. 3134/2005 under Order 39 rule 1 & 2 of the CPC on 23rd April, 2005 seeking interim orders contending that the defendants were trying to abuse the process and over reach this court. As the matter could not be concluded before the commencement of the summer vacation, liberty was given to the plaintiff to approach the court for interim orders if the arbitration proceedings were commenced in the meanwhile.

Thereafter, acting on the request of ICICI, the arbitral tribunal and the ICICI Bank met for the first time on 13th May, 2006 and fixed a schedule for the arbitration proceedings.

49. In this background, on 17th May, 2006, the plaintiff filed IA No.5838/2006 seeking an interim injunction against the defendants from seeking commencement of acting upon or continuing any arbitration proceedings against the plaintiff as prayed for in the earlier application. The ICICI Bank's counsel made a statement on 17th July, 2006 before this court that no further steps would be taken in the arbitration proceedings until hearing before the court is concluded. This statement has been continued, awaiting further orders of the court.

50. It is noteworthy, that the various issues which have been raised before this court had not arisen for consideration before the Arbitral Tribunal and the orders dated 28th December, 2004 and 24th February, 2005 were not required to go into the various issues which have been raised herein.

51. The plaintiffs and defendants are at variance with regard to the construction of the events which transpired after the letter dated 13th

September, 2000 sent by the defendant no. 1.

52. The submissions made by both sides raise some important issues which for convenience, are summed up as follows:-

(I) Whether a concluded contract of guarantee between the plaintiff and the defendant no.1 had come into existence binding the plaintiff to guarantee and securing the proposed loan of Rs.484 crores and/or the two bridge loans? [*Discussion from para 53].*

(II) Whether the clause stipulating the "Governing Law and Jurisdiction" in the term sheet or any other stipulation in the documents constituted an arbitration agreement between the plaintiff and the defendant no.1? [*Discussion from para 115].*

(III) Assuming that there is a valid arbitration agreement between the parties, whether Section 5, 8(3) & 16(5) of the Arbitration & Conciliation Act, 1996 constitute a legal bar to the maintainability of the civil suit and the plaint is liable to be rejected under Order 7 Rule 11 of the Code of Civil Procedure? [*Discussion from para 160].*

(IV) Whether the action of the plaintiff in filing an objection before the Arbitral Tribunal challenging the existence of an arbitration agreement and exercise of jurisdiction by it, without prejudice to its rights and contentions, amounts to acquiescing in the arbitration and estops the plaintiff from assailing the execution validity and bindingness of an arbitration agreement and the arbitral proceedings? [*Discussion from para 209].*

(V) Whether the plaintiff is entitled to an interim injunction prohibiting further proceedings by the arbitral tribunal in the reference commenced on the request of the defendant no.1? [*Discussion from para 230].* &

(VI) Whether the provisions of the Recovery of Debts due to Banks & Financial Institutions Act would override the provisions of the Arbitration & Conciliation Act, 1996 and an exclusive remedy to banks is provided thereunder? [*Discussion from*

para 264].

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53. The first issue for consideration therefore is whether a contract of guarantee had come into existence binding the plaintiff to guarantee and secure the proposed loan of Rs.484 crores or the advancement of the two bridge loans of Rs.50 crores each totalling to Rs.100.00 crores.

54. The plaintiff has urged at some length, that the term sheet merely indicated some terms for the proposal of the grant of Rs.484 crores financial facility, but the same were not final and did not create any binding rights and obligations. It is contended, that the plaintiff did not execute any documents at all and that the term sheet specifically stipulated `facility documents' to be executed which postulated that a financing agreement to be also entered into. It has been contended by Mr. Arun Jaitley, learned senior counsel appearing for the plaintiff, that there was no resolution of the terms on which the plaintiff was to execute the guarantee, and that the plaintiff did not execute any documents or guarantee any financial facility which were granted by the defendant no. 1. There was no satisfaction of the documents as stipulated in the term sheet, so much so, that even the conditions precedent to execution of financing agreements by the defendant no. 2 were not executed.

On the request of Shyam Telelink, the plaintiff provided a 'letter of comfort' merely stating that the plaintiff would issue the proposed guarantee in future at the time of the proposed facility of Rs.484 crores being finalised 'subject to the terms and conditions stated in

the term sheet and satisfactory documentation.'

55. It is argued that in the letter dated 27th September, 2000, it was clearly stated that the plaintiff would issue the proposed unconditional and irrevocable guarantee subject to satisfactory resolution of the guarantee terms and the guarantee structure and the guarantee release mechanism as provided in the term sheet. The submission is that the plaintiff agreed to the proposal subject to the negotiations and entering into an agreement to the satisfaction of the plaintiff which event never occurred.

56. So far as the bridge loan is concerned, while the negotiations for Rs.484 crores financial facility were going on, the ICICI Bank and Shyam Telelink entered into an interim bridge loan agreement for an amount of Rs.50 crores. The plaintiff denies that it was a party to this agreement and submits that this is manifested by the fact that the Rs.50 crores facility bridge loan was secured by the Shyam Telelink by other securities including deposit of title deeds etc as well as personal guarantees given by defendant nos. 3 to 6.

57. The plaintiff has submitted that for the reason that it had not provided any guarantee for the bridge loan, the ICICI Bank charged additional interest for this bridge loan.

It is argued that the letter of comfort dated 30th November, 2000 was issued again confirming that subject to satisfactory negotiations and resolution of the financing terms of the agreement, the security documents, the guarantee terms, the guarantee structure and the guarantee release mechanism as provided in the term sheet, they would proceed to execute the guarantee and other documents as

required for completing the contemplated transaction.

It is contended that the bridge loan agreement dated 12th December, 2000 was the same as the earlier one; was granted on identical securities from the promoters and affiliates of the defendant no. 2 and that the plaintiff was not a party to this agreement as well. The plaintiff has submitted that it did not provide any guarantee for this bridge loan.

58. In the instant case, no final terms and conditions which were agreed upon by the parties as postulated in ICICI's letter dated 13th September, 2000 are available on record. No formal documentation has been executed even though the same was stipulated. The plaintiff has urged that the same was essential and went to the root of the matter and consequently, no concluded contract could be held to have come into existence.

59. The plaintiff has contended that consequently, no liability could be fastened on it with regard to the disputes which have arisen with M/s Shyam Telelink Limited or with regard to any other matter without execution of the financial agreements and the other formal documents.

It has been urged that for this reason as well, the stipulation contained in “Governing Law and Jurisdiction clause” in the term sheet would not govern any dispute relating to the bridge loan which stood alone on independent terms and conditions.

60. The defendants have urged to the contrary that the execution of the formal document was a mere formality and nothing more. The defendants would contend that the conduct of the plaintiff and its

communications thereafter amounted to an unequivocal acceptance of the terms and conditions set out in the term sheet by the ICICI as well as commitment to unconditionally and irrevocably guarantee financial facilities by the defendant no. 1.

Placing reliance on several judicial precedents noticed in detail hereafter, it is urged that it would be a question of construction as to whether the execution of a further contract is a condition of the term of the bargain or whether it is a mere expression of the desire of the parties as the manner in which the transaction already agreed to will in fact go through. The submission is that failure to execute formal documents cannot be a ground for denial of a concluded contract between the parties.

61. Mr. Rakesh Dwivedi, learned senior counsel for defendant no. 1 and Mr. Sandeep Sethi, learned senior counsel appearing for defendant nos. 2 to 6 submit that the plaintiff was the beneficiary of the bridge loan and the entire amount of Rs.100 crores was forwarded by the defendant no. 2 to the plaintiff towards the supplies effected by it and as such, it was the sole beneficiary of the two bridge loans.

62. Mr. Sethi, learned senior counsel for the defendant no. 2 also relies on a communication dated 30th January, 2001 addressed by it to the Department of Economic Affairs, seeking permission for securing the guarantee by the plaintiff to a maximum of 65% of the total requirement.

It is also contended that the plaintiff confirmed acceptance of the terms and conditions of the term sheet and a demand was made by the plaintiff to issue a secured corporate guarantee subject to the

terms and conditions of the term sheet.

63. The defendants have urged at length that the plaintiff not only accepted the terms and conditions set down by the defendant no. 1, but acted upon the same in terms of the contract and as such is estopped from going back on the contract. It is also contended that the plaintiff persuaded the defendants and the Government of India to believe that they would execute the formal financing agreements.

64. Learned senior counsel appearing for defendants point out that the term sheet enclosed with the letter dated 13th September, 2000 described the plaintiff as a guarantor and even nominated its counsel who was to carry out the due diligence on the borrower-Shyam Telelink Ltd. on behalf of the guarantor, to prepare the financing agreements and to review the project agreements. It is urged that the term sheet contained a specific stipulation which enabled the ICICI Bank-defendant no. 1 to consider the provision of a bridge loan against the proposed facilities with full security interests including an unconditional and irrevocable guarantee from Lucent Technologies Inc, USA in a form and manner satisfactory to the lead arranger i.e. the ICICI Bank.

The further submission is that so far as the security and documents were concerned, the term sheet contained an unconditional and irrevocable guarantee by the guarantor to pay up to 65% of all amounts due under the facilities (the guarantee) subject to the satisfaction of the guarantor (plaintiff herein) on the guarantee structure. The guarantee was stated to be subject to the guarantee release mechanism clause provided in the term sheet.

So far as the clause for invocation of the guaran[redacted]; concerned, the term sheet provided that the same could be invoked in the event of a default; breach of financial covenants; breach of borrower's and guarantor's representations and warranties.

65. The contention is that the term sheet also recorded representations and warranties of the guarantor. It noticed in clause 5, that the guarantee was inter alia in full force and effect and constituted valid, binding and enforceable obligations of the guarantor; that the guarantor shall seek RBI approval for giving the unconditional and irrevocable guarantee to the lenders in a form and manner satisfactory to the lenders prior to the signing of the guarantee agreement and also that the guarantor shall undertake to arrange funds to meet the obligation of the guarantee in case of enforcement of security for events of default as mentioned in the term sheet and also receipt of and compliance with all requisite statutory approvals for the guarantee.

66. The defendants have urged that the terms and conditions set out in the term sheet were conditions precedent for sanction of the debt requirement of the project and were not negotiable, and that once the plaintiff and defendant no. 2 sent their acceptance within 30 days of the term sheet, the terms and conditions thereof were binding upon them subject to the negotiation of other and further covenants over and above the terms and conditions set out in the term sheet and formal documentation of the terms and conditions thereof.

It is argued at some length that the warrant agreement dated 5th October, 2001 between the defendant no. 2 and Lucent Hindustan

Technologies Pvt. Ltd.; and the discussions with the ICICI [illegible] release of the guarantee by the plaintiff, all establish that a binding promise between the plaintiff and defendant No.1 had emerged and only minor details were to be worked out. The submission is that for this reason, the defendant no.1's claim for specific performance requiring the plaintiff to execute guarantees for the bridge loan is maintainable.

67. Learned senior counsel have urged that the plaintiff accepted that ICICI would enter into an interim bridge loan agreement with the defendant no. 2 and for this reason issued a letter of comfort and undertaking. The plaintiff also gave an undertaking to file an application with the Ministry of Finance (External, Commercial, Borrowing Division) for permission to issue their guarantee in accordance with the term sheet within 15 days from the date of the letter of comfort. The plaintiff also furnished a letter of comfort dated 30th November, 2000 in this behalf.

68. Based on the letter of comfort given by the plaintiff dated 30th November, 2000 that ICICI entered into a second interim bridge loan financing agreement with the defendant no. 2 for credit up to additional Rs.50 crores.

69. The question which has arisen for consideration relates to the construction and legal impact of what has been termed 'a letter of comfort'. No statutory definition of this expression and document is available. Such communication also known as 'letter of intent' or 'letter of support' has been the subject of judicial interpretation before courts in different jurisdiction. Such documents are of

widespread use in commercial transaction.

In the literal sense, **Black's Law Dictionary** defines a 'letter of intent' as a letter customarily implied to reduce to writing 'a preliminary understanding of parties who intend to enter into a contract, or to intend to take some other action.'

The expression 'letter of intent' is defined by **Chitty on Contract** in its 26th Editiion in para 116 on page 114 thus :-

> "LETTER of intent: There is as yet no clear authority on the legal effect of the practice whereby the parties to a transaction exchange "letters of intent" on which they act pending the preparation of formal contracts. The terms of such letters may, of course, negative contractual intention. But where this is not the case, it would be open to the courts to hold the parties bound by the terms of such letters, especially if the parties had acted on those terms for a long period of time or if they had expended considerable sums of money in reliance on them....."

At page 180, Chitty on Contracts further deals with letters of intent and letters of comfort. It is emphasized by the learned author that there is no clear authority on the legal effect of the practice whereby the parties to a transaction exchanged a "letter of intent" on which they act, pending the preparation of formal contracts. At page 181, it is stated that "where the language of such a document does not negative contractual intention, it is open to the courts to hold the parties bound by the document; and they will, in particular, be inclined to do so where the parties have acted on the document for a long period of time or have expended considerable sums of money in reliance on it. The fact that the parties envisage that the letter is to be superseded by a later, more formal, contractual document does not, of itself prevent it from taking effect as a contract".

70. In a judgment ***(1971) 222 E.G. 169 Turriff Construct*** ***vs. Regalia Knitting Mills,*** the letter of intent was held to be a collateral contract to pay for the preliminary work.

In yet another pronouncement reported at ***1986 (1) Lloyd's Rep. 378 Wilson Smithett & Co. (Sugar Co.) v. Bangladesh Sugar Industries Limited,*** the court held that the letter of intent had contractual significance.

71. The defendant no.1 has also placed reliance on the "**Law of Contract", Butterworths Common Law Series** wherein it is pointed out that a letter of comfort may be offered to a potential creditor as an alternative to a guarantee, as a means of re-assuring the creditor that the credit will be repaid. It refers to the typical letter of comfort, generally provided by a company when credit is advanced to its subsidiary and it contains a statement of the parents' support for the subsidiary. The effect of such a letter will depend on the precise form of wording used. At page 327 of this text it is mentioned that:-

> "A letter of intent may expressly state that it is not to have contractual effect. In Drake and Scull Engineering Limited Vs. Higgs and Hill Northern Limited, another building contract case, the parties had reached agreement on all terms apart from day rates when a letter of intent was issued. However, the letter expressly stated that there should be no binding contract between the parties until contracts were formalised. The court held that in accordance with its terms the letter was therefore not contractual, with the result that on the facts the employer was not entitled to deduct liquidated damages which would have been payable under agreed contract terms. However, it is submitted that it will take clear words to prevent a letter of intent being regarded as an offer or acceptance

> of a contract if all important terms have been agreed and one party commences performance in reliance on the letter."

The judgment in **Drake and Scull Engineering Limited Vs. Higgs and Hill Northern Limited** is reported at 1994 (11) Const. L.J. 214.

72. Butterworths' Law of Contract has also drawn attention to the famous case on the subject, **Kleinwort Benson Limited Vs Malaysian Mining Corporation Bhd.** The judgment of the trial court is reported at (1988) 1 All ER 714 which was reversed in appeal by the judgment reported at (1989) 1 All E.R. 785.

In this case, the plaintiffs made a loan to a company on the strength of a letter of comfort from its parent-the defendants, which, following the normal form of such letters, contained (i) a statement that the defendants were aware of the loan to their subsidiary, (ii) an undertaking not to give up control of the subsidiary and, finally, (iii) a statement that: '*it was the defendant's policy to ensure that the business of the subsidiary is at all times in a position to meet its liabilities to the plaintiff under the loan agreement*'. When the subsidiary went into liquidation, the creditors sought payment of the debt from the parent company on the basis of the letter of comfort, which the defendant refused to pay. The case turned on the construction of the words quoted above. The defendants argued that those words had no contractual effect on the alternate bases that (a) on their proper construction they contained only a statement of present intention, rather than a promise as to the future and (b) that if the words were construed as promissory, they were not intended to

create legal relations. The plaintiff succeeded in the court of first instance which held that the circumstances in which the letter of comfort was given, feasibly created the presumption of a legal agreement since the transaction was of a commercial nature.

73. However, the court of appeal unanimously overturned this decision which judgment is reported at ***(1989) 1 All ER 785***. The court of appeal held that the crucial question was not whether the party intended to create legal relations, but whether the words in question were promissory at all, and the court accepted the contention that they contained no warranty to the future but merely a statement of the defendant's present policy. The court accepted the contention that the defendants would be liable in a tort of deceit if the intentions were not genuinely held at the time, the statement was made and that they might incur liability in negligence, if the policy was subsequently changed and the plaintiffs were not notified. The words therefore imposed upon the defendant, at best, a moral rather than a legal obligation.

74. Factors which influenced the court's decision in Kleinwort Benson's case included the fact that the parties were of equal bargaining power, that the defendants had expressly declined to give a legally binding guarantee, and that the plaintiffs had, apparently, agreed to accept a letter of comfort instead on the basis that the rate of interest on the loan would be higher than would have been charged, had the defendants provided a guarantee.

75. It would also be useful however to consider the principles laid down by the Australian courts reported at ***Banque Brussels***

Lompart S.A. (BBL) Vs. Australian National Industries l at ***(1989) 21 NSW LR 502***.

76. The Judge in this case, Sir Rogers, C.J., was strongly critical of the approach of the court of appeal in the Kleinwort Benson case, as excessively technical and commercially unrealistic, and favoured the view that commercial agreements should be given commercial effect. In this behalf, it was held by the Chief Justice that:-

> "the whole thrust of the law today is to attempt to give proper effect to commercial transactions. It is for this reason that uncertainty, a concept so much loved by lawyers, has fallen into disfavour as a tool for striking down commercial bargains. If these statements are appropriately promissory in character, courts should enforce them when they are uttered in the course of business, and there is no clear indication that they are not intended to be legally enforceable."

77. In the Banque Brussels Case (supra), holding that the letter had contractual force, the court had observed that:-

> "There should be no room in the proper flow of commerce for some purgatory where statements made by business men, after hard bargaining and made to induce another business person to enter into a business transaction would, without any express statement to that effect, reside in a twilight zone of merely honourable engagement. The whole thrust of the law today is to attempt to give proper effect to commercial transactions..... If these statements are appropriately promissory in character, courts should enforce them when they are uttered in the course of business, and there is no clear indication that they are not intended to be legally enforceable."

So far as the letter of comfort is concerned, the court laid down

the following principles which give valuable guidance on the .

The Learned Chief Justice of Australia held that:-

> "1. In determining whether a letter of comfort gives rise to contractual obligations;
>
> (a) the ordinary rules of construction and interpretation relating to contracts apply;
>
> (b) the overriding test is that of the intention of the parties as deduced from the document as a whole, seen against the background of the practices of the particular trade or industry and in the events surrounding its inception;
>
> (c) the prima facie presumption that in respect of commercial transactions there is an intention to create legal relations applies, and the onus of proving the absence of such intention rests with the party who asserts that no legal effect is intended.
>
> 2. In the circumstances, and taking into account the negotiations leading to the final version of the letter of comfort, and a close textual analysis of its terms, the letter of comfort contained 2 enforceable contractual promises, breach of which gave rise to a liability in damages where the shares .... were sold without the plaintiff being given 90 days' notice."

The Australian court was of the view that it would be inimical to the effective administration of justice in commercial disputes, that a court should use a "finely tuned linguistic fork"

78. The principles in English law so far as a letter of intent are concerned were authoritatively summarised in the pronouncement reported in ***33 PC 29 Hatzfeld Wildenburg v. Alexander*** thus :-

> "It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition of term of the bargain or whether it is a mere expression of the desire of the

> parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored."

79. Based on the consideration of several judicial pronouncements including those noted hereinabove, Butterworths has clearly stated that there is no absolute rule as to whether a letter of comfort can or cannot create a legal relationship.

80. A similar issue arose for consideration before the Supreme Court of India in the pronouncement reported at ***(1999) 1 SCC 1 Rickmers Verwaltung GNBH vs. Indian Oil Corporation Ltd.*** wherein the parties were at loggerheads over the construction to be placed on the correspondence between them. The appellant was submitting that a concluded contract had come into existence and that though no agreement had been formally signed between the parties, yet the contemporaneous correspondence exchanged between them went to show that a binding contract came into existence. On a construction of the various documents placed before the court, the court laid down the following binding principles which would guide adjudication herein :-

> "13. In this connection the cardinal principle to remember is that it is the duty of the court to construe correspondence with a view to arrive at a conclusion whether there was any meeting of mind between the parties, which could create a binding contract between them but the Court is not empowered to create a contract for the parties by going outside the clear language used in the correspondence, except insofar as

there are some appropriate implications of law to drawn. Unless from the correspondence it can unequivocally and clearly emerge that the parties were ad idem to the terms, it cannot be said that an agreement had come into existence between them through correspondence. The Court is required to review what the parties wrote and how they acted and from that material to infer whether the intention as expressed in the correspondence was to bring into existence a mutually binding contract. The intention of the parties is to be gathered only from the expressions used in the correspondence and the meaning it conveys and in case it shows that there had been meeting of mind between the parties and they had actually reached an agreement, upon all material terms, then and then alone can it be said that a binding contract was capable of being spelt out from the correspondence.

14. From a careful perusal of the entire correspondence on the record, we are of the opinion that no concluded bargain had been reached between the parties as the terms of the standby letter of credit and performance guarantee were not accepted by the respective parties. In the absence of acceptance of the standby letter of credit and performance guarantee by the parties, no enforceable agreement could be said to have come into existence. The correspondence exchanged between the parties shows that there is nothing expressly agreed between them and no concluded enforceable and binding agreement come into existence between them. Apart from the correspondence relied upon by the learned single Judge of the High Court, the fax messages exchanged between the parties, referred to above, go to show that the parties were only negotiating and had not arrived at any agreement. There is a vast difference between negotiating a bargain and entering into a binding contract. After negotiation of bargain in the present case, the stage never reached when the negotiations were completed giving rise to a binding contract. The learned single Judge of the High Court was, therefore, perfectly justified in holding that Clause 53 of the Charter Party relating to Arbitration had no existence in the eye of law, because no concluded and binding contract ever came into existence between the parties. The finding recorded by the learned single Judge is based on a proper appreciation of evidence on the record and a correct application of the legal principles. We find no merit in this appeal. It fails and is dismissed with costs."

81. In this context, learned counsel for the defendant no.1 has also

placed reliance on a decision of the court of appeals of Houston (First District) reported at ***729 SW 2d 768 Texaco Inc Vs. Pennzoil Co***. wherein similar issues had arisen for consideration. In this pronouncement, several prior pronouncements of various courts were considered. The principles laid down certainly throw valuable light on the subject. Placing reliance on the judgment reported as ***Winston Vs. Mediafare Entertainment Corporation 777 F.2d 78, 80 (2d Cir. 1985),*** it was observed that if the parties do intend to contract orally, the mere intention to commit the agreement to writing does not prevent contract formation before execution of that writing. However, this would not be if either party communicates the intent not to be bound before a final formal document is executed, then no oral expression of agreement to specific terms will constitute a binding contract.

The court articulated the following factors which would help determine whether the parties intended to be bound only by a formal, signed writing :-

> "(1) whether a party expressly reserved the right to be bound only when a written agreement is signed; (2) whether there was any partial performance by one party that the party disclaiming the contract accepted; (3) whether all essential terms of the alleged contract had been agreed upon; and (4) whether the complexity or magnitude of the transaction was such that a formal, executed writing would normally be expected."

82. A similar document termed as a letter of intent arose for consideration before a learned Single Judge of this court. In the judgment reported at ***AIR 1993 Delhi 32 Wellman Hindustan***

Limited vs. M/s NCR Corporation, the court held that the [illegible] stands is that term of a letter of intent may negative contractual intention but it would be open to the courts to hold that the parties are bound by the terms of such letters. This would be especially if the parties had acted on these terms for a long period of time or if they had expended considerable sums of money in reliance on them.

83. In this case, based on such conduct of the parties, the court had held that the plaintiff would suffer irreparable loss and damage if the defendant was not restrained from breaching such terms and had granted an interim injunction in favour of the plaintiff.

84. Learned counsel for the defendant no.1 has also placed reliance on yet another judgment from the New South Wales Supreme Court reported at ***ACN 089 347 562*** entitled ***Gate Gourmet Australia Pty Limited (in liquidation) Vs. Gate Gourmet Holding A.G. Company Number*** *CM – 020.3.003.945-1 & Ors.* reported at ***(2004) NSW SC 149*** wherein the court was called upon to consider as to whether a letter of comfort so supports credit legal obligations. The "letter of support" executed by Gate Gourmet International A.G. was in the following terms:-

> "This is to confirm that the parent entity, Gate Gourmet International AG, will provide the financial support that may be necessary to enable Gate Gourmet (Holdings) Pty Limited and its controlled entities to meet its financial commitments as and when they fall due. This guarantee will not be withdrawn before Gate Gourmet (Holdings) Pty Limited and its controlled entities have sufficient means to meet their obligations without the support of the parent entity."

85. On a strict construction of a letter placed before the court in Gate Gourmet Australia Limited (Supra), it arrived at a conclusion that its terms were clear and unequivocal and it provided that the Swiss parents will provide the financial support that may be necessary to enable the Australian holding company and its controlled entities to meet their financial commitment as and when they fall due and that the letter would not be withdrawn before the Australian holding company and its controlled entities have sufficient means to meet their obligations without the support of the Swiss parents. The statements were unconditional and no qualification thereto could be discerned even by reference to the circumstances surrounding the making representations. The representations also related to matters in the future and consequently created a binding obligation.

86. The New South Wales Supreme Court had relied upon the pronouncement reported at ***Commonwealth Bank of Australia Vs. TLI Management Pty Limited (1990) V.R. 510*** wherein the relevant letter of comfort read as follows:

> "We hereby acknowledge that the Commonwealth Bank of Australia has agreed to make temporary credit facilities totalling two hundred and fifty thousand Australian dollars $A250,000 available to Hovertravel Australia Pty Ltd which represents payments for ongoing operating costs and salaries.
>
> We confirm that the company will complete takeover arrangements (subject to shareholders' approval) of Hovertravel Ltd as soon as legally possible. These arrangements include the injection of sufficient capital to repay the temporary facility as mentioned above to takeover date or within 30 days of this date. "

Construing this letter, the court had held as follow

> "[I] n the circumstances the draft did not, in my judgment, contain words conveying to the defendant the idea that, by having it engrossed and signed, the defendant would be undertaking a contractual obligation. It would have been very simple, if that had been intended, to have used words of promise, such as "we agree", "we undertake", or even "we promise". The words "we confirm that we will . . ." were, in the circumstances, at least ambiguous. What was stated in the remainder of the sentence beginning with those words was in essence a statement of no more than was already known or believed by the plaintiff to be the defendant's intention … "

87. It was further held that many of the other words contained in the letter were vague and uncertain [at 516]:

> "The difficulty is accentuated by the relative vagueness of many of the words - for example, "complete", "takeover arrangements" and "as soon as legally possible". What would constitute a breach of such an undertaking? The second sentence adds to the imprecision of the first. If the "arrangements" include "the injection of sufficient capital" etc., what are the other arrangements? What is "sufficient capital to repay the temporary facility as mentioned above"? And what is meant by "injection"? It is far from clear that what is meant is the deposit of money to the bank account."

88. It was, therefore, held that the legal status of the letter was merely that of a "serious acknowledgment by the defendant of its understanding of the commercial position between the plaintiff and its customer, and a serious statement confirming the defendant's intention with respect to the parent of the customer……."

89. Another judgment relied upon was rendered in ***Australian European Finance Corporation Ltd. Vs. Sheahan (1993) 60***

SASR 187 wherein the relevant letter of comfort read as follo

"**RE DUKE PACIFIC FINANCE LIMITED**

> This company which is 100% owned by The Duke Group Limited will continue to be supported by this company so long as necessary.
>
> In the event that any subordinated loans are required to ensure the company's requirements under the necessary legislation or licensing requirements, these will be provided.
>
> I confirm that such support as is necessary will be given to this company and its subsidiaries."

On a construction of this letter and after the reference to several academic works authorities and judicial precedents, the court concluded thus:-

> "...I am not persuaded that the vague words of the first and third sentences contain a contractual promise. Support can mean many different things, and I do not know what support "so long as is necessary" or "as is necessary" means. They are "woolly" expressions to say the least. The second sentence is even more ambiguous, and the evidence contained no attempt to explain it. I construe it as mere padding, as is the addition of the words "and its subsidiaries" at the end of the third sentence.
>
> I am not persuaded that the parties intended that the letter would amount to a legally enforceable security. At most it contains a non-promissory statement of intention."

90. So far as the present plaintiff was concerned, it was required to issue a letter of comfort in favour of the ICICI Limited in a form acceptable to ICICI Limited for obtaining the RBI approval and furnishing guarantee for the entire financial assistance of Rs.484.00

million upon execution of the facility agreement and other documents in terms of the letter of intent dated 13th September, 2000. It is noteworthy that the description of the facility agreement in the clause in the term sheet does not include any bridge loan agreements or guarantees thereto.

91. The letter dated 13th September, 2000 from the ICICI and the term sheet enclosure therewith suggests that the defendant no. 1 was treating it as only an agreement in principle and the terms stated therein as indicative of the basis on which it would advance financial assistance to the defendant no. 2. The specific terms on which the documents would be executed were yet to be negotiated to the satisfaction of all parties. Several covenants and stipulations which were conditions precedent to the execution of the document were yet to be completed. Even the date of commencement of the agreement was clearly stipulated as the date of execution of the documents.

92. So far as the construction of the respective obligations was concerned, in the letter dated 13th September, 2000 the ICICI Limited had clearly stated that the communication should not be construed as giving rise to any binding obligation on its part unless M/s Shyam Telelink Limited & M/s Lucent Technologies, USA communicated their acceptance of the terms & conditions within 30 days from the receipt of this letter and unless the underwriting agreement, rupee loan agreement, general conditions, guarantee agreement, personal guarantee agreements, various undertakings and any other documents as may be specified by ICICI Limited relating to the above facility, are executed by Shyam Telelink Ltd in such form, as may be

required by ICICI Limited within four months from the dat[redacted]; letter or such further period as may be allowed by ICICI Limited in its absolute discretion. The ICICI Limited also reserved to itself the right to amend or modify the letter as well as the term sheet in line with advice received from its legal counsel "during the course of document finalization".

93. Certain details mentioned in the term sheet which was enclosed with the communication dated 13th September, 2000, are important. While M/s Shyam Telelink Limited was described as the "borrower", the ICICI Limited was defined as the "lead arranger" while Lucent Technologies Inc incorporated, USA as the guarantor. The suppliers included not only M/s Lucent Technologies Hindustan Pvt. Limited, India but others including Cincom System India Private Limited. The facility agreed to be advanced by the ICICI Limited was underwriting of the entire debt requirement of the project aggregating Rs.4.84 billion.

Importantly, the "agreement date" that was stipulated in the term sheet was "the date on which the facility documents are signed by the borrower, the lead arranger and the guarantor".

The `facility documents' were defined to include the `project agreements' and the `financing agreement'.

So far as the "financing agreement" was concerned, it was stipulated that "the facilities will be subject to negotiations, execution and delivery of definitive financing agreements to be entered into by the borrower, the sponsors and the guarantor, as the case may be, relating to the facilities including but not limited to the security

documents, loan agreements, lease facility agreements, g[illegible] agreements etc. satisfactory to the lead arranger".

The term sheet stipulated "interest" which the facility would carry. It was stipulated that the entire debt facility would carry an interest rate of ICICI LTPLR plus 3% per annum payable quarterly plus applicable interest tax prevalent on the date of each disbursement. The ICICI LTPLR as on date was stipulated as being 12.5% per annum payable quarterly.

It is pointed out that this term sheet also stated that the lender would consider to provide a bridge loan against the proposed facilities with full security interests including an unconditional and irrevocable guarantee from M/s Lucent Technologies Inc, USA in a form and manner satisfactory to the lead arranger.

Extensive security and documents were listed in the term sheet including an unconditional and irrevocable guarantee by the guarantor to pay upto 65% of all amounts due under the facilities which was to be subject to the satisfaction of the guarantor on the guarantee structure.

94. The ICICI Limited had stipulated mandatory conditions precedent to execution of the financing agreements. These conditions inter alia included regulatory and statutory approvals for borrowings, security structure and Lines and permission for guarantee and 14 other conditions.

95. The defendants have emphasised that it was stipulated in the term sheet that the guarantor i.e. Lucent Technologies Inc would maintain a minimum investment grade credit rating or a credit rating

equivalent to India's sovereign rating by Standard and Poor's and Moody's, whichever is higher, at all times during the effective tenure of the guarantee under the facilities and also maintain its corporate existence and its right to carry on the operations. The guarantee was to rank at least pari-passu to all present and future unsecured indebtedness of the guarantor.

As per letter dated 13th September, 2000, the same was not to be considered to give rise to binding obligations on the part of the ICICI which were to arise only upon execution of 'the Underwriting agreement, Rupee loan agreement, General conditions, Guarantee agreement, Personal Guarantee agreements, various undertakings and any other documents as may be specified by ICICI'. In the term sheet it was mentioned that one of the conditions precedent to execution of financing agreement included regulatory and statutory approvals for borrowings.

96. In the instant case, the defendant no.1 is asserting that the plaintiff had executed valid guarantees to secure financial facilities advanced by it to the defendant no.2. A contract of guarantee is a contract to perform the promise, or discharge the liability of a third person in case of its default, as defined under Section 126 of the Indian Contract Act, 1872. As per Section 127 of the said Act, anything done or any promise made, for the benefit of the principal debtor, may be sufficient consideration to the surety for giving the guarantee.

97. So far as the reliance on the plaintiff's letter dated 27th September, 2000 referring to the loan is concerned, the plaintiff

thereby stated that Lucent Technologies Inc 'shall accept t[illegible]s and conditions set out in the term sheet' whereby Lucent will provide guarantee up to 65% of the facility, 'subject to the terms and conditions of the term sheet and negotiation of satisfactory documentation'.

98. It is evident that settlement of the final terms and negotiation of documentation was yet to take place. The letter dated 27th September, 2000 from the plaintiff by itself therefore cannot be treated as an unequivocal or absolute acceptance of the terms of the term sheet.

99. The plaintiff has also urged at some length that the bridge loan agreement dated 27th September, 2000 entered into by the defendant no.1 with the defendant no.2 and the second agreement dated 12th December, 2000 were entered into and executed independent of the main financing agreement. The same was entered into on terms and conditions without a guarantee from the plaintiff and for this reason, the ICICI Limited advanced the bridge loan on a stipulated interest rate which was higher than the interest rate stipulated under the financing agreement.

100. The defendants also rely on the letter dated 30th November, 2000 addressed by the plaintiff to the ICICI Ltd. to assert that a concluded contract can be made out by the correspondence exchanged between the parties. This letter noted that the process of finalisation of documentation for the main term facility was underway and was likely to be executed in the month of December, 2000. The plaintiff stated therein that it accepted that the ICICI enter into an

interim bridge loan financing agreement with the defendant permitting them to avail credit up to an additional Rs.500 million over and above an amount availed earlier; that the necessary application to the Ministry of Finance for approval of the 'proposed guarantee' by Lucent Technologies Inc is expected to be made in the next week. The plaintiff confirmed that 'subject to the satisfactory negotiation and resolution of the financing terms of the agreement', the security document, the guarantee terms, the guarantee structures and the guarantee release mechanism as provided in the term sheet', it would 'proceed with the execution of the guarantee and other documents as required for completing the contemplated transaction on the terms the parties had agreed upon.

The communication at one place shows that negotiation and resolution of the financing terms of the agreement and the guarantee terms etc was yet to take place while at another place a reference is made to terms agreed upon. This communication is to be read against the stipulations made by the defendant no. 1 itself in the letter dated 13th September, 2000 and read together from these communications, it is not possible to hold that there was a firm contract which had come into place between the parties.

101. It has been urged by Mr. Dwivedi, learned senior counsel for the defendant no. 1 that the plaintiff had addressed a letter dated 12th January, 2001 to the Department of Economic Affairs in the Ministry of Finance wherein also it had confirmed acceptance of the terms and conditions of the term sheet and had stated that it was committed to issuing a secured guarantee. The submission is that the bridge loan

as well as the arbitration agreement are part of the term s[redacted]l that this letter itself showed that even according to the plaintiff a concluded contract had come into existence.

It is further contended that the defendant no. 1 had addressed a letter dated 30th January, 2001 wherein it had enclosed a copy of the confirmation letter from the plaintiff. The submission is that the government approval in the letter dated 16th March, 2001 to the proposal was based on this confirmation by the plaintiff.

102. This submission however fails to consider the nature of the communication by the plaintiff confirming the terms and conditions which were set out in the term sheet. As discussed hereinabove, the same were inchoate and subject to negotiation; finalisation of documents and their execution. The letter dated 12th January, 2001 also merely stated that it was 'committed to issuing' a secured guarantee which manifests the factual position that the secured guarantee had not been executed. When the term sheet is considered in the light of the stipulations contained therein, it is obvious that the terms and conditions were yet to be finalised.

The plaintiff further points out that its letter dated 12th January, 2001 to the Government of India seeking approval clearly stated that it would issue the proposed guarantee 'subject to satisfactory documentation'.

103. It is noteworthy that Shyam Telelink Ltd.-defendant no. 2 addressed a letter as late as on 4th April, 2002 to the defendant no. 1 seeking revision of the terms of sanction of the term loan for Rs. 484 crores sanctioned by the letter dated 13th September, 2000. The

defendant no. 2 wrote in no uncertain terms, that the sancti[redacted] had a clause whereby the loan was to be guaranteed by the plaintiff. It was stated that on account of downgrading of the rating of Luccent Technologies Inc., the defendant no. 1 had asked it to provide alternate guarantee of appropriate rating in respect of bridge loans. The defendant no. 2 informed the ICICI bank that it had been approached by Lucent to approach ICICI with a request and proposal that the terms of the sanction be revised so as to make the term loan without recourse to Lucent. The defendant no. 2 accordingly requested the ICICI Bank to delete the clause pertaining to guarantee of Lucent Inc. and to make the said loan without recourse to Lucent Inc.

104. It is trite that it is the express intent of the parties which controls the rule of contract formation rather than mere form. In the instant case, the matter relates to financing of a loan which was to the tune of Rs. 484.00 million rupees. Even the bridge loans are to the tune of Rs.100.00 crores. Certainly, the magnitude of the facility as well as the intricacies of the documents were of such a nature which would militate against an informal transaction for advancing of the loan or any part thereof. Such informal transaction without the formality of a formal binding legal documentation was also not contemplated by the parties. Every communication shows considered assessment and evaluation and there is repeated reference to legal advice. So much so, that even the guarantee to be executed by the plaintiff was required to be supported by a letter/confirmation from the legal consultant of the party. In addition thereto, the defendant

no. 1 had itself stipulated the effective date on which the agreement between the parties would come into existence as being the date of execution of the financing agreement. Conscious of the fact that several terms and conditions were required to be considered and statutory and regulatory sanction was also required, the defendant no.1 had itself clearly stipulated the same in the letter dated 13th September, 2000

105. In the judgment reported at ***147 F Supp. 193, 204 (S.D.N.Y. 1956) Banking & Trading Corporation Vs. Reconstruction Finance Corporation***, affirmed in **257 F. 2d 765 (2nd Cir. 1958)**, the court had stated that "if the agreement is expressly subject to the execution of a formal contract, this intent must be respected and no contract found until then".

106. Having regard to the unequivocal expression of the intent in the term sheet, it is evident that the defendant no.1 had itself intended not to be bound by any stipulation or covenant before the signing of a formal documents.

107. The letter dated 13th September, 2000 as well as the term sheet propose finalisation of binding terms after acceptance of the proposal in this communication and negotiation of the documentation unlike the facts in the case of Banque Brusals (supra). The letters of comfort were not unconditional or unequivocal in the creation of the liability of the plaintiff. The plaintiff had clearly made them "subject to completion of specific formalities". There is certainly a difference between a transaction being subject to various requirements and the formation of the agreement itself being dependent upon completion of

such matters.

108. It is noteworthy that in the letter dated 30th January, 2001 was sent by Syam Telelink Ltd. to the Department of Economic Affairs, Ministry of Finance seeking approval for the secured Lucent guarantee covering up to a maximum of 65% of the total requirement, the defendant no. 2 had stated that the Lucent guarantee is proposed to be secured on a pari-passu basis with the domestic lenders. This communication suggests that even defendant no. 2 was not treating the matter as concluded.

109. In ***Texas Inc Vs. Pennzoil Co. 729 SW 2d 768*** (Supra), the court placed reliance on a pronouncement reported at ***301 N.Y. 110, 92, N.E. 2D 914 (1950) F.W. Berk & Co. Vs. Derecktor.*** In this matter, the very acceptance of the plaintiff's order by the defendants was made subject to the occurrence of certain events. The court defined the phrase “subject to” as being the equivalent to “conditional upon or depending on” and held that making the acceptance of an offer subject to a condition was not the kind of assent required to make it a binding promise. However, making the acceptance of an offer conditional or expressly making an agreement itself conditional is a much clearer expression of an intent not to be bound than the use of the more ambiguous word “transaction”.

110. My attention is drawn to the pronouncement of the Apex Court reported at ***(2006) 1 SCC 751 Dresser Rand S.A. Vs. Bindal Agro Chem Limited*** wherein the court had held that the parties agreeing upon the terms subject to which a contract will be governed when made, is not the same as the entering into the contract itself.

Similarly, agreeing upon the terms which will govern a [illegible] without the order being placed, is not the same as placing the projects order. A prelude to the contract should not be confused with the contract itself. In this case, the court was of the view that the letters of intent made it clear that if the projects order was not placed and a letter of credit was not issued by a particular date, the other party was at liberty to alter the price and the delivery schedule. The court therefore held that it may not be possible to treat the letter of intent as the projects order. It was further held thus:-

> "Agreeing upon the terms subject to which offer is to be made and accepted, is itself a complicated and time-consuming process. But, reaching an agreement as to the terms subject to which a purchase will be made, is not entering into an agreement to purchase."
>
> 32. Parties agreeing upon the terms subject to which a contract will be governed, when made, is not the same as entering into the contract itself. Similarly, agreeing upon the terms which will govern a purchase when a purchase order is placed, is not the same as placing a purchase order. A prelude to a contract should not be confused with the contract itself. The purpose of Revision 4 dated 10-6-1991 was that if and when a purchase order was placed, neither the "General Conditions of Purchase" of BINDAL, as modified by Revision 4. But when no purchase order was placed, neither the "General Conditions" of Purchase" nor the arbitration clause in the "General Conditions of Purchase" became effective or enforceable. Therefore, initialling of Revision 4" by DR and BINDAL on 10-6-1991 containing the modifications to the General Conditions of Purchase, did not bring into existence any arbitration agreement to settle disputes between the parties."

111. It is an admitted position between the parties that so far as the

documentation of the facility agreement and the executio[redacted]r formal financing agreement and documents are concerned, correspondence was exchanged between the ICICI and the legal consultants from October, 2000 onwards. However, no formal financing agreement was ever executed. As pointed out by the plaintiff several conditions' precedent, which were not even defined, could be changed by the plaintiff, defendant no. 1 or defendant no. 2 and these conditions' precedent were never completed.

112. In the meantime, the defendant no.2 entered into a warrant agreement dated 5th October, 2001 with Lucent Technologies Hindustan Private Limited also pursuant to which, upon satisfaction of the terms of the agreement, Lucent Hindustan Technologies Pvt. Limited was to be issued securities of an affiliate of Shyam Telelink Limited - defendant no. 2.

113. From the above discussion the following facts emerge :-

(i) Lucent Technologies Inc (the plaintiff) is not a signatory to any of the agreements.

(ii) the letter dated 13th September, 2000 was a proposal made by the ICICI Bank to STL with a copy enclosed to the plaintiff. It states that the defendant no. 1 was “agreeable in principle” to advance financial facility to it which was “subject to the special terms and conditions set out in the term sheet”. The term sheet was stated to be only “indicative” and “will be finalised after the completion of due diligence and at the time of “documents finalisation”. ICICI retained the right to specify other terms and conditions as may be required at the time of definitive documentation.

(iii) The facility agreement and financing agreement, which was to contain the clause for dispute resolution, has not been executed till date and has not even come into existence even.

(iv) The letter dated 13th September, 2000 clearly stated that the demand of ICICI was subject to the satisfaction of each conditions precedent mentioned in the term sheet. The ICICI notified the parties that the communication should not be construed as giving rise to "any binding obligation" (including the guarantee agreements) which executed.

(v) The term sheet uses several expressions which show that the ICICI itself did not treat the contract as final. It was subject to satisfaction of several conditions precedent and to execution of financing agreements. So far as the covenant of the guarantor was concerned, its obligations were to subsist during the tenure of the guarantees under the financing agreements. The date was stipulated as the date on which the facility documents are signed by the parties; the term sheet specified "facility documents" to include the "project agreements" and the "financing agreement". It was further stipulated that the facilities would be "subject to negotiation, execution and delivery" of definitive financing agreements "to be entered into by the borrower, the sponsor and the guarantor". The documents included guarantee agreements and other documents.

(vi) Under the heading "Security & Documents", the term sheet mentioned that "subject to the satisfaction of the guarantor" on the guarantee structure, it would execute all documents in relation to creation and perfection of the security and the unconditional and irrevocable guarantee by the guarantor to pay 65% of all amounts due under the facilities".

(vii) A specific clause was mentioned as a condition precedent to execution of financing agreements which included a pre-condition of regulatory and statutory approvals inter alia the permission for guarantee; legal opinion by the guarantor's counsel covering all matters with regard to incorporation and existence of the guarantors and the legality, validity and enforceability of the guarantee. As per the term sheet, the stipulation regarding Governing Law & Jurisdiction as

referred to in the context of the "financing agreeme[redacted]' and not in respect of all matters related thereto which included guarantee agreements. No final terms and conditions or the agreement came into existence nor as any such agreement been placed before this court.

114. Applying the legal principles laid down in the several judgments noticed hereinabove, the circumstances and documents do not indicate that the parties intended to create any legal relations. The very terms of the letter dated 13th September, 2000, the term sheet enclosed therewith and the response of the plaintiff as contained in letters of comfort dated 27th September, 2000 and 30th November, 2000 are a strong indicator in this regard. Both use phrases and concepts having clear technical legal significance and do not manifest any intent that a final and concluded contract had been entered into. In view of the above discussion, it, therefore, has to be held that the communications placed before this court do not contain the kind of assent required to make for a binding contract.

II

115. The second question which is required to be answered in the present case is as to whether the clause stipulating the '**Governing Law and Jurisdiction**' in the term sheet or any other stipulation in the documents amounted to an arbitration agreement which would bind the plaintiff and the defendant no.1.

116. A further question has been raised as to whether the arbitral tribunal appointed at the instance of M/s Shyam Telelink Limited and Lucent Technologies Hindustan Pvt. Ltd. under its contracts dated

14th December, 1999 could be considered as an "alternate dispute resolution forum" within the meaning of the expression as contained in the term sheet enclosed by the ICICI with its letter of 13th September, 1999, which would have jurisdiction to examine the dispute at the instance of ICICI Limited.

117. An examination of this issue necessitates a look at the relevant dispute resolution clauses in the various documents relied upon by the parties. In the order of chronology, these are the supply agreements dated 14th of December, 1999; the term sheet enclosed with the letter dated 13th September, 2000 and the warrant agreement dated 5th of October, 2001.

118. The supply contracts dated 14th December, 1999 between Shyam Telelink & Tata Lucent Technologies Ltd. contains a "disputes resolution and arbitration" mechanism in clause 55 (which is clause 58 in one of the supply contract) and states thus:-

> "55 DISPUTES RESOLUTION AND ARBITRATION
>
> 55.1 If any dispute, difference, controversies or claims of any kind whatsoever shall arise between the Parties in connection with or arising out of this Contract including any question regarding its existence, validity or termination of the execution of the works, whether before or after the termination, abandonment or breach of this Contract, the Parties shall seek to resolve any such dispute or difference by mutual consultation. PSC will make their best endeavor to resolve disputes, differences, controversies or claims by mutual deliberation. In case of failure, the issues will be escalated to the respective CEOs of the parties. CEOs shall strive to resolve all such disputes, differences, controversies, or claims.
>
> 55.2 If the parties fail to resolve such dispute or difference, controversy, or claim by mutual consultation, then either party may give the other, a formal notice in writing that the dispute,

> difference, controversy, or claim exist specifying its nature, the point(s) in issue and its intention to refer such disputes, difference, controversies, or claims to arbitration under the Arbitration and Conciliation Act, 1996."
>
> (Emphasis supplied)

119. These contracts at the same time contain a clarification that "party" shall mean either Shyam Telelink Ltd. ('STL' for brevity) (defendant no. 2) or the supplier i.e. Tata Lucent Technologies Ltd. ('TLT' for brevity) who are together referred to as "parties".

120. As noticed above, the supply agreements had stated that the TLT (supplier) through their sponsors would provide "credit enhancement support to structure and effect the debt for the project". In clause 5.6, TLT (supplier) was stated to have represented that the plaintiff had agreed to provide full support and back up to the supplier to enable it to fulfil its obligations under the contract. The agreement contained a clarification that Lucent was an affiliate of the supplier. As per the definition contained in the agreement, the `the affiliate' of the party was defined to mean the company or the person who is either controlled by the respective party or who controls the respective party either by way of a significant shareholding, voting rights or technical collaboration.

121. It is trite that terms of the contract have to be strictly construed. So far as Clause 55 of one of the 4 "Supply Contracts" entered into by M/s Shyam Telelink Ltd. and M/s Tata Lucent Technologies Ltd. on 14th December, 1999 is concerned, it is clear and unequivocal that it relates to any disputes arising between the parties. The parties have been clearly defined as M/s Shyam Telelink Limited and M/s Tata Lucent Technologies Limited. The agreements clearly recognise the

independent identity of the plaintiff and the supplier. The dispute that the plaintiff or the ICICI Bank are not a party to these contracts. The nature of the mechanism stipulated also shows that the same would not take into its embrace any party other than these two.

No party has asserted before this court that there is any ambiguity in the stipulations contained in Clause 55 afore-noticed, the same being clear and unequivocal. It is noteworthy that the arbitration between STL and Lucent Hindustan Technologies Pvt. Ltd. was commenced by Shyam Technology Ltd. based on these clauses.

122. It is not the defendant no. 1's contention that the arbitration which it has invoked against the plaintiff is based on the mechanism detailed in clause 55 of these agreements dated 14th December, 1999. In this background, clause 55 of the contracts dated 14th December, 1999 does not create or constitute an arbitration agreement between the plaintiff and the defendant no.1.

123. The warrants agreement dated 5th October, 2001 between M/s Shyam Telecom Ltd., Shyam Telelink Ltd., Shyam International etc and persons who are named and cited as promoters on the one hand and Lucent Hindustan Technologies Pvt. Ltd. on the other, also provides a mechanism for dispute resolution in Clause 9 which reads as follows :-

> “ CLAUSE 9
> DISPUTE RESOLUTION
> 9.1 Except as otherwise specifically provided in this Agreement, the following provisions apply if any dispute or difference arises between the Parties arising out of or relating to this Agreement. (The '*Dispute*').
> 9.2 A Dispute will be deemed to arise when one

Party serves on the other Party a notice stating the nature of the Dispute (a *'Notice of Dispute'*).

9.3 The Parties hereto agree that they will use all reasonable efforts to resolve between themselves, any Dispute through negotiations.

9.4 Any Disputes and differences whatsoever arising under or in connection with this Agreement which could not be settled by Parties through negotiations, after the period of thirty (30) Business Days from the service of the Notice of Dispute, shall be finally settled by arbitration in accordance with the Arbitration and Conciliation Act, 1996 and :

a. All proceedings shall be conducted in English and a daily transcript in English shall be prepared.

b. There shall be three (3) arbitrators, one to be selected by Shyam Group, one to be selected by Lucent and the third to be selected by the two arbitrators appointed by Shyam Group and Lucent, who shall serve as Chairman of the Arbitration Panel; and

c. The venue of arbitration shall be in New Delhi, India."

The dispute resolution mechanism contained in clause 9 of this agreement was also confined to the 'parties' which as per the agreement included only the defendant no. 2 and Lucent Technologies Hindustan Pvt. Ltd. It is noteworthy, that the Shyam Group on the one hand and the Lucent Technologies Hindustan Pvt. Ltd. on the other, (referred to as Lucent in the agreement) were parties to the contract.

So far as the governing law, jurisdiction and indemnity is concerned, the same is stipulated in Clause 10 and also relates to the parties to the agreement.

124. The plaintiff has submitted that funds were not arranged internationally and this agreement was not acted upon. The plaintiff and the defendant no. 1 were not parties to this agreement also.

Be that as it may, clause 9 of the warrants agreement dated 5th

October, 2001 in any case does not create or constitute an ar l agreement between the plaintiff and defendant no. 1.

125. It has been argued by the defendants, that the clause "Governing Law and Jurisdiction" in the term sheet enclosed with the letter dated 13th of September, 2000 amounted to a valid arbitration agreement which binds the plaintiff. This clause as contained in the term sheet enclosed with the ICICI letter dated 13th September, 2001 requires to be considered in some detail and reads as follows :-

> "**Governing Law and Jurisdiction**
> The Financing Agreement shall be governed by and construed in accordance with Indian law. The courts at Delhi shall have jurisdiction in respect of all matters related to the Financing Agreements. The Lenders reserve their right to approach any other alternate dispute resolution forum with it venue at Delhi, and the Borrower, the Sponsors and the Guarantor, as the case may be, shall submit to such forum."

126. Mr. Dwivedi, learned senior counsel has submitted, that so far as the arbitration is concerned, it is an alternate dispute redressal mechanism in the context of the courts ordinarily deciding civil disputes and consequently in view of the above, all disputes between the parties, whether under the contract or otherwise, can be referred to an arbitral tribunal. For this reason, it has been urged that the clause in the instant case includes dispute redressal by arbitration and confers a right on the lenders that is the ICICI to approach any arbitral tribunal.

In this behalf, reliance has been placed on the judgment of the Apex Court reported at ***(1999) 7 SCC 339 State of J & K vs. Dev Dutt Pandit*** and ***(2003) 1 SCC 49 Salem M. Advocate Bar Association, TN Vs. Union of India.***

127. It is further contended that the power conferred on it is enough to even unilaterally appoint the arbitral tribunal or to approach an existing arbitral tribunal. For the reason that the defendant no. 1 has approached the arbitral tribunal, it is urged that the plaintiff was precluded from bringing the present suit or from challenging the existence, validity or bindingness of the arbitration agreement. It has been urged that the provisions of the Arbitration and Conciliation Act, 1996 prohibit such an examination by any civil court and in this behalf my attention is drawn to the provisions of sections 5, 16 and 34 of the Arbitration and Conciliation Act, 1996, by the defendants.

128. The plaintiff on the other hand has contended that even the envisaged due diligence before entering into a formal agreement was not over and that the matter was at the stage of negotiations only. A clause providing `Governing Law and Jurisdiction' would bind the parties only if such clause was incorporated in a formal and final financing agreement arrived at between the parties. A submission has also been made, that reference to the jurisdiction of the courts at Delhi negates the existence of an arbitration agreement.

129. Mr. Arun Jaitley, learned senior counsel for the plaintiff, has contended that even assuming that this clause was binding, the same does not constitute an arbitration agreement between the parties. The clause confers a unilateral right on the ICICI Bank to approach an alternate dispute resolution forum without any such right being available to the plaintiff. The clause also does not stipulate as to what would be the nature of the alternate dispute resolution mechanism

and there is no indication at all that arbitration is the s[illegible] mode.

130. I have considered the rival contentions on this issue.

131. In para 23, of the judicial pronouncement reported at ***(1999) 7 SCC 339 State of J & K Vs. Dev Dutt Pandit*** relied upon by the defendants, the Apex Court has observed that arbitration is considered to be an important alternative disputes redressal process which is to be encouraged because of the high pendency of cases in the courts and costs of the litigation. It was further observed that arbitration has to be looked upto with all earnestness so that the litigating public has faith in the speedy process of resolving their disputes by this process. There can be no dispute with these observations.

132. The other judgment relied upon by the defendants is reported at ***(2003) 1 SCC 49 Salem M. Advocate Bar Association, TN Vs. Union of India*** wherein the court was concerned with a challenge to the amendments made to the Code of Civil Procedure by the Amendment Act 46 of 1999. The court noted that one of the amended provisions which was brought in by the legislature is to be found in Section 89 of the Code, which provides for settlement of disputes outside court where it appeared to the court that there existed elements of a settlement which may be acceptable to the parties. This amendment enabled the court to formulate the terms of a possible settlement and give them to the parties for their observations; reformulate the terms and to refer the same for arbitration or conciliation or mediation or judicial settlement including settlement

through Lok Adalat. The Apex Court observed Section 89 c[redacted]s the alternate disputes mechanism to include arbitration and the prescripted other modes.

133. There can certainly be no dispute with the principle that the arbitration is one of the several methods of alternative disputes redressal ('ADR' for brevity) statutorily recognized by incorporation of Section 89 and amendment of the Code of Civil Procedure. The plaintiff has also not disputed this submission.

134. It is noteworthy that the “Governing Law and Jurisdiction” clause which is under consideration applies only to the Financing Agreement. It stipulates that Indian law would govern the financing agreements which were to be executed while courts at Delhi would have jurisdiction in respect of all matters relating thereto.

The clause as contained in the term sheet vested the jurisdiction in courts at Delhi in respect of all matters relating to the financing agreements.

135. As stipulated in the term sheet, the date of the financing agreement was the date on which the agreements were signed and executed. Terms and conditions on which the financing agreements were to be entered into were yet under negotiation and finalisation. Formal execution thereof has not been effected till date. The date of the financing agreement as stipulated in the term sheet, was the date on which the agreements were signed and executed.

136. The reading of the clause would show that the ICICI Limited had reserved the absolute and unilateral right to approach any other alternative dispute resolution forum with its venue at Delhi.

137. The other parties to the term sheet did not have any) approach such forum for a dispute resolution at their instance. The borrower, sponsor and the guarantor, as the case may be, were required to "submit to such forum".

138. There is yet another difficulty. The first part of the clause makes a reference to 'court' while the later part refers to 'alternate dispute redressal'. The factual position which therefore emerges can be summed up as follows :-

(i) the clause "Governing Law & Jurisdiction" only stipulated that the substantive law which would govern any dispute resolution would be Indian laws.

(ii) So far as the territorial jurisdiction was concerned, the parties agreed to confine the jurisdiction to courts at Delhi.

(iii) The clause refers to 'courts at Delhi' as well as an 'alternate dispute resolution forum'.

(iv) 'Alternate dispute resolution' includes recourse to methods as arbitration, mediation, conciliation all of which are based on consent of both parties. It is not confined to arbitration. No specific consent for invoking arbitration of the plaintiff is available.

(v) ICICI Bank has treated this clause as conferring an absolute unilateral power on it to take recourse to arbitration without the consent of the other side. So much so, it has conferred upon itself the absolute right even to decide the nature of the alternate dispute forum without the consent of the other side.

(vi) It is an admitted position, that so far as the facility documents and the financing agreements are concerned, the parties had not executed the same. The present disputes have arisen at a stage prior thereto.

(vii) it is most important to note that the bank has claimed that it was not only given a right to create the tribunal but a sole right is conferred upon the defendant no. 1 to take recourse

to the dispute resolution. This in fact tantamounts that the plaintiff is precluded from raising disputes or making claims upon the other side.

139. The first question which therefore arises in the present case is, that even if it were to be held that the parties had agreed to dispute redressal by the alternative mode, then whether arbitration was the mechanism which has been agreed upon.

The essential ingredients of a valid arbitration are statutorily prescripted in section 7 of the Act of 1996 in the following terms :-

> 7. **Arbitration agreement.-**(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
>
> (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
>
> (3) An arbitration agreement shall be in writing.
>
> (4) An arbitration agreement is in writing if it is contained in—
>
> (a) a document signed by the parties;
>
> (b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or
>
> (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.
>
> (5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

140. This law mandates a clear agreement by the parties to submit to arbitration their disputes in respect of a defined legal relationship.

141. In para 10 of the pronouncement in Salem Advocate Bar

Association (supra), the Supreme Court has observed that t[illegible] requirement that the parties to the suit must indicate the forum of alternate dispute redressal which they would like to resort to during the pendency of the trial of the suit. Consent of the parties is required, not only to agreement to the alternate dispute redressal mechanism but also to the forum.

It therefore requires to be seen as to whether it was so here.

142. The judicial pronouncement reported at ***AIR 2000 SC 1379 Willington Associates Ltd. vs. Kirit Mehra*** throws valuable light on the several issues raised by the defendant no. 1. In this case, the agreement contained a reference to courts as well as to arbitration. In clause 4 of the agreement relied upon in this case Willington Associated Ltd. (supra), the parties had agreed that if any dispute arises in connection with the agreement, only courts in Bombay would have jurisdiction to try and determine the suit. Clause 5 of the same agreement recorded that it was also agreed by and between the parties that any dispute or difference arising in connection with the agreement 'may' be referred to arbitration. The petitioner had contended that the word 'may' in clause 5 had to be construed as 'shall'. The Apex Court was of the view that the parties had used the word 'may' not without reason. Clause 4 showed the desire of the parties that in case of disputes, the civil courts at Bombay are to be approached by way of a suit. Clause 5 merely enabled the parties that they need not necessarily go to the civil court by way of a suit but can also go before an arbitrator. For this reason, it was held that the parties did not intend that arbitration is to be the sole remedy and

that the 'parties agreed that they can also' go for arbitration if the aggrieved party does not wish to go to a civil court by way of a suit.

In para 25 of the said pronouncement, it was held that the words 'may be referred' used in clause 5 read with clause 4 led to the conclusion that clause 5 is not a firm or a mandatory arbitration clause and, that, it postulated a fresh agreement between the parties that they would go to arbitration.

143. I find that in Willington Associates Ltd. (supra), the Apex Court also considered section 7 of the Arbitration & Conciliation Act which provides the essentials of an arbitration agreement. The statute mandates that an arbitration agreement means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not.

The Apex Court referred to a pronouncement of the Rajasthan High Court reported at ***AIR 1971 Rajasthan 258 B. Gopal Das vs. Kotah Straw Board*** wherein the clause relied upon read as follows :-

> 'that in case of any dispute arisen between us, the matter may be referred to arbitrator mutually agreed upon and acceptable to you and us'

The Rajasthan High Court held that fresh consent for arbitration was necessary.

144. In the present case, the 'Governing Law & Jurisdiction' clause is an amalgamation of clause 4 and 5 which were considered by the Apex Court in Willington Associates Ltd. (supra).

145. **Alan Redfern & Martin Hunter** in **Law and Practice Of**

International Commercial Arbitration (Fourth Editio[redacted]) discussed similar clauses in agreements in Chapter 3 para 69 at page 166 of the text. The learned authors have considered clause in agreements from the angles of uncertainty and lack of mutuality as well. The same may usefully be referred to in extenso. The principles which govern construction of arbitration agreements have been stated as follows:-

> *"**(b) Uncertainty***
>
> *Similarly, as regards uncertainty, the courts of most countries generally try to uphold an arbitration provision, unless the uncertainty is such that it is difficult to make sense of it. The same is true of institutions. By way of example, the ICC has in the past accepted the following vague and imprecise formulations as references to the ICC International Court of Arbitration: "the official Chamber of Commerce in Paris, France", "the Arbitration Commission of the Chamber of Commerce and Industry of Paris", and "a Commission of Arbitration of French Chamber of Commerce, Paris" Y. Derains & E. Schwartz, A Guide to the New ICC Rules of Arbitration (1st ed., 1998).*
>
> *From time to time, however, courts and institutions are confronted with clauses which simply fail for lack of certainty. Examples are :*
>
> *"In the event of any unresolved dispute, the matter will be referred to the International Chamber of Commerce."*
>
> *"All disputes arising in connection with the present agreement shall be submitted in the first instance to arbitration. The arbitrator shall be a well-known Chamber of Commerce (like the ICC) designated by mutual agreement between both*

parties."

"Any and all disputes arising under the arrangements contemplated hereunder.... will be referred to mutually agreed mechanisms or procedures of international arbitration, such as the rules of the London Arbitration Association."

"For both parties is a decision of Lloyd or Vienna stock-exchange binding and both will subjugate to the International Chamber of Commerce."

The problem with the first example is that, even if the broad reference to the International Chamber of Commerce is taken to be a reference to the ICC's International Court of Arbitration in Paris, the clause by itself does not stipulate whether the unresolved dispute is to be settled by arbitration or by conciliation or by some other procedures. The second example provides for arbitration, but fails to provide for the appointment of an arbitral tribunal. Even if the parties agreed upon "a well-known Chamber of Commerce" as arbitrator, this would be of no avail, since arbitrators must be individuals. Moreover, it is unclear in this clause what is meant by "in the first instance". The third example requires the future agreement of the parties on "mutually agreed mechanisms or procedures". The fourth is simply meaningless."

146. The learned authors refer to such a clause as a "pathological arbitration clause". Relying on International Chamber of Commerce Arbitration by Craig Park and Paulson (third edition) two more instances (termed as "the more flagrant examples") have been pointed out which are as follows :-

"In case of dispute (contestation), the parties undertake to submit to arbitration but in case of

litigation the Tribunal de la Seine shall have exclusive jurisdiction."
and :
"Disputes hereunder shall be referred to arbitration, to be carried out by arbitrators named by the International Chamber of Commerce in Geneva in accordance with the arbitration procedure set forth in the Civil Code of Venezuela and in the Civil Code of France, with due regard for the law of the place of arbitration."
The latter clause is given as an example of a "disastrous compromise" which might lead to extensive litigation (unrelated to the merits of the dispute) to sort out any contradictions in the various laws stated to be applicable."

147. As noticed above, the "Governing Law & Jurisdiction" clause contains both options as noticed above a reference to 'court' as well as the alternate dispute resolution forum in the later. It needs no elaboration that the alternate dispute resolution forum does not necessarily mean arbitration and can even refer to mediation or conciliation or expert determination. The clause is similar to the fourth illustration set out by Martin Hunter in the extract of the text noticed above.

148. The clause relied upon by the defendant no. 1, does not set out as to whether the dispute resolution is to be mediation or concilation or arbitration or settlement through Lok Adalat. As a result, even if it were to be held that there was an agreement for dispute redressal to be by the alternative mechanism, it is apparent that there was no agreement with regard to the method of the alternative dispute redressal and that there was no agreement that the mechanism of arbitration would be resorted to for dispute redressal.

The clause does not state which is the mode of dispute resolution to be followed and would not be enforceable on grounds of

uncertainty.

149. This clause also requires to be considered from the angle of the requirements of mutuality in a valid arbitration agreement. In the first part of the clause "Governing Law and Jurisdiction" relied upon by the defendant no. 1, refers to Indian Law and it is stated that the courts at Delhi will have jurisdiction in respect of all matters relating to the financing agreements. It further states that only the ICICI Ltd. reserves a right to approach any "other alternate dispute resolution forum". It is evident that there was no agreement to refer disputes to arbitration even at the instance of defendant no. 1. It is evident that no consent of the other party to agree to refer disputes to arbitration is postulated and that the defendant no. 1 unilaterally reserved the right to approach any other "alternate dispute resolution forum" and that the others i. e. the borrower, sponsors and the guarantor shall submit to such a forum.

150. An arbitration agreement is required to be consensual between the parties thereto. The clause stipulated by the ICICI Limited gives no option at all to the other parties.

151. It was held in ***[1947] 2 All ER 260 Woolf v. Collis Removal Service and in [1986] OB 868, Pittalis v. Sherefetin*** that an arbitration agreement need not give rise to mutual obligations to refer disputes to arbitration and an agreement to arbitrate can be expressed as conferring a right upon one party only to refer disputes to arbitration.

152. In ***[1983] 1 Lloyd's Rep 424 Messiniaki Bergen***, the charter party provided that disputes were to be decided by the English Courts

but gave either party an option to refer disputes to arbit[redacted] London. On a construction of this clause, it was held that the courts will give effect to an option to arbitration. Some clauses confer an option upon parties to choose either court or arbitration. Such a clause will be treated as a `choice of court' agreement prior to the exercise of the option. The option can be exercised at any time prior to the commencement of court proceedings by the counterparty.

153. Yet another important facet which requires to be examined is the fact that arbitration results in ouster of the jurisdiction of courts. Such ouster can be only by a clause which is clearly unconditional and unequivocal.

154. I find that the arguments laid before the learned Single Judge in the judgment dated 15th May, 1991 reported at ***(1995) 33 DRJ 672*** entitled ***Bhartia Cutler Hammer Ltd. vs. AVN Tubes Ltd***. throw valuable light on these very issues. It is noteworthy that the agreement which was considered by the court gave a right of reference to arbitration and appointment of arbitrator to only one party while the decision of the arbitrator was made final and binding on both parties. The court held that such agreement is unilateral and lacks mutuality of contract and as such was not enforceable in a court of law. The arbitration clause in this case reads as follows :-

> "18.ARBITRATION Without prejudice to the above Clause 17, of the contract the Company, M/s. Avn Tubes Limited, reserves its right to go in for arbitration, if any dispute so arisen is not mutually settled within 3 months of such notice given by the Company to the Contractor. And, the award of the Arbitrator, to the appointed by the Company, M/s. AVN Tubes Limited, shall be final and binding on both the Company and the Contractor."

The several questions which have also been urged before this court were raised as follows :-

> Mr. Banati contends that by no stretch of imagination this clause can be called bilateral. In fact the remedy of this clause shows that the defendant kept to himself the power to refer its disputes only to Arbitration. But no such power of invoking the Arbitration clause are given to plaintiff. This clause is one sided, it reserves the right of arbitration only to defendant company. This shows that the contractor, i.e. the present plaintiff has no right to invoke the provisions of Clause 18. The right is only reserved by the defendant M/s Avn Tubes Limited. Such a clause cannot be called an arbitration clause. He has placed reliance on the decision of Court of Appeal in the case Baron v. SUNDERLAND Corporation reported in All England Report 1966(1) 349(351). In the case before the Court of Appeal, the question for consideration was that if there was a want of mutuality, can such an agreement be called an arbitration agreement? The answer given was in the negative. therefore. What the Court of the appeal held was that in order to invoke the arbitration clause, there has to be mutuality. But in the case in hand, the right had been reserved by the defendant of taking its disputes only to arbitration and nowhere the right was given to the contractor i.e. the plaintiff for invoking the arbitration clause. therefore, apparently this clause suffers for want of mutuality. He has then placed reliance on the decision of the Calcutta High Court in the case of Union of India v. Ratilal R. Taunk reported in 2nd 1966(2) Calcutta, Page 527. In the case before the Calcutta High Court, a contractor had instituted a suit for recovery against the UOI pleading therein that the contract agreement was voidable because of mutual mistake of facts and alternatively it was voidable as it was based on mis-representation. UOI took up the plea that the suit was not maintainable because of arbitration clause embodied in the contract document. The question before that Court was whether an arbitration agreement is unilateral if one of the party only had the option to refer the disputes and differences to arbitration; whether such option can be validly accepted in law at the instance of other parties. It was held that according to Section 2(a) of the Arbitration Act. When an arbitration agreement gives an option or liberty to only one of the parties to agree to submit, present or

future differences to arbitration, it is not a arbitration agreement, there must be an unqualified or unconditional agreement in favor of all the parties to exercise the option to submit present or future differences to arbitration. In order to be valid and binding, such agreement must be bilateral and not unilateral. Mr. Banati, therefore contended that this arbitration clause 18 is unilateral because by this clause defendant reserved to itself the right to go in for arbitration. This clause does not confer any right on the plaintiff/contractor to invoke this clause. therefore such a clause cannot be called an arbitration clause. There is no binding arbitration agreement between the parties nor the Court can stay the suit on the basis of clause 18. Relying on the Calcutta decision Mr. Banati contended that even if defendant has chosen to invoke the provisions of this clause, still such a clause would be void for want of mutuality. On the other hand Ms. Kumkum Sen appearing for the defendant contended that there is no question of want of mutuality in this case. The parties agreed to refer their disputes arisen between them to arbitration, therefore, no fresh consent was necessary. To strengthen her argument. She placed reliance on the Division Bench judgment of this Court in the case of P.C. Aggarwal, Appellant v. K.N. Khosla and others, respondents MANU/DE/0048/1974. Relying on the observation in that case, Ms. Sen contended that the consent by the plaintiff had been given in advance for submission to arbitration. This consent makes this clause bilateral and not unilateral this consent was given in advance it can be now acted upon. The defendant has infact already acted upon the same. The previous consent will bind the plaintiff throughout."

Upon consideration of the various submissions, the court held as follows:-

> The language used in Clause 18 clearly show it is one sided. Only disputes of defendants could be referred to Arbitration. The term arbitration agreement has been defined in the act which presupposes that the parties must agree mutually that in case of any dispute having arisen between them, the have the option to invoke the said clause. Therefore, the point for consideration before the Division Bench was not as in this case. In this case right is only given to the defendant to invoke the arbitration clause without any option to plaintiff. That being so this clause 18 cannot be called bilateral. Prior giving of

> consent for such a clause would not make it bilatera
> The facts of this case are somewhat similar to the facts of Calcutta High Court which decision will squarely apply to the facts of this case. In view of my above observation I am of the opinion such a clause as clause 18 cannot be called an arbitration clause. On the basis of clause 18 suit cannot be stayed. Clause 18 is not a valid arbitration clause hence the application of the defendant deserve dismissal."

155. The judgment of the learned Single Judge was assailed by way of an appeal and affirmed by the Division Bench in the pronouncement reported at ***1992 (2) Arb.L.R. 8 A.V.N. Tubes Ltd. vs. Bhartia Cutler Hammer Ltd.*** The Division Bench concluded that the cumulative effect of the three portions of the clause reproduced above was that the right to go in for arbitration; raising of disputes and the right to appoint the arbitrator was given only to AVN Tubes ltd. which amounted to the same being a unilateral agreement. For this reason, it was held that such an agreement was not enforceable in law.

156. These very principles have been reiterated in the pronouncements of this court reported at ***2005 (116) DLT 559 Emmsons International vs Metal Distributors*** and the Division Bench's decision reported at ***UOI vs. Bharat Engineering ILR 1977 Delhi 57***.

157. In view of the above discussion, it follows that such a unilateral right as is conferred on the ICICI-defendant no.1 by the clause "Governing Law & Jurisdiction" is void also for reason that it is contrary to section 28 of the contract Act. Therefore, assuming that the clause relied upon constituted an arbitration agreement, in the light of the binding principles noticed above, it has to be held that the same is also not enforceable in law for lack of mutuality as well as uncertainty.

158. Even if there was a valid arbitration agreement between the parties, another question which begs an answer is as to whether the arbitral tribunal as constituted, by two other parties, would be covered under the forum referred to in the clause. In the instant case, the defendant no.1 has approached a tribunal constituted by the defendant no.2 and the Lucent Technologies Hindustan Pvt. Limited for resolving the disputes which have arisen between them. The plaintiff was not a party to the constitution of this tribunal. This tribunal is also concerned with disputes between the two parties who have constituted it.

159. The very expression alternate dispute redressal forum, would be indicative of the fact that the reference contained therein was to a platform or agency which was engaged in dispute redressal in the nature of the Indian Council of Arbitration; Mediation & Conciliation Centres or such like bodies.

However, in view of the decision on the other aspects, it is not necessary for me to deal with this aspect.

III

160. On behalf of the defendants, it is urged that in view of the provisions of section 5, 8(3), 16(5) and 13 (4) of the Arbitration Act, that in view of this statutory prohibition, the suit is legally barred. It is to be noted that **IA No. 2758/2005** has been filed by the defendant no. 1 under Order 7 Rule 11 CPC praying for rejection of the plaint on this ground.

161. This brings me to the third issue that assuming the existence of

a valid arbitration agreement between the parties, whether s , 8(3) and 16(5) of the Arbitration and Conciliation Act, 1996 constitute a legal bar to the maintainability of the suit once the arbitrators have entered upon the arbitration and, as a consequence, the plaint is liable to be rejected under Rule 11 of Order 7 of CPC.

162. On behalf of the defendants, reliance is placed on the pronouncements reported at ***(2002) 2 SCC 388 Konkan Railway Corpn. Ltd. vs. Rani Construction Ltd., (2004) 3 SCC 447 Secur Industries Ltd. vs. Godrej & Boyce Manufacturing Co. Ltd. & Anr.*** ;***(2005) 8 SCC 618 SBP & Co. vs. Patel Engineering***, on ***Babar Ali vs. UOI 2000 (2) SCC 178*** ; ***(2002) 1 SCC 203 Kalpana Kothari vs. Sudha Yadav*** ; ***CDC Financial vs. BPL Communications (2003) 12 SCC 140*** and a judgment dated 19th September, 2005 passed in **CS(OS) No. 30/2005** ***Krishna Finfold Pvt. Ltd. vs. Sitaram*** by a learned Single Judge of this court upheld by the Division Bench in FAO(OS) No. 335-36/2005 by the order dated 21st October, 2005. It is stated that the challenge to these orders was rejected by the Supreme Court and Special Leave Petition (Civil) 22555-56/2006 was dismissed on 13th February, 2007.

163. Mr. Rakesh Dwivedi, learned senior counsel for the defendant no. 1 has urged that once arbitration has commenced, the only provisions permitting court intervention are sections 9, 14(2), 27 and section 37(2)(b) of the Arbitration Act, 1996 and that the court cannot intervene in any other circumstance while the arbitration is pending. In support of this submission reliance is placed on the pronouncements reported at ***(2005) 8 SCC 618 S.B.P. & Company***

vs. Patel Engineering ; (2003) 12 SCC 140 C.D.C. Fina ***B.P.L Communications; AIR 2000 P&H 276 Pappu Rice Mills vs. Punjab State Coop. Supply & Marketing Federation and 2003 Arb.L.R. 470 United India Insurance Co. vs. Sundaram Finance Ltd.***

164. In reply, extensive submissions have been made by Mr. Arun Jaitley, learned senior counsel appearing for the plaintiff, that so far as the existence of an arbitration agreement is concerned, the courts are given primacy under Section 8 of the Arbitration & Conciliation Act, 1996. It is pointed out that on the issue with regard to the validity of an arbitration with regard to enforcement of foreign awards again courts are given primacy under Section 45 of the statute. It has been urged that inasmuch as, even if there is a valid existing and binding agreement, yet a party to the arbitration agreement, seeking redressal of a dispute may elect not to invoke the dispute redressal mechanism by way of arbitration and may take recourse to the remedy of a civil suit or civil proceedings before the courts. For this reason, it is urged that the submission that the provisions of Arbitration & Conciliation Act, 1996 bars the remedy of a suit to parties to an arbitration agreement, is misconceived.

165. It has further been urged, that the right to maintain a suit is granted under the statute and therefore can be taken away only by a specific statutory prohibition and no such statutory provision is in force.

166. It is well settled that an application for rejection of a plaint has to be decided on demurer. For the purposes of consideration of this

question, it may be assumed that there exists a valid and legal arbitration agreement and further that a suit has been filed in respect of claims which are the subject matter of such agreement.

167. Inasmuch as the defendants have contended that the present suit is barred in terms of section 5, 8 and 16 of the Arbitration Act, 1996, it would be useful to refer to the relevant provisions which read as follows:-

> "**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.

> "**8 - Power to refer parties to arbitration where there is an arbitration agreement -**
>
> (1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.
>
> (2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.
>
> (3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

> "**16 - Competence of arbitral tribunal to rule on its jurisdiction -**
>
> (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose, -

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) 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.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34."

168. So far as interpretation of the statutory provisions are concerned, the legal position has been succinctly stated in a plethora of judicial pronouncements, the relevant ones placed before this court are considered hereafter.

169. The nature of the remedy which is available to a person who is claiming existence of an arbitration agreement with regard to the subject matter of a suit filed against him as well as the manner in which it is to be approached in view of the statutory scheme need to

be examined before proceeding any further.

170**.** The Bombay High Court had occasion to consider an issue with regard to a plea of identity of the subject matter before in the suit before the court with that of the arbitration agreement. The court was also concerned with the requirements of section 8 of the Arbitration Act in this case. The judgment rendered by the Bombay High Court is reported at ***AIR 2002 Bom.8*** entitled ***Garden Finance Ltd. vs. Prakash Industries Ltd.*** In para 9 of the pronouncement, the court has authoritatively answered these issues thus :-

> "9. It is clear from these observations that one of the aspect to be considered by the Court while considering the application for referring the parties to arbitration is that the subject matter of the action is the same as the subject matter of the arbitration agreement. Now, this requirement will involve reference to the contents of the plaint as also to the arbitration agreement and the manner in which the applicant wants the Court to read the averments made in the plaint as also the recital in the arbitration agreement. It is obvious that the Plaintiff who has brought the action would also have the right of audience on such an application. In order to afford the Plaintiff a complete opportunity of being heard on an application under Section 8 of the Arbitration Act. In my opinion, it would have to be held that the party which seeks to refer the dispute to the Arbitrator has to make a written application for that purpose, so that the Plaintiff, who has instituted the suit, knows exactly the grounds on which the reference is sought. In the present case, though the Defendant has been served with this suit long back, there is no written application made. During the course of hearing, yesterday, when this aspect was pointed out, the learned Counsel stated that he should be given one day's time to make an application. Though the hearing of the matter did not conclude yesterday, and the Defendant got time which he was seeking to make an application, even today no such application has been made. Thus, there is no application made under Section 8 for referring the dispute to the arbitration and therefore as there is no application

made for referring the dispute to the arbitration provisions of Section 5 do not come into play and do not operate. It is further to be seen that even if it is assumed that an oral application for referring the parties to Arbitrator can be entertained, it is clear from the observations of the Supreme Court quoted above in its judgment in P. Anand's case that one of the essential requirement is that the subject matter of the action is the same as the subject matter of the arbitration agreement. Thus, according to the Supreme Court in order that under Section 8 matter can be referred to arbitration, there has to be identity of the subject matter of the suit and the arbitration agreement. As pointed out above, the subject matter of the suit is two agreements namely the agreement of lease of equipment between the Plaintiff and the Defendant No. 1 as also the agreement of guarantee between the Plaintiff and the Defendant No. 2, whereas, the subject matter of the arbitration agreement is only the lease agreement and not the guarantee agreement. Therefore, it cannot be said that there is an identity of subject matter of the suit and the arbitration agreement. In this view of the matter, in my opinion, section 5 of the Arbitration Act would also not come in the way of this Court entertaining the present suit."

171. Perusal of the pronouncement in ***(2004) 3 SCC 447 Secur Industries Ltd. v. Godrej Boyce Manufacturing Co.Ltd. & another***, relied upon by the defendant, would show that there was no dispute to the existence, validity or bindingness of an arbitration agreement. The suit had been brought by the respondent no. 1 inter alia for a declaration that the claimed petition filed by the appellant before the Council, (the statutory arbitrators) was ultravires of the provisions of the Act and therefore it is legal, null and void. In this background, the court construed the provisions of the Arbitration Act, 1996 and held that if a suit is filed in a matter which is the subject matter of an arbitration agreement, it is incumbent on the court to refer the parties to arbitration under section 8(1) of the 1996

enactment.

The core issue thus was that the suit had been filed in respect of a matter which is the subject matter of an arbitration agreement. The arbitration agreement is also required to be placed before the court in accordance with section 8 of the 1996 Act. In view of the fact that the the subject matter of the present suit is a claim by a party who has no right to invoke the remedy of alternate dispute redressal under the "governing law and jurisdiction" clause, it is evident that there is no identity of subject matter of the two proceedings. The principles laid down in this authoritative pronouncement would therefore not apply to the instant case.

172. In ***(2000) 2 SCC 178 Babar Ali vs. UOI,*** also relied upon by the defendant, the court rejected a challenge to the vires of the Arbitration Act of 1996 and held that merely because the court could consider the question of jurisdiction of an arbitrator only after the passing of the award, it cannot be a ground for contending that such an order under section 16(5) is not subject to any judicial scrutiny and that it was open for the legislature to lay down the time and manner of the judicial scrutiny.

It is necessary to note that this judgment did not arise in the factual background placed before this court.

168. So far as the pronouncement reported at ***(2002) 1 SCC 2003 Kalpana Kothari vs. Sudha Yadav*** is concerned,the court held as follows:-

> "8. ..... In striking contrast to the said scheme underlying the provisions of the 1940 Act, in the new 1996 Act, there is no provision corresponding to Section 34 of the old Act and Section 8 of the

> 1996 Act mandates that the Judicial Authority before which an action has been brought in respect of a matter, which is the subject-matter of an arbitration agreement, shall refer the parties to arbitration if a party to such an agreement applies not later than when submitting his first statement. The provisions of the 1996 Act do not envisage the specific obtaining of any stay as under the 1940 Act, for the reason that not only the direction to make reference is mandatory but not withstanding the pendency of the proceedings before the Judicial Authority or the making of an application under Section 8(1) of the 1996 Act, the arbitration proceedings are enabled, under Section 8(3) of the 1996 Act to be commenced or continued and an arbitral award also made unhampered by such pendency. We have to test the order under appeal on this basis."
>
> (Emphasis supplied)

From the above, it is apparent that the court was considering the power of the court under section 34 of the Arbitration Act of 1940 as against the powers of the court while considering an application under section 8 of the Act of 1996. This judgment would also show that recourse to section 8 of the Arbitration Act, 1996 was mandatory if a party was claiming that there was an arbitration agreement based whereon the court is required to consider whether the subject matter of the suit is covered under the claimed agreement. No such application has been filed in the present proceedings.

173. In ***(2003) 12 SCC 140*** **CDC Financial Services (Mauritius) vs BPL Communication Ltd. & Ors.**, the arbitrator was appointed in proceedings under section 11 of the Arbitration Act, 1996. The orders passed by the arbitrator were repeatedly challenged by way of writ petitions under article 226 of the Constitution of India before the high court which intervened in the matter. In this background, the court observed that in view of sections 5 of the 1996 enactment,

courts are restrained from interferring with the arbitration in the manner provided in the 1996 statute and that the orders passed by the court would amount to a violation of this mandate. This position was not disputed by the respondents and therefore the orders passed by the High Court were set aside. The judgment was rendered in the facts of the case.

There can be no dispute with the principles laid down by the Apex Court or the legislative mandate. At the same time, the legal principles have to be applied to the facts of the case.

174. In a landmark pronouncement reported at (***2003) 5 SCC 531 Sukanya Holdings Pvt. Ltd. vs. Jayesh H. Pandya & Anr.*** the Supreme Court has clearly held that the Arbitration Act does not oust the jurisdiction of the civil court to decide the dispute in a case where parties to the arbitration agreement do not take the steps stipulated under section 8 aforenoticed. In this behalf, the court considered the statutory provisions and held thus :-

> "12. For interpretation of Section 8, Section 5 would have no bearing because it only contemplates that in the matter governed by Part-I of the Act, judicial authority shall not intervene except where so provided in the Act. Except Section 8, there is no other provision in the Act that in a pending suit, the dispute is required to be referred to the arbitrator. Further, the matter is not required to be referred to the arbitral tribunal, if-(1) the parties to the arbitration agreement have not filed any such application for referring the dispute to the arbitrator; (2) in a pending suit, such application is not filed before submitting first statement on the substance of the dispute; or (3) such application is not accompanied by the original arbitration agreement or duly certified copy thereof. This would, therefore, mean that Arbitration Act does not oust the jurisdiction of the Civil Court to decide the dispute in a case where parties to the Arbitration Agreement do not take appropriate steps as contemplated under Sub-sections (1) & (2) of Section 8 of the Act.

13. Secondly, there is no provision in the Act that wh the subject matter of the suit includes subject matter of the arbitration agreement as well as other disputes, the matter is required to be referred to arbitration. There is also no provision for splitting the cause or parties and referring the subject matter of the suit to the arbitrators.

14. Thirdly, there is no provision - as to what is required to be done in a case where some parties to the suit are not parties to the arbitration agreement. As against this, under Section 24 of the Arbitration Act, 1940, some of the parties to a suit could apply that the matters in difference between them be referred to arbitration and the Court may refer the same to arbitration provided that the same can be separated from the rest of the subject matter of the suit. Section also provided that the suit would continue so far as it related to parties who have not joined in such application.

15. The relevant language used in Section 8 is--"*in a matter which is the subject matter of an arbitration agreement*". Court is required to refer the parties to arbitration. Therefore, the suit should be in respect of '*a matter*' which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced - "as to a matter" which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Section 8. The word '*a matter*' indicates entire subject matter of the suit should be subject to arbitration agreement.

16. The next question which requires consideration is--even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible under Section 8 of the Act? In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action that is to say the subject matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject matter of an action brought before a judicial authority is not allowed."

Thus, application of section 8 requires that there should be a

valid arbitration agreement between the parties to the suit, the entire subject matter of the suit should be covered thereunder, there can be no bifurcation of either the parties or the subject matter of the suit.

175. Somewhat similar to the factual narration in the instant case with regard to the challenge to the maintainability of the suit on the ground that there was an arbitration agreement raised before this court was considered in the judgment reported at ***105 (2003) DLT 467 : MANU7/DE/0514/2003 Akshay Kapur & Ors. vs. Rishav Kapor & Ors***. The defendant had filed an application under section 8 of the Arbitraiton & Conciliation Act and it was further contended that principles of waiver, acquiescence and estoppel read with section 5 of the Act of 1996 were attracted since the plaintiff had participated in the arbitral proceedings with full knowledge and without any demur whatsoever. On a detailed consideration of the entire law, the court had laid down the clear distinction between the jurisdictional dispensation under the Arbitration Act, 1940 and the 1996 regime. It was observed that the ambit of section 8 under the 1996 Act is much wider than the section 34 of the 1940 Act. Reliance was placed on the pronouncement of the Apex Court in AIR 2002 SC 404 Kalpana Kothari vs. Sudha Yadav & Ors. wherein the Apex Court has observed that in striking contrast to the said scheme under the Act of 1940, there is no provision corresponding to section 34 of the new Act. Section 8 of the 1996 Act mandates that the judicial authority before which an action has been brought in respect of a subject matter which is the subject matter of an arbitration agreement, shall refer the

parties to arbitration if a party to such an agreement applies  than when submitting his first statement. The provisions of the 1996 statute do not envisage the specific obtaining of any stay for the reason that not only the direction to make the reference is mandatory but notwithstanding the pendency of the proceedings before the judicial authority or the making of an application under section 8(1) of the 1996 Act, under section 8(3) the arbitration proceedings are enabled to be commenced or continued and an arbitral award also made unhampered by such pendency. On the very issue raised before this court challenging the maintainability of the suit including the pleas of estoppel against the present plaintiff, the observations of Vikramjit Sen, J in this judgment throw valuable light and read as follows:-

> "10. Significantly, before referring the parties to arbitration under Section 8 of the present Act, the Court must be satisfied that the action pending before it is 'the subject of an arbitration agreement'. If the Court or judicial authority comes to the contrary conclusion, it must continue and conclude the proceeding before it. To my mind, therefore, a little change has been brought about by the amending Act. It also seems to me that while it is no longer possible for a party to have the arbitrability of a dispute decided by a Court, the same position can be brought about through the device of a legal action such as the present suit. In the regime of the 1940 Act it was felt that such questions could not be left to the Arbitrator to decide and rule upon; he could not be a judge in his own cause, so to speak. Since the intention of the legislature to ensure the continuance of arbitral proceedings is palpably present, giving the Arbitrator the untrammelled power to decide all questions touching upon his jurisdiction, I would have readily read down the opening words of Section 8 to achieve this objective. But such an interpretation would do violence to and would be irreconcilable with the plain meaning of the words used therein, and thereforee I shall refrain from undertaking such an exercise. The essence of the erstwhile Section 34, as extracted in the Kothari case (supra) makes the judgment's ratio relevant even in respect of the new Act.

Xxx xxx

12. The phrase 'which is the subject matter of an agreement' is not a mere surplasage and has been carefully cogitated upon in numerous precedents including P. Anand Gajapathi Raju and Others vs . P.V.G. Raju (died) and others, MANU/SC/0281/2000 : [2000]2SCR684 where it was observed that (i) if the agreement was entered into during the pendency of an appeal it should be given effect to; (ii) in the absence of such agreement there is no provision enabling Court to refer the parties to arbitration; (iii) that if a reference is made the civil action comes to an end; and (iv) that the language of Section 8 is peremptory, enjoining that a reference be made by the judicial authority. It has also been held that it is impermissible to draw an inference about the existence of an agreement to arbitrate upon disputes, or it come to such a conclusion because of acquiescence of parties, especially since it must be reduced to writing as spelt out in Section 7(3) of the Act. The situation would appreciably be different if this question had been heard and disposed of in unequivocal and clear terms by the learned Arbitrator. In such an event the Plaintiff would have to challenge the finding after the Award is published."

176. In a case reported at ***123 (2005) DLT 532 Bharti Televentures Ltd. vs. DSS Enterprises Pvt. Ltd. & Ors***., this court had occasion to consider the impact of section 8 of the Arbitration Act of 1996. The court considered several judicial precedents including the above judicial precedent. It was held on the subject that section 8 of the Arbitration & Conciliation Act, 1996 introduced into the statute, the doctrine of election of remedies i.e. resolution of disputes either through arbitration or through civil action. It was held that in case a defendant was desirous of compelling the plaintiff to the dispute resolution mechanism which the parties had chosen by way of arbitration, it was necessary to comply with the statutory requirements of section 8 of the Arbitration & Conciliation Act. Such intention is statutorily required to be declared right at the inception

of the proceeding before the civil court. The consideration o  r on the subject and the findings returned lend guidance on the issue raised by the defendant and deserve to be considered in extenso. The consideration by the court was in the following terms :-

> “16. Section 8 of the Arb. & Con. Act introduces into the statute the doctrine of election of remedies, i.e., the resolution of disputes either through arbitration or through civil action. In Food Corporation of India v. Sreekanath Transport, MANU/SC/0377/1999, the FCI had filed a civil suit despite the existence of an exclusion clause in the Agreement. The Apex Court took the view that FCI had relinquished or abandoned its right of proceedings pursuant to the said clause. The decision in Magna Leasing Limited v. NEPC Micon Limited and Anr., has already been relied upon by me in Raj & Associates and Anr. v. Videsh Sanchar Nigam Limited and Ors., 2004 (2) Arb. L.R. 614 (VSNL case). The situation turned out to be the reverse of that which is normally encountered; the Plaintiff had filed a suit which it subsequently attempted to withdraw with the intention of pursuing its remedy through arbitration. The second Defendant, RITES, had invoked Section 8, whilst simultaneously objecting to its impleadment on the strength of Section 230 of the Contract Act, and its contention had been upheld. VSNL had filed a Counter Claim, and the Plaintiff was refused leave to conditionally withdraw the suit, observing that it had elected not to take recourse to arbitration for adjudication of its claims. My attention had not been drawn to the fortifying opinion of the Division Bench in Pran Nath Panjan v. State of Jammu & Kashmir, AIR 1972 J & K 11, found in these words -
>
> "But where the party himself chooses to invoke the jurisdiction of the civil court, submits to it, does not avail of the arbitration clause ... he cannot afterwards claim the benefit of the arbitration clause and ask the Court to enforce the said clause against the second party".
>
> 17. Section 8 of the Arb. & Con. Act came up for consideration in P. Anand Gajapathi Raju and Ors. v. P.V.G. Raju (Dead) and Ors., MANU/SC/0281/2000 and it was laid down that the party seeking to enforce the arbitration clause must file/move an application for this purpose. This is also the expressed view of the Apex Court in Sukanya Holdings (Supra). In Sudarshan Chopra and Ors. v. Company Law Board and Ors., 2004(2) Arb. L.R. 241(P&H) (DB) the Division Bench of the Punjab & Haryana High Court rejected the argument that the

Arbitrator alone was competent under Section 16 of tl Arb. & Con. Act to opine on the existence of an arbitration agreement. It also appears that the Court thought it necessary to file a formal application under Section 8 of the Arb. & Con. Act. In Global Marketing Direct Limited v. GTL Limited and Anr., 2004(3) Arb. L.R. 56 (Bombay) the learned Judge had noted the need to file an application under Section 8 where Part I of the Arb. & Con. Act applied whilst recording that there was no such formality in Section 45. It was also observed that the civil court would continue to have jurisdiction until it decided that issue. Reliance on Food Corporation of India and Anr. v. Yadav Engineer and Contractor, AIR 1982 SC 1302, may have become anachronistic since the wordings of this Section are dissimilar to those employed in Section 34 of the Arbitration Act, 1940; the former speaks of a "first statement on the substance of the dispute" whilst the latter had referred to the "written statement" and sub-section (2) of the former explicitly contemplates an "application". It is obvious that the Court was not satisfied that a case for its interference had been made out in Brawn Laboratories Limited v. Fittydent International GMBH and Anr., MANU/DE/0181/2000, which conversely implies that where a case is disclosed the court can interfere in the arbitration proceedings. In Akshay Kapur and Ors. v. Rishav Kapur and Ors., MANU/DE/0514/2003, I have expressed the opinion that on the filing of a Section 8 application this Section would apply only if the suit is directly covered by the arbitration clause. I had entertained the suit for declaration and injunction pertaining to a Valuation Report as it was distinct from the disputes that were to be decided through the aegis of arbitration. In Vijay Vishwanath Talwar v. Mashreq Bank, PSC and Ors., MANU/DE/1300/2003, my learned Brother R.C. Chopra, J. has similarly declined to dismiss a civil suit in respect of an arbitration clause which allegedly had been agreed to under duress and coercion. In Jagson International Ltd. v. Frontier Drilling, MANU/DE/0604/2004 Chopra, J. similarly dismissed an application under Order XXXIX of the CPC, allowed the Defendant's application under Section 45 of the Arb. & Con. Act, after observing that the difference in the language of that Section and Section 8 was conspicuous and was of significance. My learned Brother was of the opinion that a party should not be blindly sent to a foreign land until the Arbitration Agreement was found not to be null and void, inoperative or incapable of being performed. On facts it was found that the Plaintiff was attempting to wriggle out of the Arbitration commitment on frivolous grounds. This conclusion was arrived at after consideration of the decision of the Apex Court in

> Ganpati Raju (supra), Pinkcity (supra), Sukanya (supra) and Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd., MANU/SC/0401/1999, in which it has been opined that Section 8 of the Arb. & Con. Act envisages the reference to the Arbitrator of only those disputes which the Arbitrator is competent or empowered to decide. In Shivnath Rai Har Narain v. Italgrani Spa, MANU/DE/0705/2001, it has held that where the factum of existence of the agreement is in dispute this question should be decided by the Court as a preliminary issue whenever Part II of the Arb. & Con. Act is attracted. If enquiries of this nature are envisaged in Section 8, a fortiori it is mandatory under Section 45 of the Arb. & Con. Act. Whereas in the former the Court's scrutiny should be calculated to return a prima facie finding, in the latter it should be in greater detail, short of deciding contentious issues of fact going to the root of the disputes."

177. In ***85 (2000) DLT 2004 Braun Laboratories Ltd. vs. Fittydent International GMBH & Anr.,*** a plea was raised that an arbitration agreement was invalid as it was contained in an agreement which was entered into subject to requisite approval of the Government of India and/or the Reserve Bank of India as the case may be and such permission was not granted. On this issue, the court had observed that under the Act of 1996, there is no bar on the arbitral tribunal to rule on its jurisdiction including ruling on its objection with regard to validity of the arbitration agreement and for that purpose an arbitration clause which forms a part of a contract shall be treated as an agreement independent of the other terms of the contract; and a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

No such question arises in the present case.

178. Sections 8 and 16 of the Arbitration Act have to be harmoniously

construed. Sections 8 and 16 are independent proceedings. Section 16 confers jurisdiction upon an arbitral tribunal to rule on its own jurisdiction with respect to the existence or validity of the arbitration agreement as well, a similar power is conferred under section 8 upon a judicial authority before whom an action is brought in a matter which is the subject matter of an arbitration agreement.

179. The absolute proposition urged by the defendant that in the event of there being a valid arbitration agreement between the parties, the dispute resolution can only be by way of a recourse to arbitration, is not supported by the weight of judicial authority. There is another perspective to this aspect. In several cases, it has been held that a party's claim to get the matter adjudicated through arbitration may stand waived by way of the conduct in the proceedings.

180. In this behalf, the pronouncement reported at ***2001 (59) DRJ 463 Palinder Singh Bedi vs. The National Rifle Association of India & Anr.*** is relevant. The court held that from the conduct of the defendants in the suit, it had to be held that their right to move an application to get the matter adjudicated through arbitration stands waived. In para 11 of the pronouncement, it was held that under section 8 of the Act of 1996, the party had to make an application in the court, alleging existence of an arbitration agreement 'not later than submitting his statement on the subsistence of the dispute'. No application had been made. As the defendants did not choose to file the application under section 8, the court could deal with the matter notwithstanding the existence of an arbitration clause. The

defendant's conduct in seeking repeated adjournments for filing its written statement was also construed as amounting to a waiver of the right to get the matter adjudicated through arbitration under section 8 of the Act. The court rejected the defendant's application for stay of the suit.

181. In a pronouncement by a learned Single Judge of this court reported at ***2004 (1) Arb.L.R. 399 (Delhi) Vijay Vishwanath Talwar vs. Mashreq Bank, PSC & Ors.***, the court was required to consider the defendant's application under section 8 read with section 5 of the Act wherein the defendant prayed for reference of the parties to arbitration. Placing reliance on the pronouncement of the Apex Court in Sukanya Holdings Pvt. Ltd.(supra) it was held that the alleged arbitration agreement appears to have been signed under pressure, coercion and duress and that the entire subject matter of the suit was not covered by the arbitration agreement. For this reason, the court dismissed the application filed by the defendant.

182. The defendants have submitted that section 8 applies only to the pre-reference stage and has no applicability if the arbitrator has entered into arbitration. For this reason, it is contended that no application is necessary.

This submission however fails to take into consideration the express provisions of the statute. Section 8 of the Arbitration & Conciliation Act, 1996 mandates that the court would refer the parties to arbitration. It is not a direct reference of disputes to arbitration. If the arbitration has not commenced and an application under section 8 of the Arbitration Act is brought by a defendant in the suit which is

filed, the court while allowing the application, would simply stay the suit leaving the parties with the option to arbitrate, which is their chosen forum of dispute resolution. In such an eventuality, the party who brought the application may decide not to arbitrate as there is no compulsion upon it to do so. This would leave the other party in a difficulty which was clearly not the intent of the legislature.

183. Learned senior counsel appearing for the plaintiff has pointed out yet another situation which may result if the argument advanced on behalf of the defendants were to be accepted. As per the provisions of section 21, arbitration is deemed to commence only when one party requests that the dispute be referred to arbitration. This would result in the untenable position that the power of the civil court could be ousted merely by sending a request for arbitration without arbitrators having been actually appointed or the reference having been entered upon by any arbitrators.

184. In ***(2005) 8 SCC 618 SBP & Co. vs. Patel Engineering*** relied upon by the defendants, the Apex Court was concerned with the nature and scope of the power of the Chief Justice under section 11 of the Act of 1996. The court held that it could not be accepted that there was exclusive conferment of jurisdiction on the arbitral tribunal to decide the existence or validity of the arbitration agreement. In this behalf, in para 19 it was held thus :-

> "19. <u>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.</u> 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 incl the court as defined in Section 2d(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. 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, 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."

185. Learned senior counsel for the defendant no. 1 has placed reliance on the observations of the Apex Court in para 32 of this judgment. However these observations need to be read in the context of the issue which was raised before the Apex Court which was with

regard to the power of the Chief Justice while considering th[illegible] under section 11 of the Act. From the above, it is evident that the court has rejected the plea that the Arbitration & Conciliation Act, 1996 confers exclusive jurisdiction to rule on this issue on the arbitral tribunal or that it excludes the jurisdiction of the court to do so.

186. Section 8(3) of the Arbitration Act, 1996 permits continuation of the arbitration proceedings which pre-supposes pendency of the arbitration.

187. So far as the scope of section 16 is concerned, the issues raised by learned counsel for the defendant no. 1 stand authoritatively answered by the pronouncements of the Apex Court reported at ***AIR 2000 SC 1379 Willington Associates Ltd. vs. Kirit Mehta,*** wherein an objection was raised with regard to jurisdiction of the court to examine an issue raised by the party with regard to the existence of an arbitration agreement in a proceedings under section 11 of the Arbitration & Conciliation Act. In that case also the petitioner placed reliance on section 16 of the Arbitration & Conciliation Act to urge that only the arbitral tribunal can decide about the 'existence' of the arbitration clause. On this issue, the court pointed out that such an interpretation put on section 16 was unacceptable inasmuch the legislature had used the expression 'may rule', enabling the arbitral tribunal to rule on its own jurisdiction. It was held that the jurisdiction of the Chief Justice or his designate while considering an application under section 11 for reference to arbitration would not stand excluded from consideration of such an objection.

188. The pronouncement of the Bombay High Court reported at ***1999 Bom 118 United India Assurance Co. Ltd. vs. Kumar Texturisers*** relied upon by the defendant does not consider the authoritative pronouncements of the Apex Court which have been noted hereinabove. The case before the Bombay High Court is also distinguishable on the facts of the present case. The principles laid down by the Apex Court bind this court. It is therefore not open to the defendants to deny the jurisdiction of this court to consider the issue with regard to the existence, validity and bindingness of an alleged agreement covering the subject matter of the dispute which has not even been placed before this court.

189. Apart from the above submissions, reliance is placed on pronouncements reported at ***(2003) 1 SCC 557 Saleem Bhai & Ors. vs. State of Maharashtra & Ors***.; ***(1986) Supp. SCC 315 Azhar Hussain vs. Rajiv Gandhi; (2004) 3 SCC 137 Sopan Sukhdev Sable & Ors. vs. Assistant Charity Commissioner & Ors.*** and ***(1994) 1 SCC 502 Svenska Handelsbanken & Ors. vs. Indian Charge Chrome Ltd. & Ors.***

190. Mr. Sandeep Sethi, learned senior counsel for the defendant no. 2 has in addition submitted that on a reading of the plaint, it is evident that by way of the present suit, the plaintiff has laid a challenge to the orders passed by the arbitral tribunal. It is submitted that the same is expressly barred. Placing reliance on the pronouncement of the Apex Court in ***(1977) 4 SCC 467 T. Arivandandam vs. T.V. Satyapal & Anr.*** and ***(2005) 5 SCC 548 N.V. Srinivasa Murthy & Ors. vs. Mariyamma (Dead) By***

Proposed LRs. & Ors., it is urged that this court has to exa
essence of the plaint.

191. In ***(1977) 4 SCC 467 T. Arivandandam vs. T.V. Satyapal & Anr.,*** the court was considering the conduct of a petitioner indulging in a series of legal proceedings to avoid an eviction order passed against him and had ultimately filed a suit. In this background, the court held that a meaningful reading of the plaint, rather than a formal reading is required to be carried out in order to ascertain the nature of the pleading. In the intant case, this principle is applied.

192. In ***(2005) 5 SCC 548 N.V. Srinivasa Murthy & Ors. vs. Mariyamma (Dead) By Proposed LRs. & Ors.***, the court again carefully examined the plaint to ascertain the foundation of the suit which was held to be barred by limitation as well as under the provision of Order 2 Rule 2 of the CPC. No such objection is raised herein.

The pronouncement of the Apex Court reported at ***(2003) 1 SCC 557 Saleem Bhai & Ors. vs. State of Maharashtra & Ors***. is law for the principle that for the purposes of deciding an application under clauses (a) and (d) of rule 11 order 7 CPC, the averments in the plaint are germane; the pleas taken by the defendants in the written statement would be wholly irrelevant at that stage and therefore a direction to file the written statement without deciding the application under order 7 rule 11 CPC cannot but be a procedural irregularity touching the exercise of jurisdiction of the trial court.

No such issue arises for consideration in the present case.

193. The defendants also seek to derive strength from the

pronouncement of the Apex Court in ***(1986) Supp. SCC 31 Hussain vs. Rajiv Gandhi.*** In this case, the court was concerned with rejection of an election petition and it was held that the purpose of conferment of such powers is to ensure that a litigation which is meaningless and bound to prove abortive should not be permitted to occupy the time of the court and exercise the mind of the respondent. The sword of damocles need not be kept hanging over his head unnecessarily without point or purpose. Even in an ordinary civil litigation, the court readily exercises the power to reject a plaint if it does not disclose any cause of action. There can be no dispute about the principles laid down.

194. In ***(2004) 3 SCC 137 Sopan Sukhdev Sable & Ors. vs. Assistant Charity Commissioner & Ors.*** the court had reiterated the well settled principle that order 7 rule 11 of the CPC makes available an independent remedy to the defendant to challenge the maintainability of the suit itself, irrespective of his right to contest the same on merits. The law ostensibly does not contemplate a particular stage when the objections can be raised and also does not say in express terms about the filing of a written statement. It casts a duty on the court to perform its obligation in rejecting the plaint when the same is hit by any of the infirmities provided in the four clauses of rule 11, even without the intervention of the defendant. This settled principle also cannot be disputed. The question is whether such infirmities exist in the instant case.

195. It is a fundamental principle of law that where there is a right, there is a remedy. Section 9 of the Code of Civil Procedure confers a

general right of suit to an aggrieved person except wh[redacted] cognizance of the suit is barred either expressly or impliedly.

So far as exclusion of the jurisdiction of a civil court is concerned, the principles in this behalf were laid down by Hidayatullah, C.J. In ***(1968) 3 SCR 662 Dhulabhai vs. State of M.P.*** as follows :-

> "(1) Where the statute gives a finality to the orders of the special tribunals the Civil Court's jurisdiction must be held to be excluded if there is adequate remedy to do what the Civil Courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.
> (2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.
>
> Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in Civil Courts are prescribed by the said statue or not.
>
> (3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.
>
> (4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to

replace a suit.

(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit dies not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.

(7) An exclusion of the jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply.

This court further clarified that non-compliance with the provisions of the statute meant non-compliance with such fundamental provisions of the statute as would make the entire proceedings before the appropriate authority illegal and without jurisdiction. The court also stressed the relevance and significance of the machinery provided by the relevant special statute for rectifying any errors and irregularities."

196. Learned senior counsel appearing for the defendant no. 2 has pointed out that these principles have since been followed in ***(1993) 3 SCC 161 Shiv Kumar Chadha vs. Municipal Corporation of Delhi*** and ***(1994) 6 SCC 572 Srikant Kashinath Jituri & Ors. vs. Corporation Of The City Of Belgaum***.

There can be no dispute at all with the principles laid down with utmost clarity. However the issues which have been raised in these cases do not arise here for the reason that in the present case, there is no statutory provision restricting or prohibiting the right of the plaintiff to approach a civil court.

197. A party seeking to curtail this general right of suit has to discharge the onus of establishing his right to do so and the law

curtailing such general right has to be strictly complied with.) the Act of 1996 taking effect, in order to enable a defendant to obtain an order staying the suit apart, from other conditions mentioned in section 34 of the Arbitration Act, 1940 he was required to present his application praying for stay before filing his written statement or taking any other step in the proceeding.

198. In a pronouncement reported at ***(2002) 5 SCC 510 ITI Ltd. vs. Siemens Public Communications Network***, the primary question before the Supreme Court was whether a revision petition under section 115 of the Code of Civil Procedure lies to the High Court as against an order made by a civil court in an appeal preferred under section 37 of the Arbitration Act, 1996. The court was called upon to consider the submission that when the code is specifically made applicable, a second appeal is statutorily barred under the Act, can it be said that a right of revision before the High Court would still be available to an aggrieved party? If so, whether on the facts and circumstances of this case, such a remedy by way of revision is an alternate and efficacious remedy or not?

The appeal made directly to the Supreme Court was dismissed by the court holding that the jurisdiction of the civil court to which a right to decide a lis between the parties has been conferred, can only be taken away by a statute in specific terms and such exclusion of right cannot be easily inferred because there is always a strong presumption that the civil courts have the jurisdiction to decide all questions of a civil nature. Therefore, if at all there has to be an inference, the same should be in favour of the jurisdiction of the court

rather than the exclusion of such jurisdiction and there being [illegible] exclusion of the Code in specific terms, except to the extent stated in Section 37(2), we cannot draw an inference that merely because the Act has not specifically provided that the CPC would be applicable, by inference it should be held that the Code is inapplicable.

199. This general principle apart, the issue is now settled by the judgment of a three judge bench of the Court in the case of ***Bhatia International v. Bulk Trading S.A. and Anr***. in C.A. No. 6527/2001 -- decided on 13.3.2002 where in, while dealing with a similar argument arising out of the present Act, this Court held that :

> "While examining a particular provision of a statute to find out whether the jurisdiction of a Court is ousted or not, the principle of universal application is that ordinarily the jurisdiction may not be ousted unless the very statutory provision explicitly indicates or even by inferential conclusion the Court arrives at the same when such a conclusion is the only conclusion."

The Arbitration and Conciliation Act, 1996 does not contain any such provision.

200. As back as in ***AIR 1973 SC 2071 the State of Uttar Pradesh & Anr. vs. Janki Saran Kailash Chandra & Anr***., the Apex Court had held that mere existence of an arbitration clause in an agreement does not by itself create any obligation on the court to stay the suit or to give any opportunity to the defendant to consider the question of enforcing the arbitration clause. The right to institute a suit in some court is conferred on a person having a grievance of a civil nature, under the general law. The arbitration agreement does not by itself operate as a bar to a suit in the court.

201. Section 8 of the Arbitration Act of 1996 does not prohibit the

right of a party to maintain a suit in express terms. It also primacy on the court to determine the question with regard to existence of an arbitration agreement.

202. On the other hand, section 45 placed in Part II of the statute concerned with Foreign Awards mandates that :

> **"45. Power of judicial authority to refer parties to arbitration.**
> Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is mill and void, inoperative or incapable of bring performed."

It would therefore appear that if there is a valid and operative agreement referred to in section 44 which is capable of being performed, then section 45 would prohibit the maintainability of the suit. Section 45 does not apply to the present case.

The legislature has drawn a careful distinction while drafting section 8.

No such prohibition to the maintainability of a suit is to be found in section 8 of the Act of 1996. Section 4 statutorily recognises that a party may waive its option for dispute resolution by arbitration.

203. Section 16 does not impact the requirement or consideration of an application under section 8 at all. It also contains no prohibition of the remedy of a civil suit to even a party to the arbitration agreement.

204. Even assuming that an application under section 8 was brought

before this court, in view of the clear principles laid down by t Court in Patel Engineering (supra), it has to be held that this court has to consider and decide the application in the light of the statutory provisions. The defendant would be first required to place the arbitration agreement relied upon on record, establish its validity and bindingness and that the subject matter of the suit was the subject of such agreement.

205. In this behalf, the pronouncement of the Apex Court reported at ***(1994) 1 SCC 502 Svenska Handelsbanken & Ors. vs. Indian Charge Chrome Ltd. & Ors.*** sets down the applicable legal principles. In para 53 of the judgment, the Supreme Court held that even after entering into an arbitration clause, any party may institute legal proceedings. It is for the other party to seek stay of the suit by showing the arbitration clause and satisfying the terms of the provisions of law empowering the court to stay the suit. It is noteworthy that this judgment was rendered in the context of the Arbitration Act, 1940. However the principles laid down therein would hold good even for the purposes of consideration of the question under the later legislation. The Apex Court placed reliance on authoritative texts and the pronouncement of the House of Lords and in paras 51 and 52 of the judgment, the Apex Court had held thus:-

> "51. When parties agree to have their disputes settled by arbitration it does not mean that both have bound themselves not to go to court to have the disputes settled. At page 163 of *Russel on Arbitration, Twentieth Edn.* it is stated that "a party to a contract to refer disputes to arbitration has a perfect right to bring an action in respect of those disputes, and the court has jurisdiction to try such disputes. Any provision to the

contrary would be an ouster of the jurisdiction of the Courts.

52. Lord Macmillan in the House of Lords decision in *Heyman v. Darwins Ltd.* pointed out as under :-

> "I venture to think that not enough attention has been directed to the true nature and function of an arbitration clause in a contract. It is quite distinct from the other clauses. The other clauses set out the obligations which the parties undertake towards each other *hinc inde.* But the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution."

53. It may be that even after entering into an arbitration clause any party may institute legal proceedings. It is for the other party to seek stay of the suit by showing the arbitration clause and satisfying the terms of the provisions of law empowering the court to stay the suit……."

206. In the instant case, it has been held that the clause relied upon by the defendant no. 1 as an arbitration agreement is not so. The claim by the plaintiff is not the subject matter of the arbitral proceedings. The only step taken by the plaintiff was to have filed objections in the arbitration proceedings under protest and reserving its rights and contentions. These proceedings are not a remedy elected by or at the instance of the plaintiff. Section 5 and 8 of the Act of 1996 are not attracted or applicable. In view of the above discussion it has to be held that sections 5, 8 and 16 of the Arbitration & Conciliation Act, 1996 do not operate as a bar to the maintainability of the present suit.

207. The several prayers made in the present suit have been set down above. No right is available to the plaintiff to seek relief before any alternate dispute redressal mechanism. The plaintiff has sought inter alia the relief of declaration with regard to existence of any

agreement with the defendants.

There is yet another aspect to the argument led by the defendants before this court. The clause under consideration confers a unilateral right on the defendant no. 1 to seek dispute redressal by the alternate mode. The defendant no. 1 has claimed also an absolute, unqualified and unilateral right to chose the mode of alternate dispute redressal to appoint an authority which would intervene in the matter. The plaintiffs have challenged the legality of such conferment. This aspect is not being considered here for the reason that the same impacts also consideration of the prayer for injunction by the plaintiff.

Accordingly, this issue is considered as part of the discussion on question no. 5.

208. It is well settled that in view of section 8 of the Arbitration & Conciliation Act, there is no option at all to a party claiming existence of an arbitration agreement but to move an application filed along with a copy of the arbitration agreement which would be required to withstand a scrutiny by the court. Such scrutiny entails an opportunity to the other side to contest validity and bindingness thereof. Despite objection by the plaintiff, the defendants have not made any application under section 8 of the Arbitration and Conciliation Act of 1996. This court is also not being called upon to decide on the merits or the legality of an order passed by the arbitral tribunal. No tenable legal bar to the maintainability of the present case is pointed out. Therefore the prayer for rejection of the plaint under Rule 11 of Order 7 of the Code of Civil Procedure has to be

rejected.

IV

209. The fourth question arises from the objections raised by the defendants. It is to be seen as to whether action of the plaintiff in filing an objection before the Arbitral Tribunal challenging the existence of an arbitration agreement and exercise of jurisdiction by it, without prejudice to its rights and contentions, amounts to acquiescing in the arbitration and estops the plaintiff from assailing the execution validity and bindingness of an arbitration agreement and the arbitral proceedings?

210. The defendant no. 1 submits that the plaintiff having elected to make the objections, is precluded from maintaining the present suit and that it has to abide by the procedure provided by the Arbitration & Conciliation Act, 1996. However, it is not contended that this court is bound by the decisions taken by the arbitral tribunal.

211. The defendants have asserted that the plaintiff's conduct in filing the objections before the arbitral tribunal as indicative of such intention and conduct which would preclude it also on grounds of estoppel and acquiescence from filing the present suit.

212. Mr. Jaitley, learned senior counsel has submitted that the filing of objections to jurisdiction of the Arbitral Tribunal “without prejudice to its contentions” would not preclude the plaintiff from bringing the present suit. The submission is that the plaintiff had unequivocally conveyed that it was not acceding to the jurisdiction of the arbitral tribunal and that it had not waived its right to bring and maintain the present suit by filing the objections. The objections were filed as the

applicant had no option but to bring the fact to the notice of the tribunal that no agreement had been executed between the parties let alone any arbitration agreement and that the proceedings which had been unilaterally initiated at the instance of the defendant no.1 were without jurisdiction. Consequently there is no act on the part of the plaintiff which in any manner prejudices the plaintiffs or could be construed as a waiver of the right of the plaintiff to maintain the present suit.

213. The principles governing the plea of estoppel are statutorily prescribed in section 115 of the Indian Evidence Act. It requires that a person, by a declaration, act or omission, should have intentionally caused or permitted another person to believe a thing to be true and to act upon such belief. Having so conducted himself, such person shall not be allowed to deny the truth of that thing in any suit or proceeding between himself and such person.

214. Some light on this issue is thrown by the consideration of the provisions under the earlier statutory regime as it contained statutory prescription with regard to “step in the proceedings”. Under the Arbitration Act, 1940 the court was empowered under section 34 to stay the legal proceedings which had been commenced by a party to an arbitration agreement against any other party to the agreement; if such legal proceeding was in respect of a matter agreed to be referred to arbitration. The applicant seeking the stay had to be a party to the legal proceedings and the applicant should have taken no steps in the proceedings after appearance. The power under section 34 to stay the proceedings was not enforced as a matter of course. In

a particular case having regard to the circumstances, the court may be satisfied that the matter should not be referred to arbitration.

215. It is noteworthy that the present statute does not contain any provision akin to section 34 of the Act of 1940. Instead the legislature has incorporated section 4 in the Arbitration & Conciliation Act, 1996 on the statute book which reads as follows :-

> "**4. Waiver of right to object –** A party who knows
> (a) any provision of this Part from which the parties may derogate, or
> (b) any requirement under the arbitration agreement,
> has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object. "

The conduct of the parties is thus made relevant statutorily.

216. Several judgments have considered the aspect as to whether a person had taken a step in the proceedings in the civil court so as to manifest an intention to abandon the remedy before the arbitrator.

217. The principles laid down by the courts as to what would constitute such conduct 'steps in the proceedings' as display the intention of the party to have its rights determined in such proceedings, can lend guidance to the present consideration.

The conduct of the plaintiff in filing the objections before the arbitrator has to be tested on these principles.

218. It was held in several judgments that in order to constitute such a 'step', it must be of such a nature as to lead the court to the conclusion that the party prefers to have his rights and liabilities determined by the civil court rather than by the domestic forum upon

which the parties might have agreed. Each and every step in the proceeding cannot come in the way of the party seeking to enforce the arbitration agreement by obtaining stay of the proceedings. The party must have displayed an unequivocal intention to proceed with the legal proceedings and to abandon the right to have the matter disposed of by arbitration. It was stated that it should not be a subjective, but should be an objective test; the participation in the proceeding should raise a presumption that the applicant/defendant had actual or constructive knowledge of his right and that he had acquiesced in the method of dispute resolution adopted by the plaintiff. Of course, such presumption has been held to be rebuttable and was not absolutely irrefutable.

219. In the case in hand, the conduct of the plaintiff in filing the objection has to be construed as to whether it exhibits an unequivocal intention of abandoning the civil remedy and tantamounts to acceding to the jurisdiction of the arbitrator.

220. The legal position has been stated with utmost clarity in the pronouncement of the Apex Court reported at ***AIR 1982 SC 1392 Food Corpn. Of India & Anr. vs. Yadav Engineer & Contractor***. The court held that unless the step alleged to have been taken by the party seeking to enforce the arbitration agreement is such as would display an unequivocal intention to proceed with the suit and acquiesce in the method of resolution of dispute adopted by the other party, namely, filing of the suit and thereby indicated that it has abandoned its right under the arbitration agreement to get the dispute resolved by arbitration, any other step would not disentitle

the party from seeking relief under section 34.

The Apex Court clarified that making an application for any purpose in the suit, such as vacating stay, discharge of the receiver or even modifying the interim orders, if treated as a 'step in the suit' for the purposes of Section 34 of the 1940 statute, would work hardship and would be inequitous to the party who is willing to abide by the arbitration agreement and yet be forced to suffer the inequity of ex-parte orders. Such applications would not come in the way of the party seeking to enforce the arbitration agreement by obtaining stay of the proceedings. The step must be such as would clearly and unambiguously manifest the intention to waive the benefit of the arbitration agreement and to acquiesce in the proceedings. Therefore, contesting the application for interim injunction or for appointment of receiver or for interim relief by itself without anything more would not constitute such step as would disentitle the party to an order of stay of the civil proceeding.

221. In ***AIR 1989 SC 635 Rachappa Gurudappa, Bijapur vs. Gurudiddappa Nurandappa & Ors***., it was stated that in order to be precluded from being entitled to a stay of the suit to enable the arbitration to proceed, the party must not have evinced an intention to have the matter adjudicated by the court.

222. Similar reservation of its rights by a party and the legal impact of 'without prejudice' participation have been the subject matter of judicial consideration and the subject matter of several pronouncements which can be usefully considered. In ***(1978) 3 SCC 113 Superintendent (Tech 1) Central Excise IDD Jabalpur &***

Ors. vs. Pratap Rai, the effect of the term 'without prejudice' is construed thus :-

> "6. .....The Appellate Collector has clearly used the words "without prejudice" which also indicate that the order of the Collector was not final and irrevocable. The term 'without prejudice' has been defined in Black's Law Dictionary as follows :
> Where an offer or admission is made 'without prejudice', or a motion is denied or a bill in equity dismissed 'without prejudice', it is meant as a declaration that no rights or privileges of the party concerned are to be considered as thereby waived or lost, except in so far as may be expressly conceded or decided. See also, Dismissal without Prejudice.
>
> Similarly, in Wharton's Law Lexicon the author while interpreting the term 'without prejudice' observed as follows :
>
> The words import an understanding that if the negotiation fails, nothing that has passed shall be taken advantage of thereafter; so, if a defendant offer, 'without prejudice', to pay half the claim, the plaintiff must not only rely on the offer as an admission of his having a right to some payment.
>
> The rule is that nothing written or said 'without prejudice' can be considered at the trial without the consent of both parties-not even by a judge in determining whether or not there is good cause for depriving a successful litigant of costs.... The word is also frequently used without the foregoing implications in statutes and inter parties to exclude or save transactions, acts and rights from the consequences of a stated proposition and so as to mean not affection', 'saving' or 'excepting'.
>
> 7. In short, therefore, the implication of the term 'without prejudice' means (1) that the cause or the matter has not been decided on merits, (2) that fresh proceedings according to law were not barred."
>
> (underlining supplied)

223. Yet another pronouncement which considers the impact of participation under protest has been reported at ***(2004) 2 SCC 663 Chairman & MD, NTPC Ltd. vs. Reshmi Constructions, Builders***

& Contractors

> “34. Yet again in Rush & Tompkins Ltd. v. Greater London Council and Anr. [(1988) 1 All ER 549]:
> "The rule which gives the protection of privilege to 'without prejudice' correspondence 'depends partly on public policy, namely the need to facilitate compromise, and partly on 'implied agreement' as Parker LJ stated in South Shropshire DC v. Amos [1987] 1 All ER 340 at 343, [1986] 1 WLR 1271 at 1277. The nature of the implied agreement must depend on the meaning which is conventionally attached to the phrase 'without prejudice'. The classic definition of the phrase is contained in the judgment of Lindley LJ in Walker v. Wilsher (1889) 23 QBD 335 at 337:
>
> 'What is the meaning of the words "without prejudice"? I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one.'
>
> Although this definition was not necessary for the facts of that particular case and was therefore strictly obiter, it was expressly approved by this court in Tomlin v. Standard Telephone and Cables ltd. [1969] 3 All ER 201 at 204, 205, [1969] 1 WLR 1378 at 1383, 1385 per Danckwerts LJ and Ormrod J. (Although he dissented in the result, on this point Ormrod J agreed with the majority.) The definition was further cited with approval by both Oliver and Fox LJJ in this court in Cutts v. Head [1984] 1 All ER 597 at 603, 610, [1984] Ch. 290 at 303, 313. In our judgment, it may be taken as an accurate statement of the meaning of 'without prejudice', if that phrase be used without more."

224. A pronouncement of the Apex Court reported at ***(1994) 5 SCC 570 : MANU/SC/0823/1994 Sukalu Ram Gond vs. State of M.P. & Ors***., considers an issue similar to the instant case. The reference to the arbitrator in this case was confined to the petitioner and one Sh. Vinod Jain. An issue was raised as to whether the arbitrator, could have gone into the liability of the 5th respondent Anoop Chand

Setia and made him liable to pay the amount indicated in the award without the order of reference being amended. It was argued that the 5th respondent had participated in the award proceedings with an objection. Therefore he was bound by the award. In this behalf, the Apex Court had ruled thus :-

> " xxx xxx xxx xxx
>
> An award derives its force from the original contract. Parties to the contract, by consent, refer their dispute for settlement to a tribunal of their choosing, instead of to a court. Therefore, there should exist an agreement showing consent to refer a dispute for settlement by the arbitrator. In cases where the arbitrator enters into the consideration of the matters which are not referred to him or over which he has no jurisdiction to try, the question is not one of waiver or estoppel but of authority. The question is whether a person, not a party to a reference but who participated in the award proceeding with objection and continued to participate in the proceedings under protest, as was done in this case, whether is bound by the award? Our answer is no. He is not bound by the award, as being without authority. After taking objection to the authority of the arbitrator and making protest, unless a proper reference was made by this Court, the arbitrator does not get the authority and jurisdiction to make the award against a non-party to the contract. In the Law of Arbitration by Justice Bachawat, p. 19, it is stated that "to constitute an arbitration agreement, there must be an agreement, that is to say, the parties must be ad idem...agreement must be made by the free consent of the parties". Admittedly, there is no such agreement or consent given by 5th respondent. His participation in the award at best after protest, would protect his interest or a witness and no more. It settled law that acquiescence does not confer jurisdiction."

These very principles would apply to the reverse situation as in the instant case.

225. Mr. Rakesh Dwivedi, learned senior counsel for the defendant no. 1 has relied on the judgment reported at (***2003) 2 SCC 251 Narayan Pd. Lohia vs. Nikunj Kr. Lohia & Ors.***, in support of this

objection. In this pronouncement, the court held that u[redacted] objection with regard to composition of an arbitral tribunal is made before the tribunal itself within the time prescribed under section 16(2), there would be a deemed waiver of this objection under section 4 of the statute.

This judgment in fact supports the plaintiff as it emphasises the legal requirement that under Section 16, an objection as to jurisdiction has to be taken at the earliest.

226. The plaintiff has placed before this court its repeated objections before the arbitral tribunal challenging the existence of the arbitration agreement and its jurisdiction. It was submitted that all such objections were under protest and without prejudice to the primary contentions of the applicant that there was no arbitration agreement between the parties. The provisions of section 4 are therefore clearly not attracted.

227. From the above discussion, it is apparent that in order to waive the right to file a suit, a party should have unequivocally displayed its intention to accede to the jurisdiction of the arbitrator and to participate in the proceedings. Other than filing of the objections to jurisdiction, the defendants have been unable to point out any such act. There is no material at all to show that the plaintiff has acquiesced in the proceedings. It only wrote letters under protest and filed objections without prejudice to its contentions that there was no arbitration agreement and that the proceedings before the arbitral tribunal were without jurisdiction.

228. Section 115 of the Indian Evidence Act, 1872 prescribes a

general principle. In the light of the above discussion, it is cl[illegible] attracted to the instant case. Furthermore, the right to file a suit can be defeated only by a specific statutory prohibition which takes away such right and not by any general principle of law. So far as the doctrine of election has no applicability as the arbitral proceedings is not a dispute redressal forum or a remedy either available to or elected by the plaintiff.

229. Failure to file the protests and objections of the nature as was done would have certainly attracted a plea under section 4 of the 1996 statute. It therefore cannot be held that the plaintiff has acquiesced in the arbitration proceedings. It also cannot be held that the plaintiff has waived either its objections or its right to seek redressal of its grievance in any other proceedings by filing such application objection before the arbitral tribunal to the existence, validity and bindingness of the arbitration agreement.

V

230. Lastly, it becomes necessary to examine the plaintiff's prayer for grant of interim injunctions during the pendency of the suit.

The submission that the plaintiff would stand estopped from bringing or maintaining the present suit is not sustainable and is hereby rejected.

231. It is now necessary to consider the submission of the defendants that the plaintiff is disentitled to grant of any injunction and that an injunction against proceeding with the arbitration, if granted as prayed, would be against public policy being contrary to statutory provisions. It has further been contended that balance of convenience

is in favour of the defendants. According to the defendants, present suit is a parallel proceedings to the arbitration which is not permissible. In support of these submissions, reliance has been placed on the pronouncement of the Apex Court in ***(1983) 4 SCC 625 Cotton Corporation of India Vs. United Industrial Bank Limited & Ors***. and the pronouncements in **(2004) 3 SCC 447 Secur Industries Ltd. v. Godrej & Boyce Manufacture Co.Ltd. & Anr.** and **AIR 2004 P&H 276 Pappu Rice Mills v. Punjab State Co-operative Supply & Marketing Federation**.

232. The prayer for grant of injunction by the plaintiff is also opposed on factual grounds. It is urged that an amount of Rs.100 crores has been advanced by the defendant no.1 to the defendant no.2 which is public money and that the plaintiff had stood guarantee for the same. It is urged that having regard to the amount involved, it would militate against grant of any injunction to the plaintiff.

A detailed consideration of the impact of the documents relied upon by the parties and the correspondence exchanged has been carried out hereinabove.

233. So far as the pronouncement in **Cotton Corporation of India Limited (Supra)** is concerned, the Apex Court held that the court had no jurisdiction either under Section 41(b) of the Specific Relief Act, 1963 or under its inherent powers under Section 151 CPC to grant a temporary injunction restraining a person from instituting any proceedings which such person is otherwise entitled to institute in a court not subordinate to that from which the injunction is sought. On the facts of the case, it was held that the debtor bank was not entitled

to an interim injunction restraining the creditor corporat presenting a winding up petition against the bank before the Company Judge in the high court. These findings were based on the consideration that the equitable principle underlying Section 41(b) of the Specific Relief Act governing grant of injunctions is that access to court in search of justice according to law is the right of a person who complains of an infringement of its legally protected interest and a fortiori. Therefore no other court can by its action impede access to justice except the superior court which can injunct a person by restraining him from instituting or prosecuting a proceeding before a subordinate court. A subordinate court is precluded from granting an injunction restraining any person from instituting or prosecuting any proceedings in a court of coordinate or superior jurisdiction.

234. So far as availability of a legal remedy for enforcement of claimed interest in the instant case is concerned, it has been held hereinabove that prima facie the plaintiff in fact has no remedy other than by way of a civil suit for relief and redressal of its grievances and claims. It has also been held that there is no bar against the plaintiff prosecuting the present suit for pursuing its claims against the defendant. In this view of the matter, the principles laid down by the Apex Court in the afore-noticed judgment would in fact support the plea of the plaintiff who is seeking legal redressal for its grievances.

235. The instant case relates to matters of funding of hundreds of crores of rupees and not to small sums of money. Banks enforce the highest degree of financial discipline. It is apparent that in the instant case, the disbursement appears to have been effected

under the shield of the bridge loans without execution of documentation by either the loanee or the guarantors.

236. In view of the controversy raised, it is also necessary to examine the submission from yet another angle and that is whether an agreement between Shyam Telelink Ltd. and Lucent Technologies Hindustan Pvt. Ltd. would bind the plaintiff. The plaintiff has described itself as a US Corporation and has clearly disassociated itself from the four contracts dated 14th December, 1999 and the warrant agreement dated 5th October, 2001 entered into between Shyam Telelink – defendant no. 2 and M/s Lucent Technologies Hindustan Pvt. Ltd.

237. The plaintiff has also submitted that the reliance of the ICICI bank on the conditions precedent mentioned in the warrant agreement is misconceived. It is pointed out that the dates of the letters referred to by the ICICI Bank also do not correspond to the dates of the letters of comfort on record.

238. Admittedly, the plaintiff is a company incorporated under the laws in the United States of America, while the Lucent Hindustan Technologies Pvt. Ltd. is a company incorporated and registered in India under the provisions of the Companies Act, 1956. The defendants however have contended, that Lucent Hindustan Technologies Pvt. Limited is a wholly owned subsidiary of the Lucent Technologies Inc-the plaintiff herein.

Other than this submission, there is no allegation that the incorporation of Lucent Hindustan Technologies Pvt. Ltd. was a fraudulent cover for the plaintiff.

239. M/s Lucent Technologies Hindustan Private Limit ı "supplier" of products to the Shyam Telelinks Ltd. It is noteworthy that no commercial relationship between the plaintiff and M/s Shyam Telelink Ltd. to whom the financial facilities are being advanced to by the ICICI Limited has been pointed out. So far as the M/s Lucent Technologies Hindustan Private Limited is concerned, it has been described as an 'affiliate' of the plaintiff. The plaintiff has urged that Lucent Technologies Hindustan Pvt. Ltd. is its 'indirect subsidiary'.

240. It is well settled that in law a company is a legal entity distinct from its members (1897 AC 22 Salomon vs. A. Salomon Co. Ltd.). However by the process of lifting or piercing of the corporate veil, the court assumes that such entity is a sham to perpetuate fraud, avoid liability, to avoid effect of statute and to avoid obligations under an agreement. Certain situations when piercing of the corporate veil is permitted were illustratively pointed out by the Supreme Court in ***AIR 1986 SC 1370 Life Insurance Corporation of India vs. Escorts Ltd***. thus:-

(i) where statute itself contemplates lifting the veil;

(ii) where fraud or improper conduct is to be prevented;

(iii) where a taxing statute or benefiting tax is sought to be evaded; and

(iv) where group companies are inextricably connected as to be part of one concern.

In State of U.P. vs. Renusagar Power Co. MANU/SC/0505/1988 it was suggested that whenever a corporate entity is abused for unjust and inequitable purchase, the court would not hesitate to lift the veil

and look into relatives so as to identify the persons who are g l liable therefor.

241. It can also be pierced when the corporate personality is found to be opposed to justice, convenience and interest of revenue or workman or against public interest. (Ref: MANU/SC/0138/1966 : AIR 1967 SC 819 C.I.T. Vs Sri Meenakshi Mills Ltd.; MANU/SC/0236/1985 : (1985) 4 SCC 114 Workmen vs. Associated Rubber Industry Ltd.; ; MANU/SC/0564/1995 : (1995) 1 SCC 478 New Horizons Ltd. vs. UOI; MANU/SC/0505/1988 : (1988) 4 SCC 59 State of U.P. vs. Renusagar Power Co.; MANU/SC/0265/1978 : (1978) 4 SCC 257 Hussainbhai vs. Alath Factory Thezhilali Union ; MANU/SC/0215/1999 : (1999) 3 SCC 601 Secy. HSEB vs Suresh.)

No such submissions are made before this court.

242. While the plaintiff is a company incorporated in the USA; the other company stands registered at India. Different obligations were imposed on the two companies under the different contracts. The letter dated 13th of September, 2000 and the term sheet refer to the plaintiff alone as the guarantor. The defendant no. 1 is claiming against the plaintiff in such capacity and has not asserted a claim against the plaintiff for any liability incurred by Lucent Technologies Hindustan Pvt. Ltd.

243. Lucent Technologies Hindustan Pvt. Limited is not a party to the present suit. Nothing has been placed before this court to support a view that the constitution or nature of the activities of Lucent Hindustan Technologies Pvt. Ltd. would ipso facto render the plaintiff responsible for its contractual liabilities and commitments.

244. The two companies stand incorporated and registered in jurisdictions under the laws in force in the two countries. No legal provision or principle is pointed out that all companies which may be affiliates or subsidiaries of holding company are one legal entity. It is certainly not permissible to hold that a contract with any one of such companies would create contractual obligations with or bind the other companies. If this were to be accepted, it would tantamount to obliterating the legal and independent existence and identity of a statutorily recognised legal person and effecting a merger of the affairs of different companies without due process.

245. The facts in the instant case show that both defendant nos. 1 and 2 are conscious of and have recognized the legal status of the plaintiff and Lucent Technologies Hindustan Pvt. Ltd. in the various agreements as well as the communication dated 13th of September, 2000. Therefore whether the Indian company is an affiliate or an indirect subsidiary of the plaintiff, would not impact the issues raised in the present case.

246. The plaintiff points out that in clause 3 of the bridge loan agreement, it was stipulated that M/s Shyam Telelink Limited shall pay to ICICI Limited interest on the principal amount of the bridge loan at the rate of 1% above the rate which was stipulated on the term sheet as well. It has further been pointed out, that in clause 6 of the bridge loan agreement, the ICICI Limited had stipulated extensive securities required by it from the defendant nos. 2 to 6 which included deeds of hypothecation, mortgages by deposits of title deeds and personal guarantees from the promoters/directors of the company,

corporate guarantees and pledge of shares etc by the defenda  .

It is important to note that the letter dated 30th November, 2000 does not contain any reference to guarantee for the bridge loan, but refers to the main loan alone. There is not even an attempt to explain the reasons for these guarantees or the separate terms. Nothing is placed which suggests the plaintiff's consent to these terms. It is trite that the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract. Section 128 of the Indian Contract Act, 1872 so stipulates in absolute terms.

247. My attention is drawn to the terms of the bridge loan dated 27th September, 2000 and 12th December, 2000. It appears that the amount of the bridge loans became repayable on 15th September, 2001 and 15th December, 2001 respectively. As on the date of filing of the suit, more than five years had lapsed since the date on which these loans became repayable. No steps to take action or recover any amounts against the guarantees provided by the defendant no.2 or any one else appear to have been taken.

Neither the plaintiff nor the ICICI Bank were a party to the warrant agreement dated 5th of October, 2001. There is nothing to suggest the plaintiff's consent to the warrant agreement arbitration agreement or to the appointment or constitution of the arbitral tribunal. No statutory or regulatory permission was sought for execution of the guarantee for the bridge loans.

248. The plaintiff has submitted that the defendant no.1 is acting in collusion with the defendant no.2 and other defendants in the action which has been taken.

249. It now becomes necessary to consider the plea taken by defendant nos.1 & 2 that this court has no jurisdiction to interdict prosecution of the legal remedy for dispute redressal of arbitration by way of an interim injunction.

250. As discussed hereinabove, in the present case the defendant no.1 relies on the governing law and jurisdiction clause to claim entitlement to invoke arbitration.

251. Mr. Sethi, learned senior counsel appearing for the defendant no. 2 has placed strong reliance on a pronouncement of this court reported at ***138 (2007) DLT 104 Triad India vs. Tribal Co-operative Marketing & Development Federation of India Ltd. & Anr.*** in support of the submission that the respondent having filed the objection before the learned arbitral tribunal had no option other than to follow the procedure prescribed under section 34 of the Arbitration Act.

In view of the above discussion with regard to the nature of the clause titled Governing Laws & Jurisdiction and the factual position before this court, this submission on behalf of the defendant no. 2 has to be rejected.

252. It has been considered at length that this clause confers a unilateral and exclusive right to the defendant no.1 alone to initiate any alternate dispute redressal mechanism for the purposes of consideration of the objection taken by the defendants to the prayer for injunction on this ground. It has been held hereinabove that this clause did not amount to an arbitration agreement. However, even if it has been so, the legal permissibility of conferment to such

unilateral right has to be considered. It becomes nece[illegible] consider the legal permissibility of conferment of such unilateral rights.

253. An incident of a unilateral right being claimed by the defendant no. 1 to approach an arbitral tribunal and compulsion to the other side to submit to the jurisdiction of such forum and the impact of the proceedings conducted by such tribunal fell for consideration before the Apex Court in the pronouncement reported at ***(2005) 9 SCC 686 Dharma Prathishthanam vs. Madhok Construction Pvt. Ltd***. It was held by the court that an arbitrator or an arbitral tribunal under the scheme of the 1940 Act is not a statutory body. It is a forum chosen by the consent of the parties as an alternate to the resolution of disputes by the ordinary forum of law courts. The essence of arbitration without assistance or intervention of the court is settlement of the dispute by a tribunal of the own choosing of the parties. The law of arbitration does not make the arbitration an adjudication by a statutory body but it only aids in implementation of the arbitration contract between the parties which remains a private adjudication by a forum consensually chosen by the parties and made on a consensual reference. What confers jurisdiction on the arbitrators to hear and decide a dispute is an arbitration agreement and where there is no such agreement, there is an initial want of jurisdiction which cannot be cured even by acquiescence. The arbitrators derive their jurisdiction from the agreement and consent.

The legal position on this issue was succinctly stated by the Apex Court thus :-

> "12. On a plain reading of the several provisions referred to hereinabove, we are clearly of the opinion that the procedure followed and the methodology adopted by the respondent is wholly unknown to law and the appointment of the sole arbitrator Shri Swami Dayal, the reference of disputes to such arbitrator and the ex parte proceedings and award given by the arbitrator are all void *ab initio* and hence nullity, liable to be ignored. In case of arbitration without the intervention of the Court, the parties must rigorously stick to the agreement entered into between the two. If the arbitration clause names an arbitrator as the one already agreed upon, the appointment of an arbitrator poses no difficulty. If the arbitration clause does not name an arbitrator but provides for the manner in which the arbitrator is to be chosen and appointed, then the parties are bound to act accordingly. If the parties do not agree then arises the complication which has to be resolved by reference to the provisions of the Act. One party cannot usurp the jurisdiction of the Court and proceed to act unilaterally. A unilateral appointment and a unilateral reference - both will be illegal. It may make a difference if in respect of a unilateral appointment and reference the other party submits to the jurisdiction of the arbitrator and waives its rights which it has under the agreement, then the arbitrator may proceed with the reference and the party submitting to his jurisdiction and participating in the proceedings before him may later on be precluded and estopped from raising any objection in that regard."
>
> (Emphasis supplied)

The Apex Court placed reliance on an earlier pronouncement reported at (1979) 3 SCC 631 UOI vs. Prafulla Kr. Sayal wherein also the court had occasion to consider the matter of a unilateral appointment of an arbitrator. The observations of the Apex Court in para 17 of Dharma Prathishthanam (supra) provide valuable guidance and read thus :-

> "17. In ***Union of India*** v. ***Prafulla Kumar Sanyal***, this Court observed that an order of reference can be either to an arbitrator appointed by the parties whether in the agreement or otherwise or where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court. If no such

> arbitrator had been appointed and where the parti cannot agree upon an arbitrator, the Court may proceed to appoint an arbitrator itself. Clearly one party cannot force his choice of arbitrator upon the other party to which the latter does not consent. The only solution in such a case is to seek an appointment from the Court."

254. The Apex court agreed with the views of several high courts to the effect that reference to an arbitrator out of court must be by both the parties together and cannot be by one party alone; failing the consent, the parties or either of them must approach the court by making an application in writing. The clear and binding legal principle laid down by the court is that reference to a sole arbitrator has to be a consensual reference and not a unilateral reference by one party alone to which the other party cannot or does not consent.

255. My attention is also drawn to the pronouncement reported at ***AIR 1954 SC 340 Cr. PC Kiran Singh & Ors. vs. Chaman Paswan & Ors.*** in support of the contention that the proceedings before the arbitral tribunal are without jurisdiction and that such invalidity strikes at the very authority of the tribunal to pass any order. It has been contended that even if the plaintiff had consented to such proceedings being continued, the defect in the jurisdiction would not be cured by such consent. In this regard, in para 6 of the aforenoticed pronouncement, the Apex Court has observed thus ;-

> "6. .....It is a fundamental principle well-established that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree and such a defect cannot be cured even by consent of parties."

256. No dispute redressal mechanism was made available to the plaintiff under the "The Governing Law and Jurisdiction" clause. No consent at all of the parties to arbitration as a dispute redressal mechanism has been pointed out. The plaintiff has been vehemently protesting to the maintainability of the proceedings before the arbitral tribunal.

257. Law recognises a unilateral right to choose an arbitrator. However, such right cannot be confused with a unilateral right to refer the matter to arbitration.

258. In view of the above discussion and the principles laid down by the Apex Court in ***Dharma Prathishthanam vs. Madhok Construction Pvt. Ltd. (Supra),*** a unilateral appointment and a unilateral reference are both illegal.

259. In ***Kiran Singh & Ors. vs. Chaman Paswan & Ors.*** **(Supra)** the Apex Court has clearly declared the well established principle that even a decree passed by court without jurisdiction is a nullity and its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon. The Apex Court also held that such nullity and invalidity can be asserted even in collateral proceedings.

260. It needs no further elaboration that a defect of jurisdiction with regard to the subject matter of the action strikes at the root of the jurisdiction of even a court. Consent by parties can also not cure such defects.

261. The prayer for interim relief is also opposed by the defendant on the plea that the suit is barred in terms of Sections 5, 8 & 16 of the Arbitration Act. It has been held to the contrary hereinabove.

262. The submission on behalf of the defendants that the [illegible] declaration in the suit amounts to an appeal against the order dated 24th February, 2005 of the learned arbitral tribunal fails to take into consideration the principles laid down by the Apex Court in ***Dharma Prathishthanam vs. Madhok Construction Pvt. Ltd. (Supra); Kiran Singh & Ors. vs. Chaman Paswan & Ors.*** **(Supra)** and this court in ***Emmsons International vs Metal Distributors (Supra)*** and ***UOI vs. Bharat Engineering ILR 1977 Delhi 57.*** In view of the principles laid down in these precedents, a unilateral appointment of arbitrators and unilateral reference are both illegal. It is not disputed that the instant case reflects such appointment. The plaintiff has not waived its objections to he arbitral proceedings.

These binding and authoritative judicial pronouncements do not appear to have been placed before the Arbitral Tribunal.

263. An important question which would also have bearing on the relief admissible to the plaintiff. A further question is raised as to whether the Recovery of Debts due to Banks & Financial Institutions Act, 1993 restrict the remedy available to the defendant no. 1 to the Debt Recovery Tribunal.

264. Placing reliance on the provisions of Sections 17, 18 & 19 of the Recovery of Debts due to Banks & Financial Institutions Act, 1993, (the RDB Act hereafter for brevity) it is urged by learned Senior Counsel for the plaintiff that Debt Recovery Tribunal is the only alternate dispute redressal forum available to the defendant no.1. Reliance has been placed on the pronouncement on ***(2000) 4 SCC 406 Allahabad Bank Vs. Canara Bank & Anr.*** (Para 21 at page

420) and ***121 (2005) DLT 241 (DB) Kohinoor Creations Vs. Syndicate Bank*** in support of this submission.

265. In view of the discussion on the other issues raised herein for the purposes of the injunction applications it is really not necessary to decide this issue. However, it has been urged on behalf of the defendant no. 1 that IA No. 2758/2005 under Order 7 Rule 11 of the Code of Civil Procedure be treated as an application under section 8 of the Arbitration & Conciliation Act, 1996. It therefore becomes necessary to examine the jurisdiction of the arbitration tribunal to examine the claims of the ICICI Bank. The submission of the defendant no. 1 and the plaintiff's contentions on this issue are therefore taken up for consideration.

266. For the purposes of understanding this submission, it becomes necessary to examine the relevant provisions of the Recovery of Debts due to Banks & Financial Institutions Act, 1993 (`RDB Act' for short) which read as follows :-

> "**Jurisdiction, powers and authority of Tribunals**
>
> 17. (1) A Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions.
>
> (2) An Appellate Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain appeals against any order made, or deemed to have been made, by a Tribunal under this Act.
>
> 2[**Power of Chairperson of Appellate Tribunal.**
>
> 17A. (1) The Chairperson of an Appellate Tribunal shall exercise general power of superintendence and control over the Tribunals under his jurisdiction including the power of appraising the work and recording the annual confidential reports of Presiding Officers.

(2) The Chairperson of an Appellate Tribunal having jurisdiction over the Tribunals may, on the application of any of the parties or on his own motion after notice to the parties, and after hearing them, transfer any case from one Tribunal for disposal to any other Tribunal.]

Bar of jurisdiction.

18. On and from the appointed day, no court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or authority (except the Supreme Court, and a High Court exercising jurisdiction under articles 226 and 227 of the Constitution) in relation to the matters specified in section 17.

3[**Application to the Tribunal.**

19. (1) Where a bank or a financial institution has to recover any debt from any person, it may make an application to the Tribunal within the local limits of whose jurisdiction—

(*a*) the defendant, or each of the defendants where there are more than one, at the time of making the application, actually and voluntarily resides, or carries on business, or personally works for gain; or

(*b*) any of the defendants where there are more than one, at the time of making the application, actually and voluntarily resides, or carries on business, or personally works for gain; or

(*c*) the cause of action, wholly or in part, arises :"

267. It is apparent from a bare reading of the statutory provisions that a debt recovery tribunal is constituted under Section 17 of the Act to decide the applications of banks and the financial institutions for recovery of debts due to them. As per section 19 only the banks and financial institutions can make an application to the Debt Recovery Tribunal to recover their debts.

268. The question which arises as to whether the Recovery of Debts Act would interdict enforcement of an arbitration agreement, and which statutory provision would apply and prevail over the other?

269. So far as the jurisdiction of such tribunal is concerned, in

(2000) 4 SCC 406 Allahabad Bank Vs. Canara Bank &

question of a special law vis-a-vis a general law and a special law vis-a-vis another special law was raised. An issue was raised as to whether permission of the company court was required before filing a petition for recovery of money against it before the Debt Recovery Tribunal ('DRT' for brevity), if prior winding up proceedings were pending against a company, the Apex Court had authoritatively laid down the scope thereof as follows:-

> "21. In our opinion, the jurisdiction of the Tribunal in regard to adjudication is exclusive. The RDB Act requires the Tribunal alone to decide applications for recovery of debts due to Banks or Financial Institutions. Once the Tribunal passes an order that the debt is due, the Tribunal has to issue a certificate under Section 19(22) (formerly under Section 19(7)) to the Recovery Officer for recovery of the debt specified in the certificate. The question arises as to the meaning of the word 'recovery' in Section 17 of the Act. It appears to us that basically the Tribunal is to adjudicate the liability of the defendant and then it has to issue a certificate under Section 19(22). Under Section 18, the jurisdiction of any other court or authority which would otherwise have had jurisdiction but for the provisions of the Act, is ousted and the power to adjudicate upon the liability is exclusively vested in the Tribunal. (This exclusion does not however apply to the jurisdiction of the Supreme Court or of a High Court exercising power under Articles 226, 227 of the Constitution). This is the effect of Sections 17 and 18 of the Act."
>
> (Emphasis supplied)

As per the principles laid down, the effect of sections 17 & 18 of the Recovery of Debts due to Banks & Financial Institutions Act, 1993 is to confer exclusive jurisdiction on the DRT and the only exception is the constitutional jurisdiction of the Supreme Court and the High Court under Articles 226, 227 thereof.

270. It needs no elaboration that what can be referred to arbitrator is only such matters which the arbitrator is legally competent and empowered to decide.

In ***(1999) 5 SCC 688 Haryana Telecom Ltd. vs. Sterlite Industries Ltd.***, the court was concerned with an application under section 8 of the Arbitration Act, 1996 in a winding up petition. The court observed that :

> "The power to order winding up of the company is contained under the Companies Act and is conferred on the court. An arbitrator, notwithstanding any agreement between the parties, would have no jurisdiction to order winding up of the company. That could obviously not be referred to the arbitration and, therefore, the High Court, in our opinion was right in rejecting the application."

271. A similar issue with regard to the maintainability of a claim for probate of a Will referred by consent of the parties to arbitration was raised in ***JT 1993 (2) SC 34 Chiranjilal Shrilal Goenka (deceased) through LRs vs. Jasjit Singh & Ors***. The Supreme Court observed that it was only the probate court which could decide the question and that consent of parties could not have conferred jurisdiction nor there was any estoppel against the statute.

272. In ***(1981) 1 SCC 315*** entitled ***Life Insurance Corporation of India vs. D.J. Bahadur***, an objection was raised before the tribunal constituted under the Life Insurance of India Act, that leave of the Company Court under section 446 of the Companies Act was required as a condition precedent to filing a claim before the tribunal to recover amounts. The Supreme Court rejected the objection holding that for certain cases, an Act may be general and for certain other purposes, it may be special and the court cannot blur a distinction

when dealing with the finer points of law. It was further held that in view of section 41 of the LIC Act, the Company Court has no jurisdiction to entertain and adjudicate upon any matter which the tribunal is empowered to decide or determine under the LIC Act. The Apex Court held that the provisions of section 446(1) of the Companies Act would not operate on the proceedings before the tribunal.

273. A Division Bench of this court in the pronouncement reported at ***121 (5) Delhi Law Times 241 Kohinoor Creations & Ors. Vs. Syndicate Bank*** was called upon to consider the question as to whether the provisions of Arbitration & Conciliation Act, 1996 being the later Act would override those of the Recovery of Debts Due to Banks & Financial Institutions Act, 1993. It was noted that both statutes contain a non-obstante clause. The issue before the court was whether the non-obstante clause in section 5 of the Arbitration Act, 1996 would override section 34 of the Act. The Syndicate Bank had filed a petition against the petitioner before the High Court. The petitioner filed an application under Section 8 of the Arbitration & Conciliation Act, 1996 invoking the arbitration agreement between the parties contained in the export credit agreement contending that the disputes between the parties are required to be referred to arbitration. This application was summarily rejected by the Debt Recovery Tribunal which order was assailed before the Appellate Tribunal constituted under the statute of 1993. The petitioner did not succeed and laid a challenge to the orders passed against it before this court. Placing reliance on the afore-noticed

pronouncement of the Apex Court in Allahabad Bank Vs [illegible] Bank (supra), this court also considered the issue that both the statutes contained a non-obstante clause and the legislature had omitted to provide any provision that the earlier statute of 1993 would continue to apply despite the non obstante clause of the later statute. It was held that a harmonious interpretation has to be taken recourse to in order to resolve such conflicts. The court also placed reliance on the pronouncement of the Supreme Court in ***(1993) 2 SCC 144 Maharashtra Tubes Limited Vs. State Industrial Investment Corporation of Maharashtra.*** On a detailed consideration of the statutory provisions and the scheme of the two enactments, the Division Bench had held thus:-

> "10. The RDB Act of 1993 establishes the Tribunals for expeditious adjudication under the Recovery due to Banks and Financial Institutions, if the debt is more than 10 lakhs. Section 17 empowers the Tribunal to entertain and decide applications of these Banks and Financial Institutions in this regard. Section 18 ousts the jurisdiction of any Court or authority which otherwise would have had the jurisdiction of adjudicating all such claims except that of the Supreme Court and the High Court under Articles 226 and 227 of the Constitution. Section 31 empowers transfer of all pending suits and proceedings before courts/authorities to the DRT including execution proceedings. Section 34 provides that provisions of the RDB Act would have overriding effect notwithstanding anything inconsistent contained in any law for the time being in force or any instrument having effect by virtue of any law other than this Act. Sub-Section (2) of this section saves some enactments but not the Arbitration Act from the purview of this Act.
>
> .....
> 13. The RDB Act of 1993 establishes the Tribunals for expeditious adjudication under the Recovery Due to Banks and Financial Institutions, if the debt is more than 10 lakhs. Section 17 empowers

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>
> 14. A survey of these provisions and the appreciation of their true import leaves no scope for doubt that the adjudication of the recovery claims by the Banks and Financial Institutions and the recovery of the amount by execution of the certificates passed by the DRT fall within the exclusive jurisdiction of the Tribunal ousting the jurisdiction of any other court or authority to go into or deal with such claims."
>
> (underlining supplied)

274. In para 18, the Division Bench observed that it had been held in the pronouncements of the Apex Court that even a special statute could be treated as a general statute while referring to the tussle between the overriding provisions of the Companies Act and the RDB Act. The Apex Court had observed that for certain purposes an Act may be general and certain other purposes, it may be special, and the court cannot blur a distinction when dealing with a final point of law. After a detailed discussion, the Division Bench had thereafter held thus:-

> "19. Given regard to all this, we find no difficulty in taking the view that the RDB Act would prevail over the Arbitration Act even though it was the

later Act. This is so for variety of reasons. Firs because if the RDB Act conferred exclusive jurisdiction on the Tribunals established by it to adjudicate upon and execute the recovery claims of the Bank and other financial institutions to the exclusion all other Courts and authorities except the Supreme Court and the High Court, which position is laid down and affirmed by the Supreme Court, then the Arbitrator assuming this jurisdiction under Section 8 of the Arbitration Act could not be countenanced despite the mandatory nature of its provisions. Otherwise the established exclusiveness of the DRT's justification under the RDB Act would be eroded and compromised which would be contrary to the legislative intent behind the DRB Act because on a simple logic. If the DRT enjoys the exclusive jurisdiction to try the recovery claims of the Banks & Financial Institutions, it so enjoys against all forums established by various statutes which would include the Arbitrator under the Arbitration Act also, the only exception made in this regard being the Supreme Court and the High Court.

20. The exclusiveness of the DRT's jurisdiction is all the more fortified by the provisions of Section 34 of the RDB Act. This Section gives all pervasive overriding effect to the provisions of the RDB Act as against any inconsistent provision in any law for the time being in force. It was amended in 2000 to exempt several enactments from the purview of the RDB Act. The Arbitration Act of 1996 which was in force at the time of amendment does not figure in this list of statutes which leave no scope for doubt that it was not intended to be so exempted and its inconsequential provisions were intended to be overridden by the provisions of the RDB Act.

We are unable to accept the submission that the amendment of 2000 made in Section 34 of RDB Act was inconsequential and that the exclusion of the Arbitration Act, 1996 in the list of exempted statutes through this amendment made no difference. On the contrary this amendment provides a vital clue to the legislative intent that the RDB Act was to prevail upon inconsistent provisions of all laws in force on that date except the statutes enlisted therein."

(Emphasis supplied)

275. In ***Solitaire India Limited Vs. Fair Growth Financial Services Limited. (II) 2001 SLP 81 = (2001) 3 SCC 71*** it was held that on a harmonious interpretation of the two statutes, the Special Court Act, 1992 would prevail over the Sick Industrial Company (Special Provisions) Act, 1985. The court observed that the legislature intended that the public monies should be recovered first even from sick companies.

276. The position that a Special Act could also be treated as a General Act in certain circumstances, was further reiterated by the Supreme Court in ***Allahabad Bank Vs. Canara Bank case (Supra)***. It is noteworthy that the Supreme Court held that the principle of purposive interpretation which was applied by it in favour of the jurisdiction and powers of the company court in the earlier judgment in (1984) 4 SCC 657 Sudershan Chits India Limited Vs. O. Sukumaran Pillai and other cases, cannot be invoked in the present case against the Debt Recovery Tribunal in view of the superior purposes of the RDB Act and the special provisions contained therein. A view was taken upon applying this principle that the process of the Debt Recovery Tribunal was superior because it intended to provide a speedy and summary remedy for recovery of thousands of crores of rupees which was due to banks and to financial institutions.

The Apex Court considered the provision that Section 17 and 18 of the RDB Act dealing with adjudication of the debt due to banks and so far as the exclusivity of the jurisdiction of the Debt Recovery Tribunal was concerned, the court held thus :-

> "21. In our opinion, the jurisdiction of the Tribunal in regard to adjudication is exclusive. The RDB Act requires

> the Tribunal alone to decide applications for recovery of debts due to Banks or Financial Institutions. .....Under Section 18, the jurisdiction of any other court or authority which would otherwise have had jurisdiction but for the provisions of the Act, is ousted and the power to adjudicate upon the liability is exclusively vested in the Tribunal. (This exclusion does not however apply to the jurisdiction of the Supreme Court or of a High Court exercising power under Articles 226, 227 of the Constitution). This is the effect of Sections 17 and 18 of the Act.
> 22. We hold that the provisions of Section 17 and 18 of the RDB Act are exclusive so far as the question of adjudication of the liability of the defendant to the appellant Bank is concerned."

277. It is not disputed that the ICICI Bank Limited is entitled to initiate proceedings for recovery of its claim, if any, against the plaintiff and the defendants before the Debt Recovery Tribunal which it has not opted to do so.

278. As per the correspondence placed on record, the defendant no.1 has asserted a money claim against the plaintiff by letters and raised a demand for such sum against it.

279. On behalf of the ICICI Bank, it is contended, that the clause relating to "Governing Law & Jurisdiction" noticed above was comprehensive and covered all kinds of disputes with regard to the financing agreements, as is indicated from the expression 'in respect of all matters related to the financing agreements', and that it was not confined to recovery but would also cover non-performance of mutual obligations.

280. The clause refers to courts at Delhi and an alternate dispute redressal forum. Such an alternate dispute redressal forum has been statutorily made available to a banking institution under the provisions of the Recovery of Debts Due to Banks & Financial

Institutions Act, 1993 under which the banking and financial institutions are empowered to approach the Debt Recovery Tribunal for dispute redressal and their claims.

281. So far as the Recovery of Debts Due to Banks & Financial Institutions Act was concerned, the submission on behalf of the defendants is that it provides for an alternate dispute resolution forum in the form of the Debt Recovery Tribunal and the Appellate Tribunal. It is contended that the tribunal is a forum akin to the tax tribunals, the rent control tribunal and the service tribunals having specific jurisdiction limited jurisdiction.

A submission has been made on behalf of the defendants, that the alternative dispute redressal forum would not cover a statutory court or tribunal or forum having a limited jurisdiction and consequently, the submission that Debt Recovery Tribunal would not be covered under the dispute redressal mechanism agreed upon by the parties.

It has been held hereinabove that some of the alternate dispute redressal mechanisms have been statutorily recognised under Section 89 of the CPC. However, the clause relied upon by the defendant in the instant case does not specify any mechanism. A specific exclusive jurisdiction so far as the Recovery of Debts due to Banking & Financial Institution is concerned, has been statutorily created under the RDB Act which has to be enforced.

282. There can be no dispute that the Arbitration & Conciliation Act, 1996 is a general Act. So far recovery of debts to banks is concerned, the Recovery of Debts due to Banks & Financial Institutions Act,

1993 is a special statute enacted for a specific object which is exclusive jurisdiction with regard to claims by banks. The judgments noticed hereinabove lay down the binding principle that the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 overrides the provisions of the Arbitration & Conciliation Act, 1996 and that no consent of the other side is necessary for the bank to invoke its remedy under this statute and to seek dispute redressal by the debt recovery tribunal.

283. As a result of the above factual and legal position, even if it were held that there was a valid arbitration agreement, consideration of the claim relating to recovery of money of the defendant no. 1, would be beyond the jurisdiction of the arbitrators, as exclusive jurisdiction with regard to recovery of debts by banks and financial institutions is conferred on the debt recovery tribunal under the Recovery of Debts due to Banks & Financial Institutions Act, 1993.

284. The "Governing Law and Jurisdiction" clause does not provide any specific alternate dispute redressal mechanism to the plaintiff. In view of the above discussion, even if IA No. 2758/2005 is treated as an application under section 8 of the Arbitration & Conciliation Act, 1996, no relief can be granted therein to the defendant no. 1/applicant.

285. For the foregoing reasons, even if it were held that there is a valid and binding arbitration agreement whether the plaintiff cannot be non-suited for the reason that the proceedings for recovery by the ICICI Bank before the arbitration tribunal are without jurisdiction.

286. The defendant no. 1 has made different claims against the

plaintiff. It has been pointed out that by a letter dated 1st April, 2002 it stated that an event of default having occurred, the plaintiff was required to pay Rs.100 crores within seven days, by the letter dated 12th April, 2002, the ICICI called upon the plaintiff to pay an amount of Rs.100 crores or to provide a bank guarantee for the entire sum of Rs.484 crores. By a letter dated 27th December, 2002 of defendant no. 2, the ICICI sought compensation payment of Rs.30 crores. On 26th March, 2004, ICICI stated that the plaintiff had failed to satisfactorily secure and guarantee the bridge loan of Rs.100 crores and breached the contract contained in the term sheet. It was contended that there was a legal obligation under the term sheet on the plaintiff to provide the guarantee.

287. In the application being IA No. 2758/2005 under Order 7 Rule 11 filed by defendant no. 1 dated 8th April, 2001, in para 17, it is urged that the proceedings have been initiated to recover Rs.100 crores. This obviously is premised on the plea that there was a valid guarantee.

288. In the written submissions placed before this court, ICICI has asserted that it is claiming directions to the plaintiff to execute the guarantee for the bridge loans. It has also been stated that an event of default has occurred.

Nothing is pointed out which even remotely suggests ouster of the jurisdiction of civil courts in the documents relied upon by the ICICI Bank.

289. It has been argued on behalf of the defendants that the prayers made in the plaint are the subject matter of consideration before the

arbitral tribunal and further that though couched differently, however the plaint really makes a challenge to the order dated 24th February, 2005 passed by the arbitral tribunal.

290. So far as the facts placed before this court are concerned, a suit has been brought by the plaintiff complaining that there is no agreement at all with the defendants. The plaintiff has also contended arbitration agreement with the defendants with regard to the subject matter of the suit. Declaratory relief in this behalf as prayed.

291. The plaintiff was not a party to the reference which was a unilateral act on the part of the defendant no. 1. The plaintiff has no right under the clause relied upon by the defendant no. 1 to seek redressal of its grievances before the arbitral tribunal.

292. The plaintiff in the instant case has sued for not only a declaration, but for injunctions as well as damages against the defendants. As discussed hereinabove, the clause relied on by the defendants to submit that the arbitral tribunal alone has jurisdiction over these matters confers no right upon the plaintiff to seek dispute redressal. The reliefs sought by the plaintiff in the plaint are beyond the scope of the arbitration. The submissions made on behalf of the defendants do not consider this aspect.

The defendants have opted to neither file any application under section 8 of the Arbitration & Conciliation Act, 1996 nor placed any valid arbitration agreement before this court.

293. There is yet another facet to this contention. Assuming that the

ICICI Bank had not approached the arbitral tribunal for dispute redressal. Would a clause of this nature, even if it amounts to an arbitration agreement, preclude a civil suit at the instance of the plaintiff which has been conferred no right thereby to seek dispute redressal before the alternate dispute redressal forum?

In such an eventuality, could the plaintiff be left high and dry without any mechanism for seeking redressal of, or adjudication of its disputes and claims? The answer is clearly in the negative.

294. It therefore has to be held that there is no legal prohibition to the maintainability of the suit. The plaintiff is legally entitled to seek its reliefs by way of the present suit.

There is therefore no merit in IA No. 2758/2005 which is hereby dismissed.

295. It is also pointed out that the plaintiff had not sought any statutory or regulatory approval for the guarantee of the bridge loan and the bridge loans were disbursed even before any statutory or regulatory sanction was received. The submissions made by the defendants fail to consider the impact which the rejection of the applications seeking approval of the proposal for guarantees. Could the defendant no. 1 have then contended that the plaintiff was still liable to it for the disbursements which it has so effected? The defendant no.1 claims to have reacted for the sole reason that the plaintiff's credit ratings fell below the stipulated ratings. In view of the detailed discussion hereinabove, the plaintiff has made out a prima facie case for grant of injunction.

296. So far as the remedy available to the defendant no.1 is concerned, it has been held that prima facie there is no arbitration agreement between the parties. Even if the Governing Law & Jurisdiction clause was considered to be an arbitration agreement, such unilateral conferment is illegal and void. In view of the binding judicial pronouncements noted above, any proceedings premised on such an arbitration agreement are without jurisdiction and illegal. The plaintiff cannot be legally compelled to defend itself in such proceedings.

On the other hand, the plaintiff has asserted that it is based in USA and a compulsion to prosecute the proceedings before the arbitral tribunal which are without jurisdiction, would work irreparable loss and damage to it. There is force in such submission.

297. In addition thereto no alternate remedy is available to the plaintiff for settlement of its disputes.

Balance of convenience, interest of justice and equity are in favour of the plaintiff and against the defendants.

In view of the above, it is directed that the defendants shall stand restrained from continuing the arbitration proceedings detailed in IA Nos. 3134/2005 and 5838/2006. The defendants shall also stand restrained from commencing any other arbitration proceedings based on the clause titled “Governing Law and Jurisdiction” in the term sheet which has been enclosed with the letter dated 13th September, 2000 from the defendant no. 1.

It is made clear that the above discussion contains a prima facie

view on the factual aspects of the matter.

IA No. 3134/2005 and 5838/2006 shall stand allowed and IA No. 2758/2005 is disposed of in the above terms.

GITA MITTAL
JUDGE

October 13, 2009.
sd/aa/kr