IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Ordinary Original Civil Jurisdiction)

Dated: 29-10-2008

Coram

The Hon'ble Mr. Justice V. RAMASUBRAMANIAN

A.No.2670 of 2008, A.No.1236 of 2008 and

O.A.No.277 of 2008 and A.No.2671 of 2008

in C.S.No. 257 of 2008

1.Mr.Ramasamy Athappan

2.Nandakumar Athappan .. Applicants/Plaintiffs

Vs

1.The Secretariat of the Court,

International Chamber of Commerce,

38 Cours Albert 1 er,

75008 Paris, France.

2.O.R.E. Holdings Ltd.,

Rep., by its Board of Directors,

3rd Floor, Les Cascades,

Edith Cavell Street,

Port Louis,

Mauritius.

3.Odyssey Re Holdings Corporation,

Rep., by its Board of Directors,

No.300, First Stamford Place,

Stamford, Connecticut,

United States of America ┬ 06902.

4.Odyssey America Reinsurance Corporation,

Rep., by its Board of Directors,

No.300, First Stamford Place,

Stamford, Connecticut,

United States of America ┬ 06902.

5.Fairfax Financial Holdings Ltd.,

Rep., by its Director,

No.95 Willington Street West,

Suit No.800, Toranto,

Canada ┬ M512 N07.

6.CG Holdings Pvt. Ltd.,

Rep., by its Board of Directors,

No.19, Rajaannamalai Building,

Marshalls Road,

Chennai – 28.

7.Vasantha Mills Ltd.,

Rep., by its Director,

No.171, Trichy Road,

Singanallur,

Coimbatore – 641 018.

8.Cherraan Properties Limited,

Rep., by its Director,

No.257, I stage, 6th Cross,

Indira Nagar,

Bangalore – 560 038.

9.M/s.Cheran Enterprises (P) Ltd.,

Rep., by its Board of Directors,

Cherran Towers,

No.78 Arts College Road,

Coimbatore – 642 002.

10.Kangayem Chenniappa Palanisamy,

No.322, Thadagam Road,

Coimbatore ┬ 641 018. .. Respondents/Defendants.

FOR APPLICANTS : Mr.J.Sivanandaraj

FOR RESPONDENT 2 : P.H.Arvind Pandian

FOR RESPONDENTS 3 TO 5 : Mr.Satish Parasaran

FOR RESPONDENTS 6 & 10 : Mr.C.Harikrishnan, Sr. counsel

V. RAMASUBRAMANIAN, J.

Applications O.A.No.277 of 2008 and A.No.1236 of 2008 are by the plaintiffs in the suit respectively (i) for an interim order of injunction restraining the defendants 6 and 10 from proceeding with the arbitration and (ii) for stay of the arbitration clause. The applications A.Nos.2670 and 2671 of 2008 are by the defendants 6 and 10, praying respectively (i) for an order under section 45 of the Arbitration and Conciliation Act, 1996 referring the parties to international commercial arbitration and (ii) for an order vacating the interim injunction granted in O.A.No.277 of 2008.

2. I have heard Mr.C.Harikrishnan, learned senior counsel for the defendants 6 & 10, Mr.J.Sivanandaraj, learned counsel for the plaintiffs, Mr.Satish Parasaran, learned counsel for defendants 3 to 5 and P.H.Arvind Pandian, learned counsel for 2nd defendant.

3. In brief, the history of this litigation is as follows:-

(a) On 30.01.2004, the Plaintiffs, the 2nd defendant and defendants 6 to 10 entered into a Joint Venture Agreement at New Delhi, by which the 9th defendant was floated as a Joint Venture Company with the object of purchasing, constructing and developing a hotel property, a shopping complex and an information technology park and to develop and sell the properties owned by defendants 7 and 8. For achieving these objects, the Joint Venture Company was to obtain a Syndicated Credit Facility and the facility was to be secured by a Corporate Guarantee issued by the 4th defendant.

(b) In September 2005, disputes arose between the Joint Venture partners and the 10th defendant was removed from the post of Managing Director of the Joint Venture Company (D-9).

(c) In November 2005, the defendants 6 and 10 filed a petition in C.P.65 of 2005 under sections 397, 398, 402 and 403 of the Companies Act, on the file of the Company Law Board. It was filed against the plaintiffs herein, the defendants 2, 4 and 9 and one more person. The prayer in the Company Petition was for a declaration that the resolutions passed by the Board of Directors of the Joint venture company (D-9) on 21/22-9-2005 were null and void and for certain consequential reliefs.

(d) Around the same time, the defendants 6 and 10 also filed O.P.No. 279 of 2005, on the file of the District Court, Coimbatore, under Section 9 of the Arbitration and Conciliation Act, 1996 for a direction to the plaintiffs and defendants 2 and 4 herein, to furnish security.

(e) In December 2005, the 2nd defendant filed a petition in C.P.76 of 2005 on the file of the Company Law Board under Sections 397, 398, 402 and 403 of the Companies Act, 1956, against the plaintiffs herein and the defendants 6 to 10. The State Bank of India, ABN Amro Bank and the Syndicate Bank were also made parties to the said petition. The main prayer in the petition was to remove the 10th defendant from the post of Director of the Joint Venture company and for various consequential reliefs.

(f) In February 2006, the 10th defendant filed a criminal complaint against the plaintiffs, the defendants 2,4 and 5 and two more persons, alleging that they had committed offences punishable under section 120-B read with sections 409, 420, 405, 471 and 389, I.P.C. On the ground that no action was taken by the police on the said complaint, the 10th defendant filed Crl.O.P.No.9791 of 2006 on the file of this court for appropriate directions to the police to register the complaint and investigate. However, the 10th defendant later filed a private complaint under section 200, Cr.P.C., on the file of the Judicial Magistrate Court, Perundurai in Crl.M.P.No. 6096 of 2006 seeking to take cognizance of the offences allegedly committed by the above named persons. But the learned Magistrate dismissed the private complaint by an order dated 13-3-2007, under section 203 of the Code of Criminal Procedure.

(g) In the meantime, the Defendants 6 and 10 wrote to the Plaintiff on 14-8-2006, invoking Article 22.3 of the Joint Venture Agreement and expressing an intention to appoint either Lord

Steyn or Sir Anthony Evans as an Arbitrator on their behalf and seeking the plaintiffs↕ concurrence.

(h) On 21.08.2006, the plaintiffs sent a reply through counsel seeking time to take a reasoned decision. Therefore by a communication dated 25.08.2006, the defendants 6 and 10 informed the plaintiffs that if they did not hear from the plaintiffs, their response within 7 days, they would place a request with the Secretariat of the International Court of Arbitration.

(i) On 02.09.2006, the plaintiffs sent a reply through counsel contending that the defendants 6 and 10 had waived their right to seek arbitration and that they were attempting to agitate disputes before multiple fora.

(j) On 23.01.2007, defendants 7, 8 and 10 joined together and filed a suit in O.S.No.90 of 2007 on the file of the District Munsif Court, Kangeyam against the plaintiffs, the 9th defendant and 2 others, seeking a declaration that the allotment of shares in favour of the 2nd plaintiff herein, at the instance of the first plaintiff herein, in the Joint Venture company (9th defendant herein), is tainted by fraud and misrepresentation and also null and void and for consequential reliefs. Along with the suit, the defendants 7, 8 and 10 herein (Plaintiffs in O.S.No.90 of 2007) also sought an interim order of injunction in I.A.No.411 of 2007 restraining the first plaintiff herein from acting as a Director of the Joint Venture company and from alienating the shares. The application for interim injunction was dismissed by an order dated 3-9-2007.

(k) Even while prosecuting the above suit, the 10th defendant herein filed another police complaint and got the same forwarded by the Judicial Magistrate Court, Kangeyam, for investigation under section 156 (3), Cr.P.C. Therefore, a FIR was registered in Crime No.7 of 2007 on 19-4-2007 against the plaintiffs herein as well as a few others on the file of the District Crime Branch, Erode. But in a quash petition filed by the plaintiffs herein, in Crl.O.P.No.12695 of 2007, this court stayed all further proceedings in the criminal complaint in Crime.No.7 of 2007.

(l) One more police complaint came to be filed at the instance of the father of the 10th defendant herein in Crime No. 238 of 2007 in the Chennimalai Police Station, Erode on 1-6-2007, but the same was also stayed by this court in a quash petition in Crl.O.P.Nos.19448 and 19449 of 2007. There were also a few more complaints, the details of all of which may not be relevant for our purpose. Therefore I skip them.

(m) On 12.09.2007 the defendants 6 and 10 filed a formal request with the Secretariat of the Court of International Chamber of Commerce (ICC), Paris, seeking the initiation of Arbitration, in terms of Article 4 of ICC Rules of Arbitration. It was virtually a claim petition where the defendants 6 and 10 sought a declaration that the Joint Venture Agreement dated 30.01.2004 was vitiated by misrepresentation on the part of the plaintiffs herein and hence void. Consequently, the defendants claimed the relief of transfer of title to the immovable properties and also damages.

(n) On 24.10.2007, the plaintiffs herein sent a letter to ICC, requesting extension of time to file a response to the claim. Subsequently, the plaintiffs sent a letter dated 26-11-2007

requesting ICC to invoke Article 6.2 of the ICC Rules to stop further process of Arbitration, on the ground that they challenge the validity and scope of the arbitration agreement.

(o) But the ICC, at its session held on 1-2-2008 decided to proceed with the arbitration and the said decision was communicated to the parties by the Secretariat.

(p) Therefore on 03.03.2008, the plaintiffs moved the present suit, C.S.No.257 of 2008 praying for a declaration that Article 22 of the Joint Venture Agreement is null and void and for a consequential injunction restraining defendants from the proceeding with the Arbitration. On 7.3.2008, this Court granted an ad interim ex parte injunction, in O.A.No.277 of 2008, restraining the defendants in the suit from proceeding with the Arbitration.

(q) On 28.03.2008, the International Court of Arbitration, by itself, appointed Prof. James Crawford on behalf of 6th defendant and the 2nd plaintiff, pursuant to the Arbitration Clause. On 07.05.2008, the ICC also appointed Sir Ian Barker QC as the Chairman of the Arbitral Tribunal.

(r) But the Arbitrators did not proceed further in view of the interim order of injunction granted in O.A.No.277 of 2008. Therefore, on 13.06.2008, defendants 6 and 10 filed applications A.Nos. 2670 and 2671 of 2008, seeking respectively (i) to refer the parties to Arbitration under section 45 of the Arbitration and Conciliation Act, 1996 and (ii) to vacate the interim order of injunction granted in O.A.No.277 of 2008. Hence all the applications were taken up together.

4. Before proceeding further, an interesting fact situation is to be taken note of and it is this. The plaintiffs oppose arbitration on the ground that the Arbitration clause forming part of the Joint Venture Agreement is null and void, inoperative and incapable of being performed, though they accept the Joint Venture Agreement as valid. But the defendants 6 and 10 who seek arbitration, claim that the entire Joint Venture Agreement except the arbitration clause is null and void and the Arbitration clause alone has survived, to enable the parties to work out their remedies through International Commercial Arbitration.

5. The arbitration clause, which forms part of the Joint Venture Agreement, reads as follows:-

22.DISPUTE RESOULTION

22.1. This Agreement shall be governed by and construed and enforced in accordance with the laws of India.

22.2. The parties shall prior to adopting a legal recourse, attempt in good faith to resolve any dispute or difference arising between all or some of the parties in respect of the interpretation or implementation of the Joint Venture Agreement including its existence, validity or termination (each a 'dispute') within thirty (30) business days of its being raised by any party. Any party may give the other Party a written notice of any Dispute not resolved in the normal course of business. Within seven (7) Business days after delivery of the said notice the Parties or

Representatives thereof shall meet at a mutually accepted time and place, and thereafter as often as they reasonably deem necessary, to attempt to resolve the Dispute.

22.3. If the Dispute cannot be settled pursuant to and in accordance with Article 22.2 hereof, the same shall be settled by Arbitration in accordance with the Rules of the Arbitration of the International Chamber of Commerce ("ICC"). The Dispute shall be settled by an arbitral tribunal comprising of three (3) arbitrators. CG Holdings and Athappan shall together be entitled to appoint one (1) arbitrator and ORE shall be entitled to appoint one (1) arbitrator. The two (2) Arbitrators appointed as aforesaid will then appoint the third arbitrator. In the event of failure to constitute the Arbitral Tribunal as aforesaid within forty five (45) business days from issue of notice of Disputeby any party, (the "Default") reference shall be made to the ICC to appoint the Arbitrator not nominated by the party or to appoint the third arbitrator as the case maybe. Provided that while selecting the third arbitrator, ICC shall not select a person of Indian or American or nationality. The Arbitration shall be conducted in the English language. The seat of arbitration tribunal shall be London, England. Any arbitration award by the Arbitration Tribunal shall be final and binding upon the parties, shall not be subject to appeal and shall be enforced by judgment of a Court of competent jurisdiction.

22.4. The losing party, as determined by the Arbitral Tribunal, shall pay all reasonable out-of-pocket expenses (including, without limitation, reasonable attorney's fees) incurred by the prevailing Party, as determined by the arbitral tribunal, in connection with any such dispute. Notwithstanding any other provision of this Agreement, any Party shall be entitled to seek injunctive or other provisional relief against immediate, irreparable loss or damage from any Court of competent jurisdiction pending the final decision or award of the arbitrator. When any Dispute occurs and is referred to Arbitration, expect for the matters under dispute, the Parties shall continue to exercise their remaining respective rights and fulfill their remaining respective obligations under this Joint Venture Agreement.

6. As seen from the above clause, the case on hand is covered by Part II of the Arbitration and Conciliation Act, 1996. But the plaintiffs assail the arbitration agreement as null and void, inoperative and incapable of being performed. Therefore, the Court is obliged to hold an enquiry under Section 45, before referring the parties to arbitration. The scope of the enquiry to be conducted under Section 45, fell for consideration in SHIN-ETSU CHEMICAL CO. LTD. v. AKSH OPTIFIBRE LTD AND ANOTHER (2005) 7 SCC 234, where a three member Bench of the Supreme Court, echoed divergent views. While Justice Y.K.Sabharwal, as he then was, took the view that there is an obligation cast upon the judicial authority to record a full fledged finding on the validity of the arbitration agreement, the majority view of Hon↕ ble Justices D.M.Dharmadhikari and B.N.Srikrishna was that the Court's obligation was only to decide the issue prima facie. But the concurrence of both the learned judges who aired the majority view was only on one aspect namely that a prima facie finding is sufficient for allowing of an application under section 45. However, Justice Dharmadhikari held that if an application under Section 45 is to be rejected, on the ground that the agreement is "null and void" or "inoperative" or "incapable of being performed", the judicial authority or the Court must afford full opportunities to the parties to lead whatever documentary or oral evidence they want to lead and then decide the question like the trial of a preliminary issue on the issue of jurisdiction or

limitation in a regular civil suit and pass an elaborate reasoned order. The reason for this conclusion of Hon↕ ble Justice Dharmadhikari was that the rejection of an application under Section 45 of the Act, was subject to appeal, under Section 50 (1)(a) of the Act and further appeal to the Supreme Court under Section 50(2). Thus there was no unanimity of opinion on this issue.

7. However in INDIA HOUSEHOLD AND HEALTHCARE LTD v. LG HOUSEHOLD AND HEALTHCARE LTD. (2007) 5 SCC 510, Hon'ble Mr. Justice S.B. Sinha, of the Apex Court refused to appoint an arbitrator under Section 11 due to several reasons. One of the reasons was that a Memorandum of Understanding, which preceded the License Agreement, was the product of a fraud of very large magnitude and that some of the parties to the fraud were even convicted by a criminal court in Korea for various offences including bribery. Therefore a civil suit was filed for restraining the Defendants from acting on the Memorandum of Understanding and License Agreement and an interim order of injunction came to be issued. In such circumstances, the Supreme Court refused even to appoint an Arbitrator under Section 11.

8. The plaintiffs and some of the defendants resist the application under Section 45 on the ground inter alia -

(a) that the Arbitration Agreement is null and void, inoperative and incapable of being performed;

(b) that the issues raised before the Arbitrators are already in issue before various Courts and Special Forums in India and hence the defendants 6 and 10 who have themselves initiated such proceedings in India cannot seek to agitate the very same issues for the very same prayers before the Arbitrators;

(c) that the defendants 6 and 10 are not only challenging the Joint Venture Agreement as vitiated by fraud, but have also initiated criminal proceedings in India and hence they have made the Arbitration Agreement a dead letter and inoperative;

(d) that some of the parties to the present suit are not parties to the Joint Venture Agreement and the Arbitration Agreement and hence the Arbitral Tribunal would not have jurisdiction to adjudicate, in so far as those persons are concerned;

9. In response, the defendants 6 and 10 contend -

(a) that the filing of a Company Petition under Sections 397 and 398 of the Companies Act, before the Company Law Board, being a statutory remedy available to the defendants 6 and 10, will not prohibit them from invoking the Arbitration clause in respect of the matters covered by the Agreement between the parties;

(b) that O.S.No.90 of 2007 filed by them on the file of the District Munsif Court, Kangeyam was in respect of a cause of action that arose prior to the Joint Venture Agreement and hence did not make the Arbitration Clause inoperative or incapable of being performed;

(c) that the very filing of O.P.No.279 of 2005 under Section 9 of the Arbitration and Conciliation Act, would show that the defendants 6 and 10 never had any intention to abandon the Arbitration Agreement; and

(d) that the plaintiffs filed objections before the International Chamber of Commerce, requesting them to invoke Article 6 of ICC Rules to stop further progress in the Arbitration, but the said request was rejected by the International Chamber of Commerce and that thereafter the plaintiffs were not entitled to come up with a suit to achieve what they could not achieve before the International Chamber of Commerce;

10. I have carefully considered the rival submissions. The phrase "unless it finds that the said agreement is null and void, inoperative or incapable of being performed", appearing in section 45 of the 1996 Act, does not appear to have come up for judicial exploration so far. The phrase is adopted from Article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration. But much before the UNCITRAL Model Law was adopted, we had the Foreign Awards (Recognition and Enforcement) Act, 1961, Section 3 of which contained the same phraseology. It read as follows:-

"3. Stay on proceedings in respect of matters to be referred to Arbitration. -- Notwithstanding anything contained in the Arbitration Act, 1940 (10 of 1940) or in the Code of Civil Procedure, 1908 (5 of 1908), if any party to submission made in pursuance of an agreement to which the Convention set forth in the Schedule applies, or any person claiming through or under him commences any legal proceedings in any Court against any other party to the submission or any person claiming through or under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other step in the proceedings apply to the Court to stay the proceedings and the Court, unless satisfied that the agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings."

11. The Schedule to Foreign Awards (Recognition and Enforcement) Act, 1961 contained the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Article II.3 of the Schedule to the 1961 Act reads as follows:-

"The Court of a contracting State, when seized of an action on a matter in respect of which the parties have made an agreement within the meaning of this Article, shall at the request of one of the parties, refer the parties to Arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

12. Since the words and phrases ‼ null and void¶ , ‼ inoperative¶ and ‼ incapable of being performed" appearing in section 45, have not come up for consideration so far with particular reference to Arbitration and Conciliation Act, 1996, the interpretation, if any, given by courts to the same phrase, under section 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961, may be of assistance in finding a solution to the problem on hand.

13. Similarly, the same phraseology is also used in Section 9(4) of the English Arbitration Act, 1996. While construing the same found in section 9(4), the Chancery Division in Albon Vs. Naza Trading SDN BHD {2007 (2) All.E.R. 1075} held that "null and void means devoid of legal effect". The Chancery Division also drew inspiration from the ratio laid down by the United States Court of Appeals, in one of the earliest cases, Rhone Mediterranee Compagnia francese di assicurazioni e riassicurazioni Vs. Achille Lauro (712 F.2d 50 3d Cir.1983), and held that an agreement to arbitrate would be null and void only (i) when it is subject to an internationally recognised defence such as duress, mistake, fraud or waiver or (ii) when it contravenes fundamental policies of the Forum State. Similarly, it was held therein that an Arbitration Agreement would be "inoperative" if for some legal reason it ceased to have legal effect.

NULL AND VOID:

14. Keeping the above broad principles in mind, if we look at the definition of the words "null" and "void", it is seen that both the words are defined in P.Ramanatha Iyer's The Law Lexicon, to mean "of no legal force or effect". Section 2(g) of the Contract Act, 1872 defines a void agreement as "an agreement not enforceable by law". Section 2(j) of the Contract Act declares that "a Contract which ceases to be enforceable by law becomes void when it ceases to be enforceable". Thus, two types of nullity and voidity are contemplated by the Contract Act, viz., (i) agreements which are unenforceable and of no legal effect right from the inception, which are termed as void ab initio and (ii) agreements which might be valid at the inception but which becomes void on account of something that made them unenforceable after the inception.

15. The agreements which are void, are dealt with under Sections 20, 23 to 30 and 36 of the Contract Act. In brief:

(i) Section 20 declares an agreement to be void, if both parties to the agreement, are under a mistake as to a matter of fact;

(ii) Section 23 lists out the circumstances under which the consideration or object of an agreement would be illegal;

(iii) Section 24 declares agreements whose considerations and objects are unlawful in part, to be void;

(iv) Section 25 declares an agreement without consideration to be void except under certain contingencies;

(v) Sections 26 and 27 declare agreements in restraint of marriage and trade to be void;

(vi) Section 28 declares agreements in restraint of legal proceedings to be void (with a few exceptions);

(vii) Section 29 declares agreements to be void for uncertainty;

(viii) Section 30 declares agreements by way of wager to be void (with the exception of horse racing), and

(ix) Section 36 declares all agreements contingent upon the happening of impossible events, to be void.

16. While the provisions of Sections 20, 23 to 30 and 36 of the Contract Act, deal with agreements which are void from their very inception, Section 35 deals with agreements which become void subsequently, though they are not vitiated at the time of their making. Section 35 reads as follows:-

"35. When contracts become void, which are contingent on happening of specified even within fixed time. -- Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time become void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible."

17. Therefore, the basis of the plaintiff's claim that the Joint Venture Agreement is null and void, has to be tested on the touchstone of the parameters laid down under the Contract Act, 1872, in the aforesaid provisions. In other words, the plaintiffs should bring their case within any one of the parameters laid down in the aforesaid provisions of the Contract Act, if the Application under Section 45 taken out by the defendants 6 and 10 is to be rejected on the ground that the arbitration agreement is null and void. In simple terms, these parameters are (i) mistake of fact on the part of both the parties, (ii) the consideration or the object of the Agreement being unlawful on account of being forbidden by law, defeating the provisions of law, fraudulent, involving or implying injury to the person or the property of another, immoral or opposed to public policy, (iii) lack of consideration for the contract, (iv) restraint of marriage, trade or legal proceedings, (v) uncertainty, (vi) wager, (vii) contingent on impossible events, (viii) contingent on an uncertain event that fails to happen within a fixed time and (ix) agreement to do an act which is impossible or which becomes impossible subsequently.

18. In the light of the above principles, if the plaint is carefully scrutinised, it is seen that in paragraph 16 of the plaint, the plaintiffs have summarised the grounds on which they challenge the Arbitration Agreement. The plaintiffs have broadly classified in paragraph-16 of the plaint, 8 different heads under which the Arbitration Agreement is assailed. They are:-

(i) The Arbitration proceedings are barred by res judicata and hence incapable of proceeding further.

(ii) The Arbitration Agreement is extinguished by waiver, estoppel, abandonment and frustration.

(iii) The Arbitration Agreement is incapable of being enforced in view of Section 16 of the Specific Relief Act.

(iv) Some of the defendants are not parties to the Arbitration Agreement.

(v) The very claim of the defendants 6 and 10 before the Arbitrators is that the Joint Venture Agreement is null and void. Therefore the Arbitration Agreement which forms part of it, is also null and void.

(vi) Complicated issues, which cannot be decided by arbitration, are involved.

(vii) The conduct of the defendants 6 and 10 disentitles them from seeking Arbitration.

19. The challenge to the Arbitration Agreement on the ground that it is null and void is found only in sub paragraph V of paragraph-16 of the plaint. But there, the plaintiffs have not specifically pleaded any question of fact that rendered the Arbitration Agreement null and void. None of the parameters prescribed in sections 20, 23 to 30, 35 or 36 of the Contract Act, is pleaded with any kind of precision by the plaintiffs, to enable this court to come to the conclusion that the Arbitration Agreement is null and void. The plaintiffs seek a declaration that the Arbitration Agreement is null and void only on the basis that the defendants 6 and 10 themselves have sought a declaration in their Arbitration Claim Petition that the Joint Venture Agreement is null and void. Therefore, according to the plaintiffs, the Arbitration Agreement which forms part of the Joint Venture Agreement also became null and void.

20. In effect, the plaintiffs herein are not assailing the Arbitration Agreement as null and void for reasons of their own. They are assailing the Arbitration Agreement as null and void on the basis of the stand taken by the defendants 6 and 10 before the Arbitrators, that the Joint Venture Agreement is null and void. But a reading of the Claim Petition dated 12-9-2007, filed by the defendants 6 and 10 before the International Chamber of Commerce, (plaint document No.34) would show that the attack of defendants 6 and 10 is to the Joint Venture Agreement and not to the Arbitration Agreement. In paragraph-4 of the Arbitration claim petition, containing the reliefs sought for, the defendants 6 and 10 have sought a declaration that the Joint Venture Agreement is vitiated by misrepresentation and thus void. But in paragraph-4.1.3, the defendants 6 and 10 have actually claimed damages for the alleged breach of the Joint Venture Agreement and/or the misrepresentations. Thus the defendants 6 and 10 seek reliefs for the alleged damage suffered by them on account of the voidity or breach of the Joint Venture agreement. This is why they are not assailing the arbitration agreement, but challenging only the joint venture agreement. Moreover, the crux of the complaint of the defendants before ICC, is that the joint venture

agreement is vitiated by misrepresentations. An agreement brought forth by misrepresentation is only voidable under section 19 of the Contract Act and not void. Therefore on the basis of the stand taken by the defendants 6 and 10 before the Arbitrators that the Joint Venture Agreement has become void, the plaintiffs are not entitled to claim that the Arbitration Agreement is also null and void. In other words, in a suit filed by a party to an Arbitration Agreement, the plaintiff should take a definite stand about the nullity and voidity of the Arbitration Agreement and not about the underlying contract, in view of the Doctrine of Severability. The plaintiffs cannot ignore the Arbitration Clause and invoke the jurisdiction of a Civil Court, just on the basis that even according to the defendants the underlying agreement was void.

21. As stated earlier, in reason No.V in paragraph-16 of the plaint, the plaintiffs have not laid a foundation, strong enough for their claim, that the Arbitration Agreement is null and void, for some acceptable reasons of their own. The plaintiffs have just pleaded that even according to the defendants 6 and 10, the Joint Venture Agreement has become null and void. This is not, in my considered opinion, a pleading, sufficient to hold that the Arbitration Agreement is null and void, for the purpose of rejecting an application under Section 45 of the Act.

INCAPABLE OF BEING PERFORMED:

22. The next limb of the rider contained in section 45 is the word ‼ inoperative¶ . But before examining the question as to whether the arbitration agreement in this case has become inoperative, let me, for the purpose of convenience, examine whether the agreement has become incapable of being performed. The phrase ‼ incapable of being performed¶ signifies, in effect, frustration and the consequent discharge. If, after the making of the contract, the promise becomes incapable of being fulfilled or performed, due to unforeseen contingencies, the contract is frustrated.

23. When the rule of ◄ frustration↕ was at its infancy, in the 17th Century, the Court took a rigid view in Paradine Vs. Jane that if a person binds himself by contract absolutely to do a thing, he cannot escape liability for damages. However, the rigour of the said rule as to absolute contracts, was mitigated in subsequent cases starting with Taylor Vs. Caldwell in 1863, where it was held that if the further fulfillment of the contract is brought to an abrupt stop by some irresistible and extraneous cause for which neither party is responsible, the contract shall terminate forthwith and the parties discharged. As a matter of fact, the theory of ‼ implied term¶ was evolved from the said decision.

24. In Paal Wilson & Co A/S Vs. Partenreederei Hannah Blumenthal {(1983) 1 All ER 34}, the House of Lords formulated two essential pre-requisites for a contract to be frustrated. They were as follows:-

‼ (2) In any event, the two essential prerequisites for a contract to be held to be frustrated were (a) that there was some outside event or extraneous change of situation which was not foreseen or provided for by the parties at the time of making the contract and which either made it impossible for the contract to be performed at all or rendered its performance radically different from that which the parties contemplated when entering into the contract and (b) that the outside event or extraneous change of situation and the consequences thereof occurred without the fault or default of either party.¶

25. The principle of frustration and impossibility of performance are incorporated in Section 56 of the Contract Act, which reads as follows:-

‼ 56. Agreement to do impossible act. ⊤ An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossible or unlawful. ⊤ A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful. ⊤ Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.¶

26. Thus section 56 of the Contract Act, contemplates 3 situations, namely (i) agreement to do an act which is impossible in itself (ii) agreement to do an act which becomes impossible after the making of the contract and (iii) agreement to do an act, which becomes unlawful later, on account of some event which the promisor could not prevent.

27. But the case on hand will not fall either under the category of an agreement to do an act impossible in itself or under the category of an agreement to do an act, which became unlawful by reason of some event which the promisor could not prevent. It will also not fall under the category of a contract to do an act which became impossible after the contract was made. We must remember that we are here concerned with the arbitration agreement and not the main joint venture agreement. The arbitration by itself is not incapable of being performed, even if the joint venture agreement between the parties is presumed to be incapable of being performed. Therefore, I do not accept the contention that the arbitration agreement became incapable of being performed.

28. The reliance placed by the plaintiffs on section 16 of the Specific Relief Act, 1963, is misconceived. Section 16 speaks of personal bar to the relief of specific performance. It disentitles a person, who has become incapable of performing his part of the contract, from seeking specific performance of the contract. It is for the simple reason that every contract contains reciprocal promises and there is no point in compelling one of the parties to perform his part of the obligations when the other party cannot be so compelled, on account of his incapacity. Section 45 of the Arbitration and Conciliation Act, 1996 does not speak of incapability or incapacity of a party to a contract, but speaks of incapability of the arbitration agreement from being performed. Per contra, section 16 of the Specific Relief Act, 1963 speaks of incapability of the party to the contract. In any case, neither the parties nor the arbitration agreement in the present case, have become incapable of performance. Therefore, the contention that the arbitration agreement has become incapable of being performed, cannot be accepted.

INOPERATIVE:

29. Apart from assailing the agreement as null and void and incapable of being performed, the plaintiffs also claim that the arbitration agreement is inoperative. Section 45 of the Act, enables the Judicial Authority to refuse to make a reference, not only when the Arbitration Agreement is null and void or incapable of being performed, but also when the Agreement is inoperative. Therefore the plaintiffs' contention that the Agreement has become inoperative by virtue of certain events, has also to be tested.

30. The word "inoperative" is defined in P.Ramanatha Iyer's, The Law Lexicon to mean "without the practical force". Black's Law Dictionary defines the word "inoperative" as "having no force or effect".

31. Going by its natural meaning, the word "inoperative" indicates something which has become a dead letter. Something which is legally valid, may also, at times, lose its life force and become clinically dead or inoperative, either by the acts of parties or on account of extraneous factors. Russell on Arbitration says that an Arbitration Agreement will be inoperative in cases where, for example, it contains such an inherent contradiction that it cannot be given effect to. He refers to such Arbitration Clauses as "Pathological Arbitration Clauses" and cites the decision in Lovelock Limited Vs. Exportles {(1968) 1 Lloyd's Rep. 163}, where an agreement contained a clause, the first part of which mandated the reference of any dispute to Arbitration in England and the latter part of it mandated the reference of any other dispute to Arbitration in Russia. Therefore the Court held that the Arbitration Agreement was void for ambiguity and was neither effective nor enforceable. But the case on hand poses no such conundrum.

32. One of the circumstances when an arbitration agreement may become inoperative is, when the dispute arising out of the underlying contract is resolved. The Supreme Court of New South

Wales, Commercial Division, Australia, took such a view in Shanghai Foreign Trade Corporation (PR China) vs. Sigma Metallurgical Co. Pty. Ltd., (Yearbook Commercial Arbitration, Vol. XXII-1997 page 609). An agreement may be rendered inoperative even by acts of omission or commission, on the part of the parties. Waiver, abandonment, renunciation, election, acquiescence etc., are some of the acts of commission or omission, by which an agreement may be made inoperative by a party. In his "The Law and Practice of Arbitration and Conciliation (2nd Edition) Mr.O.P.Malhotra, the learned Author says the following about waiver:-

"Waiver of the right to arbitration, however, cannot be easily assumed. It requires an unequivocal demonstration of intent to waive. In determining whether a party has waived its right to arbitration, the Court examines the following factors -

(i) whether the party's actions are inconsistent with the right to arbitrate;

(ii) whether the litigation machinery has been substantially invoked and the parties were well into preparation of a lawsuit before the party notified the opposing party of an intent to arbitrate;

(iii) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay;

(iv) whether a defendant seeking arbitration filed a counter-claim without asking for a stay of the proceedings;

(v) whether important intervening steps (eg, taking advantage of judicial discovery procedures not available in arbitration) had taken place; and

(vi) whether the delay affected, mislead, or prejudiced the opposing party (Jackson Trak Group, Inc v Mid States Port Auth 242 Kan 683, 751, P 2d 122, 129 (1988) cited in Malarky Enterprises (US) v Healthcare Technology Ltd (UK), Yearbook Commercial Arbitration, vol. XXIII-1998 (US No.248) 945, 947)"

33. In Paal Wilson & Co A/S Vs. Partenreederei Hannah Blumenthal {(1983) 1 All ER 34}, the House of Lords explained the doctrine of abandonment in relation to an arbitration agreement, as follows:-

‼ (3) Since the doctrine of abandonment depended on the formation of a contract of abandonment (to which the normal rules of contract applied, including the necessity for consensus ad idem between the parties), the sellers had to show either (a) that an implied agreement to abandon the contract to arbitrate was to be inferred from the parties↕ conduct or (b) that the buyers↕ conduct as evinced to the sellers was such as to lead the sellers reasonably to believe that the buyers had abandoned the contract to arbitrate (even though that may not have been the buyers↕ actual intention) and that the sellers had significantly altered their position in reliance on that belief.¶

34. The issue of abandonment of the right to arbitration was considered by the Apex court in F.C.I. Vs. YADAV ENGINEER AND CONTRACTOR {(1982) 2 SCC 499}, wherein the Supreme Court held as follows:-

‼ Abandonment of a right to seek resolution of dispute as provided in the arbitration agreement must be clearly manifested by the step taken by such party. Once such unequivocal intention is declared or abandonment of the right to claim the benefit of the agreement becomes manifest from the conduct, such party would then not be entitled to enforce the arbitration agreement because there is thus a breach of the agreement by both the parties disentitling both to claim any benefit of the arbitration agreement. Section 34 provides that a party dragged to the Court as defendant by another party who is a party to the arbitration agreement must ask for stay of the proceedings before filing the written statement or before taking any other step in the proceedings. That party must simultaneously show its readiness and willingness to do all things necessary to the proper conduct of the arbitration. The legislature by making it mandatory on the party seeking benefit of the arbitration agreement to apply for stay of the proceedings before filing the written statement or before taking any other steps in the proceedings unmistakably pointed out that filing of the written statement discloses such conduct on the part of the party as would unquestionably show that the party has abandoned its rights under the arbitration agreement and has disclosed an unequivocal intention to accept the forum of the Court for resolution of the dispute by waiving its right to get the dispute resolved by a forum contemplated by the arbitration agreement. When the party files written statement to the suit it discloses its defence, enters into a contest and invites the Court to adjudicate upon the dispute. Once the Court is invited to adjudicate upon the dispute there is no question of then enforcing an arbitration agreement by forcing the parties to resort to the forum of their choice as set out in the arbitration agreement. This flows from the well-settled principle that the Court would normally hold the parties to the bargain {see Ramji Dayawala & Sons (P) Ltd Vs. Invest Import {(1981) 1 SCR 899 : (1981) 1 SCC 80}.¶

35. Again in GENERAL ELECTRIC CO. Vs. RENUSAGAR POWER CO. {(1987) 4 SCC 137}, the Supreme Court held as follows:-

‼ Thus we see that it is the view of this Court that a step in the proceeding which would disentitle the defendant from invoking Section 34 of the Arbitration Act should be a step in aid of the progress of the suit or submission to the jurisdiction of the Court for the purpose of adjudication of the merits of the controversy in the suit. The step must be such as to manifest the intention of the party unequivocally to abandon the right under the arbitration agreement and instead to opt to have the dispute resolved on merits in the suit. The step must be such as to indicate an election or affirmation in favour of the suit in the place of the arbitration. The election or affirmation may be by express choice or by necessary implication by acquiescence. The broad and general right of a person to seek redressal of his grievances in a Court of law is subject to the right of the parties to have the disputes settled by a forum of mutual choice. Neither right is insubstantial and neither right can be allowed to be defeated by any manner of technicality. The right to have the dispute adjudicated by a Civil Court cannot be allowed to be

defeated by vague or amorphous mis-called agreements to refer to ◄ arbitration↕ . On the other hand, if the agreement to refer to arbitration is established, the right to have the dispute settled by arbitration cannot be allowed to be defeated on technical grounds.¶

36. The above cases arose out of section 34 of the Arbitration Act, 1940, relating to stay of legal proceedings. Section 34 of the old Act entitled a party against whom legal proceedings were initiated, to seek a stay of the proceedings, on the basis of the arbitration agreement. But the right so conferred was restricted by the prescription that it should be exercised before the filing of a written statement or taking any other steps in the proceedings. Therefore, the Supreme Court held that the action of the defendant in filing a written statement or taking other steps in the legal proceedings would tantamount to abandonment of the right to seek arbitration.

37. Interestingly, the Supreme Court did not merely look at the filing of the written statement as an act simplicitor, disentitling the defendant to seek arbitration in terms of section 34, without anything more. In other words, the Supreme Court did not just think that the filing of the written statement by the defendant resulted in the forfeiture of a right to seek arbitration. The filing of the written statement was considered by the Apex court, as an abandonment of the right itself.

38. A similar rider, as found in section 34 of the 1940 Act, is found in section 8 of the 1996 Act. Under section 8 of the 1996 Act, a defendant is required to file an application for referring the parties to arbitration, ‼ not later than when submitting his first statement on the substance of the dispute.¶ Therefore the principle enunciated by the Supreme court, in FCI case and General Electric Case would apply even to a case covered by the 1996 Act, if the defendant does not apply under section 8, before submitting his first statement on the substance of the dispute, as he would be held guilty of abandonment of the right to seek arbitration.

39. But section 45 of the 1996 Act is differently worded. It does not impose a restriction that the right to seek a reference to arbitration should be exercised before a written statement is filed or before submitting the first statement on the substance of the dispute. Therefore a question may arise as to whether the same principle of abandonment of the right to arbitration can be applied to a case under section 45.

40. It is true that section 45 does not impose an obligation upon a party to a proceeding, to file an application seeking a reference, before any particular stage in the proceeding is reached. However, it speaks about the arbitration agreement becoming ‼ inoperative¶ . A comparison of section 34 of the 1940 Act, section 8 of the 1996 Act and section 45 of the 1996 Act, would show an interesting scheme kept in mind by the law makers. While the exercise of the right to seek arbitration under section 34 of the 1940 Act or section 8 of the 1996 Act is time bound and

not really substance-bound, the exercise of the right to seek arbitration under section 45 of the 1996 Act is actually substance-bound and not time bound. Section 45 empowers a judicial authority to reject an application for arbitration if the agreement is inoperative. Since an agreement can be made inoperative by abandonment, the principle laid down by the Apex court in FCI case and General Electric case as to what constitutes abandonment, can be applied to a case under section 45 of the 1996 Act also.

41. As stated earlier, an agreement may be made inoperative by waiver. For example, if a party to a contract chooses to invoke the jurisdiction of a particular law (governing law) or a particular Court, ignoring the clause relating to ‼ governing law and jurisdiction¶ contained in the contract between them, it may not be open to him thereafter to turn around and make a disclaimer of the action initiated by him, if the other party has submitted himself to the jurisdiction and obtained a relief or finding in his favour.

42. Abandonment may also arise when the contract is followed by a long period of delay or inactivity. But the party seeking to establish abandonment must show that the other party so conducted himself as to entitle him to assume and that he did assume, that the contract was agreed to be abandoned sub silentio. The abandonment of a right may arise by virtue of a party making an election. Some times this is also called ‼ waiver by election¶ . It would arise when a person is entitled to alternative rights inconsistent with one another and that person acts in a manner which is consistent only with his having chosen to rely on one of them. Such cases do not require detriment to the other party as foundation for their application {R.Samudra Vijayam Chettiar Vs. Srinivasa Alwar and Others ┬ AIR 1956 Madras 301}. A second type of waiver is ‼ waiver by estoppel¶ . It arises when the innocent party so conducts himself as to lead the party in default to believe that he will not exercise that right. This type of waiver is actually an application of the principle of equitable estoppel.

43. Another category of cases where discharge by breach may occur, are cases where one party by words or conduct evinces an intention not to perform or expressly declares that he is or will be unable to perform his obligations in some essential respect. The renunciation of a contract belongs to this category.

44. In the light of the above principles, if we scan the facts of the present case, to see if there is abandonment, waiver, election or renunciation, it is seen that both before and after the defendants 6 and 10 invoked the arbitration clause, the parties were engaged in a pitched battle in various courts and forums. The details of the cases pending/disposed of between the parties are presented in a tabular form for easy appreciation.

Case No

Petitioners in that case

Respondents in that case

Forum

Reliefs prayed for therein

Result

C.P.No.65 of 2005

D-6 and D-10 herein

Plaintiffs herein, defendants 2, 4 & 9 and another

Company Law Board

1. To declare the meetings and resolutions passed by the Board of J.V.Company

(D-9) as null and void and other reliefs

Disposed of on

13-8-2008

C.P.No.76 of 2005

D-2

Plaintiffs,

D-6 to D-10 State Bank, ABN Amro, Syndicate Banks

Company Law Board

To remove D-10 from the post of CEO and for other reliefs

Disposed of on

13-8-2008

O.S.No.90 of 2006

D-8 and D-10

Plaintiffs,

D-9 and 2 others

D.M.C., Kangeyam

To declare the allotment of shares to P-2 at the instance of P-1 as tainted by fraud and misrepresentation

I.A. dismissed

45. Apart from the above suit and company petitions, the parties have lodged several criminal complaints and counter complaints against one another alleging the commission of various offences. The details of these complaints are as follows:-

Lodged in

complainant

Accused

Offences alleged

Status

Economic offences wing

D-10

Plaintiffs, Defts. 2, 4, and 5

120-B, r/w 409,420,405,

471, 389

Not investigated; petition for direction filed in high court

Crl.M.P.No. 6096/2006, J.M., Perundurai

D-10

Plaintiffs, Defts.4 and 5 and others

109, 406,420, 467

Dismissed

Cr.No. 7/07 District Crime Branch, Erode

D-10

Plaintiffs, D-2,4 &5

120-B, 109, 420,408, 409

Stayed by High Court in Crl.O.P.12695/07

Crime No. 238/07, Chennimalai Police

Chenniappan

Director of D-6

Plaintiffs, D-2,4 &5

120-B, 406, 409, 420 IPC

Stayed by High Court in Crl.O.P.19448/07

Crime No. 466 of 2007, Kangeyam Police

Chenniappan

Director of D-6

Plaintiffs, D-2 & 4

406, 409, 420, 471, IPC

Stayed by High Court, Madras in Crl.O.P.No. 20886 to 20889 of 2007

Crime No. 468 of 2007, Kangeyam Police

Chenniappan

Director of D-6

Plaintiffs, D-2 & 4

406,409,420, 467,471,472, 477 IPC

Stayed by High Court, Madras in Crl.O.P.No. 20886 to 20889 of 2007

46. The above table contains details of only those criminal complaints filed by the defendants 6 and 10. There are also complaints filed by the plaintiffs and others against the 10th defendant leading to the arrest and detention of the 10th defendant by the police. Serious allegations of fraud, breach of trust, cheating etc., are made by the parties against one another.

47. Thus it is clear that the defendants 6 and 10 themselves, have taken recourse to civil suit, company petitions and police complaints against the plaintiffs herein and various other persons. If the defendants 6 and 10 had been faithful to the arbitration agreement, they should have invoked the arbitration clause at the earliest. But they had taken recourse to several other forums including about half a dozen police complaints. Very serious allegations of cheating, breach of trust, criminal conspiracy, falsification of accounts, fabrication of documents have been made in those complaints. While the allegation of fraud is the foundation for the criminal complaints, the allegation of misrepresentation is the basis for the arbitration proceedings. The first strike, of taking recourse to other forums and other proceedings was made only by the defendants 6 and 10 and not by the plaintiffs. Both parties are now plunged into a series of litigation, in which the same evidence would be used.

48. The concept of holding the parties to their bargain and driving them to arbitration is based on the principle of ‼ one-stop adjudication¶ . If the parties are already engaged in gorilla warfare at several locations in the battle field, asking them to submit to arbitration, in addition to those proceedings, would not serve the purpose for which an arbitration clause is provided for. Arbitration is devised as an alternative dispute resolution mechanism and not as an additional dispute resolution mechanism. Therefore I am of the opinion that the defendants 6 and 10 have made the arbitration agreement (or clause) inoperative by resorting to a series of litigation before various fora.

49. An argument was raised by the learned Senior counsel for defendants 6 and 10 that the company petitions filed by his clients are only statutory remedies availed by them and that it would not amount to abandonment. As a matter a fact, there were 2 company petitions, one filed by defendants 6 and 10 and another filed by defendant-2, under sections 397 and 398, Companies Act, 1956. These company petitions have now been disposed of by the Company Law Board, by a common order dated 13-8-2008. Both company petitions related to the alleged oppression and mismanagement of the affairs of the Joint Venture company.

50. The order passed by the Company Law Board dated 13-8-2008 discloses that the entire dispute before the Board revolved only around the Joint Venture Agreement. It is stated in paragraph-3 of the order of the CLB that ‼ all the contentious issues primarily arising on account of the alleged breach of the terms of the JVA dated 30-1-2004 are common to C.P.No.65 of 2005 as well as C.P. No.76 of 2005.¶ In paragraph-16 of its order, the CLB has enlisted the reasons on account of which disputes arose between the parties. Non fulfillment of the terms and conditions of the JVA is one of the reasons cited there. In the same paragraph (16), at page 38 of its order, the Company Law Board has elicited in a nutshell the nature of the dispute in the following words:-

‼ The whole of the controversies have spurred out of the JVA dated 30-1-2004. KCP (D-10) is accusing ORE (D-2) of non fulfillment of the terms and conditions of the JVA, whereas the latter is finding fault with KCP for having grossly violated the provisions of the JVA¶

51. It is in the above context that the CLB pointed out in the later portion of paragraph 16 of its order (at page 41) that ‼ none of the complaints made as regards violation of contractual rights derived from the JVA can be agitated in a proceeding under section 397 of the Act ¶ and that ‼ therefore the grievances of KCP or ORE on account of the purported breach of the terms of the JVA are not amenable to the jurisdiction of CLB¶ . After saying so, the CLB also noted the existence of clause 22 of the JVA for dispute resolution.

52. At the end of an elaborate discussion, the CLB noted at page 59 of its order that there is complete mistrust and lack of mutual confidence and that it is impossible to carry on the joint venture business of CEPL (D-9) as per the terms of the JVA on account of the strained relationship which got aggravated by virtue of a number of criminal complaints initiated against the second defendant and others. Therefore the CLB suggested that the most equitable remedy would be parting of ways among D-2, plaintiffs and D-6. The CLB also recorded an opinion that ‼ the very purpose of CEPL (D-9) could never be achieved in terms of JVA since 30-1-2004 and therefore CG Holdings (D-6) and KCP(D-10) cannot be claim to be in the management.¶ The remedy suggested by the CLB was that the entire investments made by ORE (D-2) and Athappan(plaintiffs) in CEPL (D-9), must be returned back with reasonable interest on such investments till the date of repayment, failing which the properties belonging to VML (D-7) shall be conveyed in favour of ORE (D-2) and Athappan (plaintiffs) towards satisfaction of their claims in full. It was further pointed out by CLB that the suggestions made by it was to ensure cessation of relationship among KCP (D-10), ORE (D-2) and Athappan (plaintiffs), without suffering any prejudices by them.

53. In the light of such findings and opinion, the CLB issued certain directions to the parties in paragraph-17 of its order, which are as follows:-

‼ 17. In view of the foregoing conclusions and in exercise of the powers under Sections 397 and 398 read with Section 402 and with a view to bringing to an end the grievances of CG Holdings, KCP, ORE and Athappan, the following order is passed:-

"CEPL shall return a sum of Rs.75 crores and Rs.4 crores invested by ORE and Athappan respectively, together with simple interest at the rate of 8% per annum from the date of investment till the date of repayment within a period of 12 months in one or more instalments, commencing from 01.11.2008. While making the payment CEPL, CG Holdings and KCP shall ensure that at least 25% of the amount due is paid in every quarter. CEPL, C.G. Holdings and KCP are at liberty to make use of the fixed deposit held by CEPL with SBI, Erode Main Branch, free of any liens or encumbrances towards refund of the investments of ORE and Athappan. VML shall not alienate or sell any of its immovable properties till full payment is made to ORE, in terms of this order. In the event of any failure to make the repayment within the specified time, CEPL, CG Holdings, KCP and VML will duly convey the immovable properties of VML, namely, 17.15 acres of land in favour of ORE and 7.80 acres of land in favour of Athappan by executing and registering necessary deeds of conveyance in strict compliance with all applicable laws, as consideration for reduction of capital and surrender of the shares of ORE and Athappan, upon which ORE as well as Athappan will deliver the share certificates and blank transfer forms in respect of their holdings in CEPL and the subsidiaries, if any, in favour of CG Holdings and KCP. CEPL is consequently authorised to reduce its share capital and in the meantime, operation of the impugned agreements is suspended, to expedite and ensure due completion of the modalities of exit by ORE and Athappan, thereby, bringing to an end the acts complained of in the present proceedings. CEPL shall ensure necessary statutory compliances till the whole process, in accordance with the aforesaid directions, is properly completed. The parties are at liberty to apply in the event of any difficulty in implementation of the smooth exist of ORE and Athappan from CEPL."

54. In effect, the CLB has now paved the way for the smooth exit of the plaintiffs and the second defendant from the Joint Venture company (D-9) after taking away their investments and enabling the defendants 6, 7, 8 and 10 to retain control of their immovable properties. The purport of the order is virtually to restore status quo ante that prevailed between the parties prior to the JVA. Therefore, if the order of the CLB is accepted and enforced, the parties will go back to their original position, resulting in the JVA getting obliterated.

55. Accepting the above directions of CLB, the defendants 6 and 10, through their counsel, have already sent a letter dated 20-8-2008 (filed by the defendants 6 and 10 as additional document after orders were reserved in these applications) to the counsel for the plaintiffs expressing readiness and willingness to refund the money and have the shares re-conveyed. Once this is done, the defendants 6 and 10 will get back control of the immovable properties, to the exclusion of the plaintiffs and defendant-2. The prayer made by the defendants 6 and 10 in paragraph 4.1.2 in the arbitration claim petition is for a direction to the JV company (D-9) to transfer the title of the real estate to the claimant or to its order. This prayer actually merges with the prayer now

granted by CLB. In such circumstances, it is clear that the defendants 6 and 10 have, by their own conduct, made the arbitration clause/agreement inoperative.

56. The purpose of arbitration is to minimize the role of courts and other fora and to ensure speedy resolution of disputes. In cases covered by Part ┬ II of the Act, the role of the court at the pre reference stage, is confined only to the grant of interim measures under section 9 and the examination of the validity and enforceability of the arbitration agreement (whether null and void, inoperative or incapable of being performed). The defendants approached the District Court at Coimbatore, seeking a relief under section 9 and it is understandable. But they also filed Company Petitions, a suit and several criminal complaints and also obtained a relief from the Company Law Board, which would restore the parties to the joint venture agreement, to their original position. The claim for damages alone is now available for the arbitral tribunal to adjudicate, since the question of transfer of title to immovable property (also prayed before the arbitral tribunal) has already been substantially decided by the CLB. Therefore, the arbitration agreement has been rendered inoperative by the defendants 6 and 10.

57. There is also one more issue. A set of persons namely, the plaintiffs and defendants 2, 6 to 10 alone are parties to the joint venture agreement, of which the arbitration agreement is a part. But the arbitration claim is made not only against persons who are parties to the joint venture agreement (and the arbitration agreement), but also against defendants 3, 4 and 5. In paragraph 2.3 of the Claim Petition filed before the arbitrators, the defendants 6 and 10 seek to justify the impleadment of defendants 3, 4 and 5 on the ground that they are the altar ego of the second defendant and that they had participated in the pre contract negotiations and made representations on behalf of the other defendants. The paragraph relating to reliefs claimed, is not confined to the parties to the arbitration (or joint venture) agreement alone. Thus there is an attempt on the part of defendants 6 and 10 to seek reliefs before the arbitrators, against persons who are not bound by the arbitration agreement. This is why defendants 3, 4 and 5 have been made parties to the present suit. These defendants are not bound by the arbitration clause and need not subject themselves to the jurisdiction of the arbitral tribunal. But their very impleadment before the arbitral tribunal by the defendants 6 and 10 shows that their presence is needed by the defendants 6 and 10 to substantiate their claim. Therefore the ratio laid down in Sukanya Holdings case {(2003) 5 SCC 531} would apply and I cannot direct the parties to go before the arbitral tribunal.

58. The fact that the plaintiffs sent a letter to the ICC on 26.11.2007, requesting them to stop further process of arbitration and that the same was rejected under Article 6 of the ICC Rules, would not amount to the plaintiffs submitting to the jurisdiction of the Arbitral Tribunal. The letter dated 26.11.2007 by which the plaintiffs made a request to ICC invoking Article 6.2 of the ICC Rules, is filed as plaint document No.36. All the points now raised in the suit that there is abandonment of the Arbitration Agreement etc., are raised in that letter dated 26.11.2007. The ICC International Court of Arbitration merely conveyed, by their letter dated 1.2.2008, their

decision to proceed further with the Arbitration. This letter is filed as plaint document No.39. No reasons are found in the said letter. Therefore the contention that the plaintiffs have submitted to the jurisdiction of the Arbitral Tribunal, cannot be accepted.

59. As stated in the earlier portion of this order, one view expressed by the Supreme Court in SHIN-ETSU CHEMICAL CO. LTD Vs. AKSH OPTIFIBRE LTD AND ANOTHER {(2005) 7 SCC 234} is that if the Court decides to reject an application under Section 45, an elaborate enquiry is to be held, giving opportunities to the parties to lead evidence. Such a view was expressed on the basis that the order rejecting an application under Section 45 is appealable.

60. But in the present case, there is neither any scope nor any need for an elaborate enquiry, as I am rejecting the application on the basis of the admitted facts and evidence that the Arbitration Agreement has become inoperative by virtue of the conduct of the defendants 6 and 10. A question of fraud or misrepresentation, required to be established before holding an agreement to be null and void, is a question of fact and may have to be established only on the basis of oral and documentary evidence. But I am not recording a finding that the Arbitration Agreement is null and void. I am inclined to dismiss the application under Section 45 only on the ground that the Arbitration Agreement has become inoperative. The admitted facts and the documents filed by the defendants 6 and 10 themselves, establish this fact conclusively. Therefore, in my considered view, there is no necessity to go through an elaborate trial to find what is so obvious.

61. In view of the above, the application A.No.2670 of 2008 under Section 45 is dismissed. The application for injunction O.A.No.277 of 2008 and the application for stay of arbitration clause A.No.1236 of 2008 are allowed and the application to vacate the injunction A.No.2671 of 2008 is dismissed.

Svn

[PRV / 16063]