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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Pronounced on: 12.05.2020

\+ CS(OS) 568/2017

SPENTEX INDUSTRIES LTD ..... Plaintiff

Through Mr.Ramesh Singh, Mr.Arun Arora and Ms.Kaumudi Joshi, Advs.

Versus

QUINN EMANUEL URQUHART & SULLIVAN LLP ..... Defendant

Through Mr.Tejas Karia, Ms.AmeeRana and Mr.Anirveda Sharma, Advs.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

IA No. 14498/2017

1. This application is filed by the defendant under Order 7 Rule 11 of the Civil Procedure Code, 1908 read with Section 45 of the Arbitration and Conciliation Act, 1996 for rejection of the plaint.

2. This suit is filed by the plaintiff seeking the following main relief:-

> "a) To pass a decree of declaration, declaring that the Letter of Engagement dated 20.05.2013 as well as arbitration clause being Article 16 of the Letter of Engagement dated 20.05.2013 is null and void, inoperative and incapable of being performed and also against the public policy of India;"

3. Other reliefs are stated in the plaint. However, learned counsel of the plaintiff had at the outset submitted that the relief is being confined to prayer 'a' only.

4. The case of the plaintiff is that the defendant is a firm of overseas lawyers having its office in Washington DC, United States of America and that the plaintiff and its subsidiary, namely, Spentex Netherland B.V.(SNBV) (hereinafter referred to as 'the subsidiary') had entered into investment transactions with the Republic of Uzbekistan. Certain disputes arose between the plaintiff and its subsidiary on one hand and the Republic of Uzbekistan on the other. The plaintiff expected a possible submission of disputes for resolution through an international arbitration. Accordingly, the plaintiff approached the defendant for its legal services in connection with the aforesaid possible future arbitration proceedings. The defendant issued a detailed common Engagement Letter dated 20.05.2013 in respect of possible arbitration proceedings. It is stated that the plaintiff and its subsidiary signed the Engagement Letter on 21.05.2013 at Delhi and returned a copy to the defendant. Hence, it is claimed that a concluded contract came into existence between the plaintiff and the defendant and its subsidiary at New Delhi on 21.05.2013. Some amendments in the Engagement Letter were executed on 28.05.2013.

5. It is stated that the arbitration between the subsidiary of the plaintiff and Republic of Uzbekistan commenced on 03.09.2013. It is the case of the plaintiff that it was not a party to the said arbitration proceedings and that the defendant never acted for the plaintiff in the said proceedings. It is further claimed that as the arbitration proceedings progressed, the defendant found the case to be complex and costly to litigate. A

clarification/amendment was issued on 04/11.3.2015 jointly by the plaintiff and the subsidiary company. Another amendment was also carried out on 11.08.2015. A third amendment was carried out on 09.09.2015. In the meanwhile, the defendant raised memos/invoices for the arbitration proceedings on the subsidiary. Certain other correspondences have taken place between the subsidiary/plaintiff and the defendant which may not be relevant for adjudication of the present application. On 27.12.2016, an award was passed in the arbitration proceedings. The copy of the award has not been filed on account of confidentiality agreement.

6. Thereafter, certain communications are said to have taken place between the defendant and the subsidiary in respect of the fee issues of the defendant. Thereafter the defendant raised a demand for an arbitration on 25.08.2017 in terms of Article 16 of the Letter of Engagement dated 20.05.2013 under the aegis of JAMS. On 01.09.2017 JAMS gave a notice for commencement of Tripartite Arbitration.

7. It is the case of the plaintiff that the arbitration agreement entered into between the plaintiff and the defendant is null and void, inoperative and non-est. Reliance is placed on Section 44 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Arbitration Act'). It is stated that the relationship between the plaintiff-client and the defendant-firm of lawyers cannot be considered as 'commercial' under the law in force in India. Hence, it is pleaded that Letter of Engagement seeking to resolve any possible future disputes/differences between the plaintiff and its lawyer is null and void, inoperative and non-est. It is further pleaded that there is no dispute between the plaintiff and defendant and that the dispute is between

the subsidiary and the defendant. No services have been rendered by the defendant to the plaintiff.

8. The defendant has without prejudice to its rights filed written statement. The case of the defendant is that the plaintiff is a manufacturer of cotton and synthetic yarns. The subsidiary is a Netherlands based subsidiary of the plaintiff which was specifically established for the purpose of making investments in Uzbekistan. It is pleaded that the contract between the plaintiff and the defendant contains an arbitration agreement under Clause 16. The same reads as follows:-

> "16. Arbitration
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> Although we think it is unlikely, it is possible that a dispute may arise between us regarding some aspect of the Engagement and our representation of the Clients. If the dispute cannot be resolved amicably through informal discussions, we believe that most, if not all; disputes can be resolved more expeditiously and with less expense by binding arbitration rather than on court. This provision explains the circumstances under which such disputes shall be subject to binding arbitration.
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> AGREEMENT TO ARBITRATE:
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> (a) QEU&S and the Clients agree that any dispute between them, whether a claim by you against us or by us against you, including, without limitation, claims for unpaid fees and charges, negligence, breach of contract or fiduciary duty, fraud or any other claims relating to any aspect of the Engagement and our representation of you, shall be resolved by confidential, binding arbitration as described in (b) below.
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> The parties acknowledge that this agreement to arbitrate results in a waiver of the parties rights to a court or jury trial for any fee

dispute and/or malpractice claim. This also means that the parties may be giving up their rights to discovery and appeal, to compel witness and documents, to seek all available relief (except punitive damages which are provided for under state law), and to have the matter heard in a public forum. If the parties later refuse to submit to arbitration, they understand that they may be ordered to do so. The clients acknowledge that, before signing this Engagement Letter and agreeing to binding arbitration, they are entitled to, and have been given, a reasonable opportunity to seek the advice of independent counsel.

(b) ARBITRATION PROCESS:

In the event of any dispute that is subject to arbitration pursuant to (a) above, the initiating party will provide a written demand for arbitration to the other party setting forth the basis of the initiating party's claim and the dollar amount of damages sought.

The parties further agree that, if arbitration is necessary, each arbitration will:

1. Be heard and determined by a panel of three arbitrators (all of whom will be retired state or federal judges with at least five years judicial experience), with one selected by each party to the arbitration and the third selected by the first two from the panel of arbitrators of JAMS (or its successor), which JAMS arbitrator will not be the mediator who handled the mediation referred to above;

2. Take place in Washington, D.C. (the "applicable city");

3. Be conducted in accordance with JAMS Streamlined Arbitration Rules and Procedures (or any successor rules and procedures), in effect at the time the initiating party delivers to the other party the demand for arbitration required hereunder;

4. Apply the laws of the jurisdiction in the United States where the applicable city is located, without application of regard to any

applicable conflict of law principles. The arbitration proceedings and the decision of the arbitrator will be confidential, except to the extent that a client reasonably determines disclosure is required by any law, rule or regulation applicable to such Client or its affiliates, including but not limited to United States securities or stock exchange laws, rules and regulations. Notwithstanding anything to the contrary contained in this agreement, the prevailing party in any arbitration, action or proceeding to enforce any provision of this agreement will be awarded attorneys' fees and costs incurred in that arbitration, action or proceeding, including, without limitation, the value of the time spent by QEU&S attorneys to prosecute or defend such arbitration, action or proceeding (calculated at the hourly rate(s) then normally charged by QEU&S to clients which it represents on an hourly basis), except that the foregoing shall not apply to any mediation, as described above, and the parties will split the fees of the arbitrator; and

5. The tribunal shall neither have nor exercise any power to act as amiable compositeur or ex aequo et bono or to award special, indirect, consequential, or punitive damages.

6. The language of the arbitration shall be English.

7. Be final and binding on both parties, will not be subject to do novo review, and that no appeal may be taken. The ruling of the arbitrator(s) may be entered and enforced as a judgement by a court of competent jurisdiction. The arbitration provisions of this Agreement may be enforced by any court or competent jurisdiction, and the party seeking enforcement shall be entitled to an award of all costs, fees and expenses, including attorneys' fees, to be paid by the party against whom enforcement is ordered.

8. The parties also agree that any service of process associated with any arbitration brought pursuant to this paragraph, as well as any action to enforce any award issued pursuant to such an arbitration, may be effectuated by registered mail or courier. The

parties also agree to consent to jurisdiction in any US or other court where they may have assets subject to execution, and hereby waive any defenses that such jurisdiction is improper, for any enforcement action to satisfy any arbitral award against them pursuant to this paragraph."

9. It is further pleaded that the plaintiff failed to pay the defendant's fee which includes fixed fees payable at specified milestones, costs and expenses incurred in relation to the ICSID Arbitration(International Centre for the Settlement of Investment Disputes), and fees linked to the outcome of the ICSID Arbitration. It is further stated that the Tribunal on 27.12.2016 issued the Award dismissing the plaintiff and the subsidiary's claim in the arbitration on the basis of its findings that the plaintiff and the subsidiary engaged in illegalities especially corruption in making investments in Uzbekistan. In terms of the contract between the parties, the plaintiff and the subsidiary became liable to pay the defendant unpaid fees based on the hours that the firm had invested in the case times as per regularly billed hourly rates.

10. I have heard learned counsel for the parties.

11. Learned counsel for the plaintiff Mr.Ramesh Singh has submitted as follows:-

(i) It is stated relying upon the judgment of the Supreme Court in the case of ***World Sport Group (Mauritius) Ltd. vs. MSM Satellite (Singapore) PTE Ltd., (2014) 11 SCC 639*** that the present suit for injunction is maintainable and is not barred under Section 45 of the Arbitration Act. Learned counsel for the plaintiff also relies upon the judgment of the Supreme Court in the case of ***M.P. Electricity Board and Ors. vs. Shiv Narayan & Anr., (2005) 7 SCC 283*** to submit that the legal relationship

between the parties cannot be treated as 'commercial' and hence, the provisions of Sections 44 and 45 of the Arbitration Agreement Act would not apply. He also relies upon the judgement of the Division Bench of the Bombay High Court in ***Sakharam Narayan Kherdekar vs. City of Nagpur Corporation & Ors., AIR 1964 Bom. 200*** to reiterate the aforesaid contention.

(ii) He further pleads that the agreement in question between the plaintiff and the defendant is barred by Indian Law as it has a provision of contingency fees. Reliance is placed on the judgment of the Supreme Court in the case of ***B. Sunitha vs. The State of Telengana & Anr., (2018) 1 SCC 638*** to support the above contention that a lawyer in India is barred from charging contingency fees.

(iii) He further pleads that the dispute is between the subsidiary of the plaintiff and the defendant. No work was done by the defendant for the plaintiff and hence, the present suit would lie.

12. I may only note that the plaintiff have confirmed on 13.12.2018 that the arbitral tribunal has given its award in the arbitration proceedings.

13. Learned counsel for the defendant-Mr. Tejas Karia has refuted the contention of the plaintiff. He pleads as follows:-

(i) It is pleaded relying upon the judgment of a Coordinate Bench of this court in the case of ***Clearwater Capital Partners (Cyprus) Ltd. vs. Satyajit Singh Majithia & Ors., 2012 (128) DRJ 478***, judgment of the Supreme Court in the case of ***World Sport Group (Mauritius) Ltd. vs. MSM Satellite (Singapore) PTE Ltd.(supra)*** & ***Sasan Power Ltd. vs. North American Coal Corporation (India) Pvt. Ltd., (2016) 10 SCC 813*** and the judgment of the Division Bench of this court in the case of ***McDonald's India Private***

Ltd. vs. Vikram Bakshi & Ors., 2016 SCC OnLine Del. 3949 to plead that the present suit is not maintainable and is liable to be dismissed at the threshold.

(ii) He further submits that the relationship between the plaintiff, subsidiary of the plaintiff and the defendant is commercial in nature. Hence, section 44 of the Arbitration Act is attracted. He relies upon the judgment of the Supreme Court in the case of ***R.D. Saxena vs. Balram Prasad Sharma, (2000) 7 SCC 264*** and of the Allahabad High Court in the case of ***Aditya Narayan Singh vs. State Election Commission, Uttar Pradesh & Anr., 2003 SCC OnLine All. 1118*** to support his submissions.

(iii) He further submits that as per the arbitration clause, arbitration proceedings are to take place in Washington DC and that the applicable laws are the laws of United States of America as applicable to the city where the proceedings will take place. It is pleaded that as per the law applicable to the proceedings, there is no bar on charging of contingency fees. Hence, the agreement between the parties is legal and valid.

14. I may now look at the first issue, namely, as to whether the present suit seeking a declaration that the Letter of Engagement dated 20.05.2013 and the arbitration clause being Article 16 of the Letter of Engagement is null and void or inoperable or incapable of being performed is maintainable. In this context reference may be had to the judgment of the Supreme Court in the case ***World Sport Group (Mauritius) Ltd. vs. MSM Satellite (Singapore) PTE Ltd.(supra).*** The Supreme Court in that case was dealing with a Deed for Provision of Facilitation Services. The appellant acting on the Facilitation Deed sent a request for arbitration to ICC, Singapore. The respondent in the meanwhile filed a second suit before the Bombay High

Court against the appellant seeking a declaration that the Facilitation Deed stood rescinded and that the appellant was not entitled to invoke the arbitration clause in the Facilitation Deed. In those facts, the Supreme Court held as follows:-

> "22. We are unable to accept the first contention of Mr Venugopal that as Clause 9 of the Facilitation Deed provides that any party may seek equitable relief in a court of competent jurisdiction in Singapore, or such other court that may have jurisdiction over the parties, the Bombay High Court had no jurisdiction to entertain the suit and restrain the arbitration proceedings at Singapore because of the principle of comity of courts. In *Black's Law Dictionary*, 5th Edn., Judicial Comity, has been explained in the following words:
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> > "*Judicial comity*.—The principle in accordance with which the courts of one State or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect."
>
> Thus, what is meant by the principle of "comity" is that courts of one State or jurisdiction will give effect to the laws and judicial decisions of another State or jurisdiction, not as a matter of obligation but out of deference and mutual respect.
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> 23. In the present case no decision of a court of foreign country or no law of a foreign country has been cited on behalf of the appellant to contend that the courts in India out of deference to such decision of the foreign court or foreign law must not assume jurisdiction to restrain arbitration proceedings at Singapore. On the other hand, as has been rightly submitted by Mr Subramanium, under Section 9 CPC, the courts in India have jurisdiction to try all suits of a civil nature excepting suits of which cognizance is either expressly or impliedly barred. Thus, the appropriate civil court in India has jurisdiction to entertain the suit and pass appropriate orders in the suit by virtue of

Section 9 CPC and Clause 9 of the Facilitation Deed providing that the courts in Singapore or any other court having jurisdiction over the parties can be approached for equitable relief could not oust the jurisdiction of the appropriate civil court conferred by Section 9 CPC. We find that in Para 64 of the plaint in Suit No. 1828 of 2010 filed before the Bombay High Court by the respondent, it is stated that the Facilitation Deed in which the arbitration clause is incorporated came to be executed by the defendant at Mumbai and the fraudulent inducement on the part of the defendant resulting in the plaintiff entering into the Facilitation Deed took place in Mumbai and the rescission of the Facilitation Deed on the ground that it was induced by fraud of the defendant has also been issued from Mumbai. Thus, the cause of action for filing the suit arose within the jurisdiction of the Bombay High Court and the Bombay High Court had territorial jurisdiction to entertain the suit under Section 20 CPC."

15. Similarly, the Supreme Court in ***Sasan Power Ltd. vs. North American Coal Corporation (India) Pvt. Ltd.(supra)*** held as follows:-

"43. In any case, whether an arbitration agreement is exclusively governed by the provisions of either Part I or by Part II of the 1996 Act or both (as discussed earlier), judicial authorities seized of an action in respect of which there exists an arbitration agreement are bound to refer the dispute between the parties to arbitration and are precluded under Sections 8 and 45 from adjudicating the dispute (of course) subject to the other conditions stipulated in the two sections.

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46. Section 45 permits an enquiry into the question whether the arbitration agreement is "null and void, inoperative and incapable of being performed"

16. It would follow from the above that a suit would be maintainable for a limited purpose. A suit may lie for the limited purpose of holding an enquiry as to whether the Arbitration Agreement is null and void, inoperative and incapable of being performed.

17. The scope of enquiry in case such a suit is filed is limited. Usually courts have frowned upon suits filed containing vague, evasive and bald allegations to claim that the Arbitration Agreement is null and void etc.

18. The legal position in this context may be noted.

19. The Supreme Court in ***World Sport Group (Mauritius) Ltd. vs. MSM Satellite (Singapore) PTE Ltd.(supra)*** also dealt with the aforesaid issue. As noted in that matter the respondent had filed two suits i.e. the first suit sought a declaration that the facilitation deed was null and void and recovery while the second suit sought a declaration that the facilitation deed stood rescinded and the appellant was not entitled to invoke the arbitration clause in the said facilitation deed. Having held that a suit may be maintainable as noted above, the Supreme Court however held as follows:-

> "**24.** Any civil court in India which entertains a suit, however, has to follow the mandate of the legislature in Sections 44 and 45 in Chapter I of Part II of the Act, which are quoted hereinbelow:
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> "CHAPTER I
>
> NEW YORK CONVENTION AWARDS
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> **44.*Definition***.—In this Chapter, unless the context otherwise requires, 'foreign award' means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960—

(*a*) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and

(*b*) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

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 null and void, inoperative or incapable of being performed."

25. The language of Section 45 of the Act quoted above makes it clear that notwithstanding anything contained in Part I or in the Code of Civil Procedure, 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 null and void, inoperative or incapable of being performed. Thus, even if, under Section 9 read with Section 20 CPC, the Bombay High Court had the jurisdiction to entertain the suit, once a request is made by one of the parties or any person claiming through or under him to refer the parties to arbitration, the Bombay High Court was obliged to refer the parties to arbitration unless it found that the agreement referred to in Section 44 of the Act was null and void, inoperative or incapable of being performed. In the present case, the appellant may not have made an application to refer the parties to arbitration, but Section 45 of the Act does not refer to any application as such. Instead, it refers to the request of one of the parties or any person claiming through or under him to refer the parties to arbitration. In this

case, the appellant may not have made an application to refer the parties to arbitration at Singapore but has filed an affidavit-in-reply to the notice of motion and has stated in Paras 3, 4 and 5 of this affidavit that the defendant had already invoked the arbitration agreement in the Facilitation Deed and the arbitration proceedings have commenced and that the suit was an abuse of process of court. The appellant had thus made a request to refer the parties to arbitration at Singapore which had already commenced.

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36. Thus, the arbitration agreement does not become "inoperative or incapable of being performed" where allegations of fraud have to be inquired into and the court cannot refuse to refer the parties to arbitration as provided in Section 45 of the Act on the ground that allegations of fraud have been made by the party which can only be inquired into by the court and not by the arbitrator. *N. Radhakrishnan* v. *Maestro Engineers* [(2010) 1 SCC 72] and *Abdul Kadir Shamsuddin Bubere* v. *Madhav Prabhakar Oak* [AIR 1962 SC 406] were decisions rendered in the context of domestic arbitration and not in the context of arbitrations under the New York Convention to which Section 45 of the Act applies. In the case of such arbitrations covered by the New York Convention, the Court can decline to make a reference of a dispute covered by the arbitration agreement only if it comes to the conclusion that the arbitration agreement is null and void, inoperative or incapable of being performed, and not on the ground that allegations of fraud or misrepresentation have to be inquired into while deciding the disputes between the parties.

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41. We make it clear that we have not expressed any opinion on the dispute between the appellant and the respondent as to whether the Facilitation Deed was voidable or not on account of fraud and misrepresentation. Clause 9 of the Facilitation Deed states inter alia that all actions or proceedings arising in connection with, touching upon or relating to the Facilitation Deed, the breach thereof and/or the scope of the provisions of the

section shall be submitted to ICC for final and binding arbitration under its Rules of Arbitration. This arbitration agreement in Clause 9 is wide enough to bring this dispute within the scope of arbitration. To quote *Redfern and Hunter on International Arbitration* (5th Edn., p. 134, para 2.141)

"Where allegations of fraud in the procurement or performance of a contract are alleged, there appears to be no reason for the Arbitral Tribunal to decline jurisdiction."

Hence, it has been rightly held by the learned Single Judge of the Bombay High Court that it is for the arbitrator to decide this dispute in accordance with the arbitration agreement."

20. Similarly, in ***Sasan Power Ltd. vs. North American Coal Corporation (India) Pvt. Ltd.(supra)*** the Supreme Court and this aspect held as follows:-

"46. Section 45 permits an enquiry into the question whether the arbitration agreement is "null and void, inoperative and incapable of being performed"

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48. It is settled law that an arbitration agreement is an independent or "self-contained" agreement. In a given case, a written agreement for arbitration could form part of another agreement, described by Lord Diplock as the "substantive contract" [*Aughton Ltd.* v. *MF Kent Services Ltd.*, (1991) 57 BLR 1 (CA)"the status of a so-called "arbitration clause" included in a contract of any nature is different from other types of clauses because it constitutes a "self-contained contract collateral or ancillary to" "the substantive contract". These are the words of Lord Diplock in *Bremer Vulkan Schiffbau and Maschinenfabrik* v. *South India Shipping Corpn. Ltd.*, 1981 AC 909. It is a self-contained contract, even though it is, by common usage, described as an "arbitration clause". It can, for example,

have a different proper law from the proper law of the contract to which it is collateral. This status of "self-contained contract" exists irrespective of the type of substantive contract to which it is collateral."] by which parties create contractual rights and obligations. Notwithstanding the fact that all such rights and obligations arising out of a substantive contract and the agreement to have the disputes (if any, arising out of such substantive contract) settled through the process of arbitration are contained in the same document, the arbitration agreement is an independent agreement. Arbitration agreement/clause is not that governs rights and obligations arising out of the substantive contract: It only governs the way of settling disputes between the parties.

49. In our opinion, the scope of enquiry (even) under Section 45 is confined only to the question whether the arbitration agreement is "null and void, inoperative or incapable of being performed" but not the legality and validity of the substantive contract.

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51. This Court in *Hindustan Petroleum Corpn. Ltd.* v. *Pinkcity Midway Petroleums* [(2003) 6 SCC 503] , which was a case where there was a dealership agreement between the parties for supply of petroleum products to the respondents before this Court. On the ground that the dealer committed certain irregularities in business, supply of petroleum products was suspended by the appellant for a period of 30 days and along with the penalty of Rs 15,000. The dealer filed a civil suit seeking a declaration that the action of HPCL was illegal and arbitrary. In the said suit, HPCL filed an application praying that the dispute be referred to arbitration in view of the arbitration agreement between the parties. The said application was dismissed by the civil court holding that the dispute between the parties was not covered by the arbitration agreement which finding came to be confirmed by the High Court in a revision.

Dealing with the question, this Court held: (SCC pp. 511-12, para 16)

> "*16*. It is clear from the language of the section, as interpreted by the Constitution Bench judgment in *Konkan Rly.* [*Konkan Railway Corpn. Ltd.* v. *Rani Construction (P) Ltd.*, (2002) 2 SCC 388] that if there is any objection as to the applicability of the arbitration clause to the facts of the case, the same will have to be raised before the Arbitral Tribunal concerned. … the courts below ought not to have proceeded to examine the applicability of the arbitration clause to the facts of the case…."

If it is impermissible for a civil court to examine whether a dispute is really covered by the arbitration agreement, we see no reason to hold that a civil court exercising jurisdiction under Section 45 could examine the question whether the substantive agreement (of which the arbitration agreement is a part) is a valid agreement. No doubt that *HPCL case* [*Hindustan Petroleum Corpn. Ltd.* v. *Pinkcity Midway Petroleums*, (2003) 6 SCC 503] was in the context of the bar contained in Section 8 of the 1996 Act. But the same principles of interpretation apply even for the interpretation of Section 45."

21. Reference may be had to the judgment of a Coordinate Bench of this court in ***Clearwater Capital Partners (Cyprus) Ltd. vs. Satyajit Singh Majithia & Ors (supra)***. The Coordinate Bench there was dealing with a shareholder agreement which provided that the venue of arbitration would be Singapore. Respondents No. 1 to 6 therein filed a suit seeking declaration that the agreements in question were illegal and therefore, *void- ab-initio*. Respondents No.1 to 6 had filed a suit claiming following relief:

> "10. On 3rd February 2012 Respondent Nos. 1 to 6 filed CS(OS) No. 277 of 2012 seeing the following reliefs:

(a) declaration that SSA and SHA, both dated 11th December 2005 and the amended SHA dated 22nd January 2010 are 'illegal and therefore, void ab initio being in complete contravention of the External Commercial Borrowing Guidelines ('ECB Guidelines') issued by the Reserve Bank of India ('RBI') as well as the Securities Contracts (Regulation) Act, 1956 ('SCR Act');

(b) declaration that Put Option contained in Clause 9.6 of SHA as amended by Clause 1.1 of the amended SHA was 'illegal and unlawful and not enforceable in law;

(c) permanent injunction restraining the CCPCL, (Defendant No. 1 in the suit) from initiating any legal action for the enforcement of any terms of the SSA and SHA "including but not limited to invocation of the arbitration clauses" in the SSA and SHA as well as the amended SHA as well as enforcement of Put Option contained in Clause 9.6."

22. The court considered the issue as to whether the suit seeking the aforesaid relief was maintainable in view of the arbitration clause in the shareholder agreement. The court held as follows:-

"17. A collective reading of the aforementioned clauses shows that Article 17.10 which provides for the exclusive jurisdiction of the courts in Delhi is subject to Article 17.9 which provides for arbitration. The scope of the disputes that can be referred, in terms of Article 17.9.1, to arbitration, is indeed wide. It includes not only disputes arising out of SHA but also a dispute "regarding the existence, validity or termination of this Agreement or the consequences of its nullity." Consequently, any dispute between the parties arising out of a challenge by Respondent Nos. 1 to 6 to the existence or validity of the SHA or of any of its articles, including Article 9.6 as further amended, on any ground whatsoever, can also be referred to arbitration.

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30. In the present case, neither of the parties has approached this Court for appointment of an arbitrator under Section 11 of the Act. In fact, Respondents 1 to 6 are seeking a declaration as to the invalidity of the SHA itself including its arbitration clause. Meanwhile CCPCL has already invoked the arbitration clause and sought reference of the disputes to arbitration under the SIAC Rules. As already held, it is only where the arbitrator is not appointed in terms of the SHA read with the SIAC Rules that the question of this Court exercising powers under Section 11 of the Act arises. If an arbitrator is appointed either by consent of the parties or failing that in terms of the SIAC Rules, then it would be for such arbitrator to determine in the first instance the question concerning the validity of the SHA or any clause thereof.

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32. Therefore, it is the procedure envisaged in the SHA that will first be given effect to and upon that procedure not resulting in an arbitrator being appointed, the SIAC will step in. It is only where the SIAC fails to appoint an Arbitrator that it will be open to the parties to invoke Section 11(6) of the Act for appointment of a sole Arbitrator.

33. For the aforesaid reasons, this Court is of the view that the suit is not maintainable as such and it is accordingly dismissed."

23. Similarly, in ***Himalaya International Ltd. vs. Simplot India Foods Pvt. Ltd & Anr., 2014 SCC Online Del. 217***, this court while dealing with a suit seeking a decree for permanent injunction to restrain the defendant from proceeding before the Singapore International Arbitration Centre for arbitration of the Shareholder Agreement and Master Agreement held as follows:-

"14. The legal position that follows aforesaid is that the issues that are raised by the plaintiff, namely, non-compliance of Clause 12.3(a) and Clause 12.3(b) are issues which have to be gone into by the Arbitral Tribunal. Section 5 of the said Act takes away the jurisdiction of the civil court. The said statutory provision has to be given effect to.

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16. Hence, the present suit does not lie and is barred under Section 5 of the Arbitration & Conciliation Act and Section 34 and 41(i)(h) of the Specific Relief Act in terms of Order 7 Rule 11(d) of CPC, the present suit is barred by law and hence, the plaint is liable to be rejected. Accordingly, the application is allowed and the present suit is dismissed."

24. Similarly, in ***McDonald's India Private Ltd. vs. Vikram Bakshi & Ors., (Supra),*** the Division Bench of this court held as follows:-

"60. Our focus is on the question whether an anti-arbitration injunction could at all have been granted in the facts and circumstances of the present case. We have already explained as to how, if the arbitration agreement was taken to be one which was covered under Section 44 of the 1996 Act, the arbitration proceedings could not be injuncted because the same was neither null or void, inoperative or incapable or being performed. Even if we assume that Part I of the 1996 Act was to apply, then also, because of the provisions of Section 8, the judicial authority would be obliged to refer the parties to arbitration. We may point out that Section 8 and, in particular, sub-section (1) thereof has been recently amended with retrospective effect from 23.10.2015 to read as under:-

"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 to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that *prima facie* no valid arbitration agreement exists.
> xxxx xxxx xxxx xxxx xxxx"

61. Thus, there is now a mandate to refer the parties to arbitration unless the court finds that *prima faice* no valid arbitration agreement exists. This is clearly not the case here. Therefore, in any eventuality, in the facts and circumstances of the case and applying the principles, as indicated above, the learned single Judge could not have restrained the appellant from pursuing the arbitration proceedings before the arbitral tribunal.

62. There is a very interesting observation in paragraph 7.01 of ***Redfern and Hunter on International Arbitration***: *Sixth Edition: Oxford University Press*. The observation is as follows:-

> "The relationship between national courts and arbitral tribunals swings between forced cohabitation and true partnership. Arbitration is dependent on the underlying support of the courts, which alone have the power to rescue the system when one party seeks to sabotage it. …"

63. Courts need to remind themselves that the trend is to minimize interference with arbitration process as that is the forum of choice. That is also the policy discernible from the 1996 Act. Courts must be extremely circumspect and, indeed, reluctant to thwart arbitration proceedings. Thus, while courts in India may have the power to injunct arbitration proceedings, they must exercise that power rarely and only on principles analogous to those found in sections 8 and 45, as the case may be, of the 1996 Act. We have already indicated that the circumstances of

> invalidity of the arbitration agreement or it being inoperative or incapable of being performed do not exist in this case."

25. It would follow from the above judgments that the policy which is clear is that courts have to be extremely circumspect and reluctant in any manner to interfere in arbitration proceedings. The mandate is to refer parties to arbitration unless the arbitration agreement is on the face of it null and void, inoperative or incapable of being performed. The court is not to examine the legality or validity of the substantive agreement.

26. I may look at the facts of the case to see as to what are the allegations to claim that the arbitration agreement is null and void, inoperative or incapable of being performed. First plea raised by the learned counsel for the plaintiff is that the provisions of Sections 44 and 45 of the Arbitration Act do not apply to the agreement as the agreement between a client and a lawyer which is the subject matter of the present dispute, 'cannot be considered as commercial under the law in force in India'. Reference may be had to the relevant statutory provisions, namely, Section 44 and 45 of the Arbitration Act which read as follows:-

> "44. Definition.—In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960—
> (a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and
> (b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

> 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 null and void, inoperative or incapable of being performed."

27. In terms of Section 44, a foreign award would mean an arbitral award arising out of a legal relationship considered as commercial under the law in force in India. The word "commercial" has not been defined in the Arbitration Act. However, learned counsel for the plaintiff has relied upon the judgments of the Supreme Court in the case of ***M.P. Electricity Board and Ors. vs. Shiv Narayan & Anr., (supra)*** and the judgment of the Bombay High Court in ***Sakharam Narayan Kherdekar vs. City of Nagpur Corporation & Ors.(supra)*** to plead that the work of a lawyer cannot be said to be commercial in nature. Learned counsel for the defendant rebuts the said submission. He relies upon judgments of the Supreme Court in the case of ***R.D.Saxena vs. Bahram Prasad Sharma (supra)*** and judgment of the Allahabad High Court in the case of ***Aditya Narayan Singh vs. State Election Commission (supra)*** to support his plea. I may first look at the said judgments relied upon by the plaintiff.

28. In ***M.P. Electricity Board and Ors. vs. Shiv Narayan & Anr., (supra),*** the Supreme Court was dealing with a case where the tenant was an advocate and was using the office in a tenanted premises. The appellant

sought to levy charges for a commercial connection on the respondents. In that context the Supreme Court noted the issue as follows:-

> "1. An interesting question is raised in this appeal i.e. whether the legal profession is a commercial activity or is it a trade or business. The Madhya Pradesh Electricity Board (hereinafter referred to as "the Board") and its functionaries charged Respondent 2 advocate for electricity consumption at the rate applicable for commercial consumers. The demand was questioned by filing a writ petition before the Madhya Pradesh High Court which by the impugned judgment held that the legal profession does not involve a commercial activity and, therefore, the rate applicable to commercial consumers was not applicable to him. The judgment is questioned by the Board in this appeal."

29. The Court held has follows:-

> "13. In *Stroud's Judicial Dictionary* (5th Edn.) the term "commercial" is defined as "traffic, trade or merchandise in buying and selling of goods".
>
> 14. A professional activity must be an activity carried on by an individual by his personal skill and intelligence. There is a fundamental distinction, therefore, between a professional activity and an activity of a commercial character. Considering a similar question in the background of Section 2(4) of the Bombay Shops and Establishments Act, 1948 (79 of 1948), it was held by this Court in *Devendra M. Surti (Dr.)* v. *State of Gujarat* [AIR 1969 SC 63] that a doctor's establishment is not covered by the expression "commercial establishment".
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> 15. In the above background, we would have dismissed the appeal. But we notice that in *New Delhi Municipal Council* v. *Sohan Lal Sachdev* [(2000) 2 SCC 494] certain observations are made, with which we do not agree. In para 12 it was observed as follows: (SCC p. 497)

"*12*. The two terms 'domestic' and 'commercial' are not defined in the Act or the Rules. Therefore, the expressions are to be given the common parlance meaning and must be understood in their natural, ordinary and popular sense. In interpreting the phrases the context in which they are used is also to be kept in mind. In *Stroud's Judicial Dictionary* (5th Edn.) the term 'commercial' is defined as 'traffic, trade or merchandise in buying and selling of goods'. In the said dictionary the phrase 'domestic purpose' is stated to mean use for personal residential purposes. In essence the question is, what the character of the purpose of user of the premises by the owner or landlord is and not the character of the place of user. For example, running a boarding house is a business, but persons in a boarding house may use water for 'domestic' purposes. As noted earlier the classification made for the purpose of charging electricity duty by NDMC sets out the categories 'domestic' user as contradistinguished from 'commercial' user or to put it differently 'non-domestic user'. The intent and purpose of the classification, as we see it, is to make a distinction between purely 'private residential purpose' as against 'commercial purpose'. In the case of a 'guest house', the building is used for providing accommodation to 'guests' who may be travellers, passengers, or such persons who may use the premises temporarily for the purpose of their stay on payment of the charges. The use for which the building is put by the keeper of the guest house, in the context cannot be said to be for purely residential purpose. Then the question is, can the use of the premises be said to be for 'commercial purpose'? Keeping in mind the context in which the phrases are used and the purpose for which the classification is made, it is our considered view that the question must be answered in the affirmative. It is the user of the premises by the owner (not necessarily absolute owner) which is relevant for determination of the question and not the purpose for which the guest or occupant of the guest house uses electric energy. In the broad classification as is made in the Rules, different types of user which can

> reasonably be grouped together for the purpose of understanding the two phrases 'domestic' and 'commercial' is to be made. To a certain degree there might be overlapping, but that has to be accepted in the context of things."

30. In view of the said judgment in the case of ***NDMC vs. Sohan Lal Sachdev (supra)*** the Supreme Court referred the issue to a larger Bench. The larger Bench vide judgment dated 27.10.2005 allowed the appeal of the Electricity Company. The judgment of the Supreme Court in the case of NDMC vs. Sohan Lal Sachdeva was upheld. However, the court clarified that it is not going into the issue as to whether an advocate can be said to be carrying on commercial activity.

31. The other judgement relied upon by the plaintiff is the judgment of the Division Bench of the Bombay High Court in the case of ***Sakharam Narayan Kherdekar vs. City of Nagpur Corporation & Ors. (supra).*** That was a case relating to Bombay Shops and Establishments Act. The concerned official had sought registration of the office of an advocate under the aforenoted act. In those circumstances, the court held as follows:-

> "44. In our opinion, enough has been stated above to indicate how the profession of an advocate is of a class apart, not only from other professions but also from other commercial activity in which a person may be employed. It is possible to conceive of any commercial activities where services of a professional man like engineer, or architect or draftsman may be utilised, but we cannot conceive of commercial venture where services of a lawyer, not for his own benefit but as a means of providing advice and legal aid to others on behalf of a corporation or an organised body may be made available as part of their

commercial activity. The relations between a counsel and his client are not analogous to those of a trader and his customer. The client is not his customer; there is a certain fiduciary relation between them when the counsel accepts a brief. The obligations do not end with the disposal of the case; they continue so far as the lawyer is concerned. He has obligations not only to the client but also to the Court, and generally to the administration of justice, in which he performs a healthy and necessary function. We, therefore, do not think that the profession of a lawyer is possible to be carried on as a commercial venture in any sense of the term. ....."

32. In this context reference may also be had to the judgments relied upon by the learned counsel for the defendant.

In the case of ***R.D. Saxena vs. Balram Prasad Sharma (supra)*** the Supreme Court held as follows:-

"42. In our country, admittedly, a social duty is cast upon the legal profession to show the people beckon (*sic* beacon) light by their conduct and actions. The poor, uneducated and exploited mass of the people need a helping hand from the legal profession, admittedly, acknowledged as a most respectable profession. No effort should be made or allowed to be made by which a litigant could be deprived of his rights, statutory as well as constitutional, by an advocate only on account of the exalted position conferred upon him under the judicial system prevalent in the country. It is true that an advocate is competent to settle the terms of his engagement and his fee by private agreement with his client but it is equally true that if such fee is not paid he has no right to retain the case papers and other documents belonging to his client. Like any other citizen, an advocate has a right to recover the fee or other amounts payable to him by the litigant by way of legal proceedings but subject to such restrictions as may be imposed by law or the rules made in that behalf. It is high time for the legal profession to join heads and evolve a code for themselves in addition to the mandate of the Advocates Act,

Rules made thereunder and the Rules made by various High Courts and this Court, for strengthening the belief of the common man in the institution of the judiciary in general and in their profession in particular. Creation of such a faith and confidence would not only strengthen the rule of law but also result in reaching excellence in the profession."

33. Similarly, the Division Bench of the Allahabad High Court in ***Aditya Narayan Singh vs. State Election Commission, Uttar Pradesh (supra)*** held as follows:-

"3. In our view, it is the discretion of the client to choose his counsel. The learned counsel for the petitioner relied upon the decision of a Division Bench of the Andhra Pradesh High Court in the case of *Damodardass Agarwal* v. *Badrilal*, [A.I.R. 1987 A.P. 254], (DB), in which it was held that the leave of the Court is necessary for the client for terminating the appointment of his advocate. We respectfully disagree with the view taken in the aforesaid decision. In our opinion, the relationship between a litigant and a lawyer is purely, contractual, and it can be terminated at any time by the litigant, and the only remedy of the lawyer for claiming the fee, etc., is to file a civil suit but he cannot insist that without leave of the Court his engagement as a lawyer cannot be terminated. In fact it would be derogatory to the noble profession of lawyers, if it is held that even if the litigant does not want to continue him as his lawyer, he cannot change his lawyer without leave of the Court. The Supreme Court in *R.D. Saxena* v. *B.P. Sharma*, [(2000) 7 S.C.C. 264], has held that refusal to return case files when demanded by the client amounts to professional misconduct. It was held that if a litigant wishes to change his counsel and goes to his earlier lawyer and asks him to handover the file of his case, then it is the duty of the lawyer to handover the file and he cannot insist that he will hand it over only after his fee is paid. It was also held therein that in litigant is free to change his lawyer, and the earlier lawyer can only sue for his fees or expenses."

34. In my opinion, in the facts of this case, the aforesaid two judgments relied upon by learned counsel for the plaintiff would have no application. The factual backgrounds on which the aforesaid two judgments were rendered were entirely different. In this context reference may be had to the judgement of the Supreme Court in the case of ***R.M. Investment and Trading Co. Pvt Ltd. vs. Boeing Co. & Anr., (1994) 4 SCC 541.*** The Supreme Court was dealing with the issue whether the agreement for consultant services for sale of Boeing aircrafts in India is a commercial agreement within the meaning of Section 2 of the Foreign Awards (Recognition and Enforcement) Act, 1961. The court held as follows:-

> "12. It is not disputed that the sale of aircraft by Boeing to customers in India was to be a commercial transaction. The question is whether rendering of consultancy services by RMI for promoting such commercial transaction as consultant under the Agreement is not a "commercial transaction". We are of the view that the High Court was right in holding that the agreement to render consultancy services by RMI to Boeing is commercial in nature and that RMI and Boeing do stand in commercial relationship with each other. While construing the expression "commercial" in Section 2 of the Act it has to be borne in mind that the
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> > "Act is calculated and designed to subserve the cause of facilitating international trade and promotion thereof by providing for speedy settlement of disputes arising in such trade through arbitration and any expression or phrase occurring therein should receive, consistent with its literal and grammatical sense, a liberal construction." [See : *Renusagar Power Co. Ltd.* v. *General Electric Co.* [(1984) 4 SCC] (SCC at p. 723-24 : SCR at p. 492) and *Koch*

Navigation Inc. v. *Hindustan Petroleum Corpn. Ltd.* [(1989) 4 SCC 259, 262 (para 8)] (SCC at p. 262 : SCR at p. 75).]

The expression "commercial" should, therefore, be construed broadly having regard to the manifold activities which are integral part of international trade today."

The term commercial has to be interpreted liberally consistent with its literal and grammatical sense.

35. In this context reference may also be had to the judgement of the Supreme Court in the case of ***New Delhi Municipal Council vs. Sohan Lal Sachdev, (Supra)***. The court was dealing with the Electricity Act, 1910. The court noted as follows:-

"12. The two terms "domestic" and "commercial" are not defined in the Act or the Rules. Therefore, the expressions are to be given the common parlance meaning and must be understood in their natural, ordinary and popular sense. In interpreting the phrases the context in which they are used is also to be kept in mind."

36. The term commerce has been defined in ***Collins Concise Dictionary, Third Edition*** as follows:

"Commerce: The activity embracing all forms of the purchase and sale of goods and services"

Clearly transactions relating to services for valuable consideration would be a commercial legal relationship and would be covered by Section 44 of the Arbitration and Conciliation Act, 1996.

37. There is another aspect which is quite relevant The aforenoted two judgments relied upon by the learned counsel for the plaintiff were passed keeping into account that the advocates in India are governed by a statutory regime, namely, The Advocates Act, 1961 and the rules and regulations framed thereunder. However, in the present case the defendant is a foreign law firm not governed by the statutory regime prevailing in India relating to advocates.

38. Essentially, the defendant has initiated arbitration proceedings for his outstanding fees. The defendant being a law firm was advising and acting for the plaintiff subsidiary. It was to be paid for the services as agreed upon. It cannot be urged that such an agreement was completely bereft of elements of commerce. The claim of the law firm is that the plaintiff have defaulted in paying its professional charges and other aspects. The claim does not relate to professional issues. As the proceedings are substantially for recovery of money, the same would tantamount to a commercial relationship as per section 45 of the Arbitration Act. Hence, the plea of the learned counsel for the plaintiff that section 44 and 45 of the act are not attracted is a plea without merits.

39. Another plea raised by the learned counsel for the plaintiff was that the agreement in question involves payment of contingency fees and such an agreement would be void in India. The plea is misplaced. A perusal of the Engagement Letter dated 20.05.2013 shows that there is a component of fixed fee also which was spelt out being USD 750,000 payable at different stages. Other costs have also to be recovered. Hence, the entire contract is not based only on the contingency fees.

Further as rightly pointed out by the learned counsel for the

defendant, the agreement is governed by the laws prevailing in USA. It is not the case of the plaintiff that under the US law contingency fees is barred. Hence, on account of these stated allegations, it cannot be held that the document in question, namely, the Engagement Letter is null and void. This plea also does not lead to a conclusion that the Arbitration Agreement is null and void inoperative or incapable of being performed.

40. The last argument of the learned counsel for the plaintiff was that the defendant has done no professional work for the plaintiff. The entire work was done for the subsidiary company. This is a plea which is at best on the merits of the claim of the defendant before the concerned arbitral tribunal. The Supreme Court in *World Sport Group (Mauritius) Ltd. vs. MSM Satellite (Singapore) PTE Ltd.* had noted as follows:-

> "**36.** Thus, the arbitration agreement does not become "inoperative or incapable of being performed" where allegations of fraud have to be inquired into and the court cannot refuse to refer the parties to arbitration as provided in Section 45 of the Act on the ground that allegations of fraud have been made by the party which can only be inquired into by the court and not by the arbitrator. *N. Radhakrishnan* v. *Maestro Engineers* [(2010) 1 SCC 72] and *Abdul Kadir Shamsuddin Bubere* v. *Madhav Prabhakar Oak* [AIR 1962 SC 406] were decisions rendered in the context of domestic arbitration and not in the context of arbitrations under the New York Convention to which Section 45 of the Act applies. In the case of such arbitrations covered by the New York Convention, the Court can decline to make a reference of a dispute covered by the arbitration agreement only if it comes to the conclusion that the arbitration agreement is null and void, inoperative or incapable of being performed, and not on the ground that allegations of fraud or misrepresentation have to be inquired into while deciding the disputes between the parties."

41. Hence, the noted ground does not in any manner effect the arbitration agreement. It does not also lead to a conclusion that the arbitration agreement is null and void, inoperative or incapable of being performed.

42. The plaintiff have failed to show or plead that the arbitration agreement is null and void, inoperative or incapable of being performed. The plaint fails to disclose any cause of action. It was for the plaintiff to have participated in the arbitration proceedings and raised any issues/defences which they thought appropriate. They have chosen to abstain themselves from the arbitration proceedings and the award has already been passed. They are free to take appropriate steps as per law against the award.

43. The present application is allowed.

44. As the court is presently hearing matters vide video conferencing, the court master may also inform Ld. Counsels for the parties on phone about the present pronouncement.

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The present suit is without any cause of action and the suit is accordingly dismissed. Pending applications, if any, also stand dismissed.

JAYANT NATH, J

May 12, 2020
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