IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL (LODGING) NO.534 OF 2010
IN
NOTICE OF MOTION NO. 1809 OF 2010
IN
SUIT NO.1828 OF 2010

MSM Satellite (Singapore) Pte Ltd.)
a Company organized under the laws of)
Singapore and having its Principal Office)
at 5 Tampines Central 6, #02-19 Telepark)
Building, Singapore 529482)Appellant
(Org.Plaintiff)

VERSUS

World Sport Group (Mauritius) Limited)
a Company incorporated under the laws)
of Mauritius (registered number 017684C1/GBL))
with its registered address at 308 James Court)
St. Denis Street, Port Louis, Mauritius)Respondents
(Org.Defendant)

Mr. Dushyant Dave, Senior Advocate, a/w Mr.Anil Menon, Mr.Vijay Gandhi, Mr.Sanjay Kumar, Mr. Ashish Prasad, Ms.Sumitri Kharade and Mr.Ragved Sawant i/b M/s Anil Menon Associates for the Appellant.

Dr. Abhishek Manu Singhvi, Mr.Aspi Chinoy and Mr.J.J. Bhatt, Senior Advocates, a/w Mr. Zal Andhyarujina, Mr.Anubhav Singhvi, Mr.Jaiveer Shergill, Mr. Rook Roy, Mr.Suhas Tulzapurkar, Mr.Nishad Nadkarni, Mr.Yogesh Chawak, Mr.Ashutosh Sampat and Mr.Vineet Shrivastava i/b M/s. Legagris Partners for the Respondents.

CORAM : MOHIT S. SHAH, C.J. AND
S.C. DHARMADHIKARI, J.

JUDGMENT RESERVED ON : 18TH AUGUST 2010
JUDGMENT PRONOUNCED ON : 17TH SEPTEMBER 2010

JUDGMENT : (PER CHIEF JUSTICE)

This appeal is directed against the judgment and order dated 9th August 2010 of the learned Single Judge dismissing Notice of Motion No.1809 of 2010 of the appellant-plaintiff in Suit No.1828 of 2010. By the said Notice of Motion, the appellant-MSM Satellite (Singapore) Pte Ltd. (hereinafter referred to as the "plaintiff" or "Sony") had applied for an injunction to restrain the defendant-World Sport Group (Mauritius) Limited (hereinafter referred to as the "defendant" or "Mauritius company") from referring the dispute between the parties to the suit to arbitration upon invoking an arbitration clause in the agreement between the parties dated 25th March 2009 and from continuing with the arbitration proceedings filed by the defendant in the International Chamber of Commerce (ICC).

2.The suit came to be filed by the appellant-plaintiff on 30th June 2010 upon the defendant-Mauritius company issuing notice dated 28th June 2010 to the plaintiff-Sony for invoking arbitration under the arbitration clause in the agreement between the parties dated 25th March 2009 titled as "the Deed for the Provision of Facilitation Services" (hereinafter referred to as "Facilitation Deed" for short). Under the Facilitation Deed, plaintiff-Sony was to pay the sum of Rs.425 crores to the defendant-Mauritius company, out of which Rs.125 crores was already paid by Sony to the Mauritius company in three installments.

3. The plaintiff's case in brief was that :

3.1 For broadcasting matches of the Indian Premier League (IPL) Board for Cricket Control of India ("BCCI" for short) had floated tenders and the World Sports Group had won the tender to global media rights. On January 21, 2008, BCCI entered into Media Rights License Agreement (MRLA) with WSG (India) for IPL till 2017 for a sum of Rs. 2568 crores (US $ 642 million). On the same day i.e. on January 21, 2008, BCCI and plaintiff-Sony entered into MRLA for the Indian Subcontinent media rights till 2017 for Rs.2203.2 crores (US $ 550.8 million).

3.2 On 14th March 2009, BCCI under Mr. Lalit Modi terminated the MRLA dated 21st January 2008 with plaintiff-Sony. Hence, plaintiff-Sony filed Section 9 petition under the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Arbitration Act") before this Court and obtained injunction till 16th March 2009. However, to defeat the plaintiff-Sony's rights under the agreement dated 21st January 2008 and to get over the said injunction, BCCI under Mr. Lalit Modi entered into a new MRLA with defendant-Mauritius company at 3.00 a.m on 15th March 2009. The BCCI under Mr. Lalit Modi and defendant-Mauritius company impressed upon the plaintiff-Sony that all the Indian sub-continental rights were given to the defendant-Mauritius company and that since the Mauritius company had no broadcasting channel of its own, it was given seventy two hours to find a sub-licensee from 15th March 2009 when BCCI under Mr.Lalit Modi entered into the agreement with the Mauritius company. BCCI under Mr.Lalit Modi extended the deadline of seventy two hours to find a sub-licensee by the Mauritius company by another seventy two hours which deadline was thus to

expire by 3.00 p.m. on 24th March 2009. On 23rd March 2009, this Court declined interim injunction in favour of plaintiff-Sony on the ground that the BCCI had already entered into an agreement with the Mauritius company on 15th March 2009.

3.3 Since this Court vacated the ad-interim stay and declined injunction, Mr.Lalit Modi issued e-mails stating that BCCI had entered into a new agreement with Mauritius company and anyone interested in broadcasting rights should contact Mauritius company. In this background, negotiations took place between plaintiff-Sony and the Mauritius company through their representatives Mr.Andrew Georgiou and Mr.Venu Nair who were the common Directors of the Mauritius company and the Indian company called Worlds Sport Group in India. The said representatives of the Mauritius company reiterated that the Mauritius company had unfettered rights for the Indian sub-continent. They also represented to Plaintiff-Sony that by virtue of the MRLA between BCCI and the Mauritius company, the Mauritius company had the requisite media rights which it could relinquish to facilitate the acquisition of media rights directly from BCCI and that the rights arising out of the agreement between BCCI and defendant Mauritius company could be terminated and that thereafter plaintiff-Sony can directly enter agreement with BCCI to acquire Indian sub-continental media rights to the IPL.

3.4 On the basis of the above representation made by BCCI Commissioner Mr.Lalit Modi and the common Directors of the Mauritius company and the Indian company (World Sport Group India (Pvt.) Ltd.), the following new agreements dated 25th March 2010 were entered into :

(i) Deed of termination between WSG (India) and plaintiff-Sony in terminating the Option Deed of 21st January 2008;

(ii) BCCI through Mr.Lalit modi and plaintiff-Sony for new MRLA for Indian rights;

(iii) Defendant Mauritius company and plaintiff-Sony entered into a Facilitation Deed under which the plaintiff-Sony was required to pay Rs.425 crores to the Mauritius company for the Mauritius company having facilitated the plaintiff-Sony in getting back the Indian Subcontinent Media rights which the plaintiff-Sony already had from BCCI under the agreement dated 21st January 2008 which agreement was purportedly rescinded by BCCI through Mr.Lalit Modi on 14th March 2009 and therefore the plaintiff-Sony had no other alternative but to enter into agreement to get those rights back through the Mauritius company. For this plaintiff-Sony had to agree to pay BCCI Rs.2203.2 crores (US $ 550.8 million) for acquiring the Indian Subcontinent Media Rights upto the year 2017.

(iv)BCCI through Mr.Lalit Modi entered into another agreement with WSG (India) for World Wide Media Rights (excluding Indian Subcontinent) for Rs.2568 crores (US $ 642 million). Open agreement also had a cross-development act (27.5) which contemplated issue of termination notice if the plaintiff-Sony failed to comply with the payment/bank guarantee requirement under the Facilitation Deed.

3.5 On signing of the aforesaid agreements on March 25, 2009, Mr. Lalit K. Modi sent an e-mail congratulating new deal between plaintiff-Sony and the World Sport Group.

4. The gist of the plaintiff's case, as argued at the hearing of the appeal is to be found in paragraphs 19 to 22 of the plaint. It is, therefore, necessary to set out the same verbatim. Paragraphs 19 to 22 of the Plaint read as under :-

> "19. The Plaintiff agreed to pay the BCCI the exact amount as rights fee which was supposed to be paid by the Defendant under the WSGM-MRLA dated 15th March, 2009 and the Plaintiff was made to believe that the Plaintiff was paying the facilitation fees under the Deed to the Defendant for it having relinquished its Media Rights under the Purported MRLA, in favour of the Plaintiff. The payment obligation of the Plaintiff to the defendant under the Deed was further safeguarded vide clause 10.4 in the MSMS-MRLA dated 25th March, 2009 between the Plaintiff and BCCI which the Plaintiff was informed was necessary as the rights would not have accrued to the Plaintiff otherwise.
>
> 20. However, information recently received from BCCI after suspension of the IPL Commissioner, including letters and other correspondence as well as certain agreements, unknown to and unavailable to the Plaintiff at the relevant time of execution of the Deed, reveal that Defendant has fraudulently induced the Plaintiff into executing the Deed by suppressing the fact that the Media Rights forming subject matter of the MSMS-MRLA dated 25th March, 2009 had in fact reverted to BCCI and that as on date of Deed, the Defendant did not hold any of the rights whatsoever to the Indian Sub-continent media rights of the IPL.

21. During the IPL season 3 i.e. in April 2010 a controversy erupted in the BCCI regarding the alleged wrong doings of the Commissioner and various charges were levelled against him by the BCCI who reportedly issued show cause notices to Mr. Lalit K. Modi (the Commissioner), BCCI denied any knowledge about the Deed and the fees agreed to be paid by the Plaintiff to the Defendant there under in exchange for the Defendant relinquishing its Media Rights for the Indian sub continent in favour of the Plaintiff.

22. The BCCI has issued a show cause notice to Mr. Lalit K. Modi inter alia alleging that

> "(a) WSG (Mauritius) Pvt. Ltd., appears to have been chosen against WSG (India) Pvt. Ltd., to enter into within the 72 hour validity contract dated 15.3.2009. Since in any case this contract was by mutual decision never to be implemented and WSG (Mauritius) Pvt. Ltd., was meant to be a conduit for receipt of "Facilitation Fee". WSG (Mauritius) Pvt. Ltd., was totally unknown entity and no documents are available on record to show that this entity qualified the criteria under Clause 2.4 of the ITT.
>
> (b) The entire exercise of having WSG (Mauritius) Pvt. Ltd., as a Licensee of media Rights with an obligation to sub license within 72 hours appears to be ruse to bait SONY to match a practically non existing and bogus bid. Instead of going for a fresh tender process on termination of the WSG Contract, you have taken upon yourself to negotiate with select parties without even knowing the value of the property belonging to BCCI only to enable the payment of "Facilitation Fee" by Sony."

The Plaintiff is now given to understand by the BCCI that Mr. Modi in his response to the allegations made by BCCI has not referred to the Purported MRLA."

(emphasis supplied)

5. The plaintiff thereafter referred to the correspondence between the BCCI and the representatives of the plaintiff-Sony with the President of the BCCI on 25th April, 2010, 30th May 2010, 14th June 2010, etc. In view of the above developments, on 25th June 2010, plaintiff-Sony filed a Suit (Suit (Lodging) No.1092 of 2010) against the defendant-Mauritius company i.e. (1) World Sport Group (Mauritius) Ltd., (2) World Sport Group (India) Pvt. Ltd. And (3) Board of Control for Cricket in India (BCCI) praying for a declaration that the Facilitation Deed dated 25th March 2009 between plaintiff-Sony and defendant No.1-Mauritius company was illegal, null and void, not binding upon and not enforceable against Sony and that no amounts were due and payable under the said Deed by plaintiff-Sony to the Mauritius company. The plaintiff also prayed for permanent injunction to restrain BCCI from issuing any termination notice against plaintiff-Sony on the basis of the Media Rights License Agreement between BCCI and WSG (India). The plaintiff also prayed for a decree against the Mauritius company for a sum of Rs.147 crores along with further interest at the rate of 16% on the principal amount of Rs.125 crores. The plaintiff also prayed for interim relief to restrain BCCI from issuing any termination notice against the plaintiff on the basis of any agreement along with BCCI and Mauritius company or on the basis of any agreement dated 25th March 2009 between BCCI and WSG (India). The above Suit came to be filed by the plaintiff-Sony against the above three defendants on 25th June 2010 and notice thereof was served upon the defendants on 26th June 2010. When the Notice of Motion in the said Suit came up for hearing before the learned Single Judge on 28th June 2010, the learned counsel for BCCI stated that BCCI would not terminate the MRLA agreement dated 25th March 2009 between BCCI and the plaintiff during pendency of the Notice of Motion and the matter was adjourned to 16th August 2010.

6. However, after filing of the above referred Suit, the plaintiff was served with a copy of the Mauritius company's letter dated 28th June 2010 addressed to the International Chamber of Commerce enclosing the request of the Mauritius company for arbitration as contemplated under the Facilitation Deed. The Mauritius company indicated that it was seeking an award in the following terms :

> "38. The Claimant seeks an award in the following terms:
>
> (a) a declaration that the Rescission Notice issued by the Respondent is invalid and without effect;
>
> (b) a declaration that the Facilitation Deed entered into by the Claimant and the Respondent is valid and enforceable and that the rights and obligations contained therein continue in full force;
>
> (c) a declaration that each and every term in the Facilitation Deed is valid and enforceable and continues in full force;
>
> (d) a declaration that the Claimant is entitled to keep the sum of Rs.125 crores being the sums previously paid by the Respondent to the Claimant under the provisions of the Facilitation Deed;
>
> (e) an order that the Respondent pay to the Claimant all sums due and payable pursuant to the Facilitation Deed (i.e. balance of Rs.300 crores);
>
> (f) costs of this arbitration; and
>
> (g) any other relief or remedy that the Tribunal deem fit."

7. The case of plaintiff-Sony in the second suit filed before the learned Single Judge, from which the present appeal arises, is that upon becoming aware of the Court proceedings initiated by the plaintiff by filing the first suit on 25th June 2010, with a view to frustrate the same, instead of participating in the proceedings before this Court, the defendant Mauritius company has approached the ICC (International Court for Arbitration) on 28th June 2010 with a request for arbitration containing reliefs which are directly and specifically in issue before this Court in the Indian proceedings. Plaintiff-Sony further contended that there is no other Court which may be construed as courts of `natural jurisdiction' since no part of the cause of action in connection with the present dispute has arisen outside India. The Singapore Arbitral Tribunal is not the appropriate or convenient forum to resolve the alleged dispute between the plaintiff and the defendant. Furthermore, the alleged dispute between the defendant and the plaintiff is not an independent and isolated dispute between the two parties. It is intricately and inseparably connected with other material issues which involve other parties also such as WSGI AND BCCI and are part of the Indian proceedings. The Singapore proceedings against the plaintiff is a gross abuse of the judicial process and is an attempt to harass the plaintiff by engaging it in a protracted and expensive legal battle in Singapore and incur heavy expenses which are clearly avoidable. Admittedly, no part of the evidence material to the dispute is to be found at Singapore and none of the witness relevant to the issues are at Singapore. It is the settled legal position that when there are serious allegations of fraud or where the dispute requires detailed examination of witnesses, the same are not suitable for arbitration and have to be necessarily decided by Courts. Considering the nature of allegations which the plaintiff has raised

against the defendant, which is bound to necessitate detailed evidence and cross examination of parties, it is apparent that even assuming, without admitting that the arbitration clause in the deed survived the rescission on the ground of fraud, it is only the Courts which would have jurisdiction to decide the dispute and having regard to the fact that this Court is the Court of inherent and natural jurisdiction, the dispute would be decided solely and exclusively by this Court in the Indian proceedings which are prior in point of time to the Singapore proceedings.

8. The above Notice of Motion in the second suit came to be opposed by the affidavit in reply filed by the constituted attorney of defendant-Mauritius company. The defendant has objected to the territorial jurisdiction of this Court to entertain the suit and has also contended that whatever disputes the plaintiff has raised can be raised in the arbitration proceedings. The defendant has submitted as under :-

> "4. I submit that it is the admitted and undisputed position that:
>
> i. The Facilitation Deed (as defined hereinbelow) is governed by and construed in accordance with the laws of England and Wales without regard to the choice of law principle;
>
> ii. Both, the Plaintiff and the Defendant are companies outside the jurisdiction of this Hon'ble Court. The Plaintiff is a company incorporated in Singapore and the Defendant is a company incorporated in Mauritius.
>
> iii. All actions or proceedings arising in connection with, touching upon or relating to the Facilitation Deed, the breach thereof and/or the scope of provision of section relating to arbitration itself

has been mandated by the Plaintiff and the Defendant to be submitted to the ICC for final and binding arbitration. Thus, any matter for any action in respect of the Facilitation Deed is required to be referred to arbitration.

iv. It is an undisputed fact that the Defendant has already invoked the arbitration in accordance with the Facilitation Deed and arbitration proceedings have commenced.

v. Parties at all relevant time were aided in their discussion and negotiation by experts, such as attorneys conversant with English laws.

5. I say that the suit is dishonest. I submit that the present suit is a vexatious proceeding and is an abuse of process of law. The chosen forum is Singapore, which is the Plaintiff's country of residence. Both parties are not resident in India. Singapore is the Plaintiff's own country and choice. I say that the suit ought to be dismissed in limine on the following grounds each of which is in the alternative and without prejudice to the other.

6. I submit that this Hon'ble Court has no jurisdiction to entertain or try this suit and/or the suit does not lie inasmuch as

a. the Plaintiff has not taken any leave under Clause XII of the Letters Patent. The Plaintiff and Defendant are both resident outside the jurisdiction of this Hon'ble Court. The Plaintiff executed the agreement outside India (in Los Angeles). Negotiations in relation to the deed for provision of facilitation services being Exhibit "I" to the plaint (**Facilitation Deed")**, were partly held outside India, more particularly with the Plaintiff's lawyers who were in England and the representatives of the parties hereto not being within the jurisdiction of this

Hon'ble Court at all material times. On the Plaintiff's own showing, the whole of the cause of action has not arisen in Mumbai. The payment made till date under the Facilitation Deed was also made by the Plaintiff outside India and received by the Defendant outside India, i.e. outside the jurisdiction of this Hon'ble Court. The whole of the cause of action has not arisen within the jurisdiction of this Hon'ble Court. Since no leave has been taken under Clause XII, I submit that this suit is liable to be dismissed.

b . the suit is barred by law;

c. the plaint discloses no cause of action and the suit is liable to be dismissed on a demurrer;"

9. At the hearing of this appeal, the defendant-Mauritius company has also sought to give its defence on merits and further submitted in paragraph 37(g) as under :-

"g. It is submitted that any alleged representation by the IPL Commissioner on behalf of the BCCI, cannot be attributable to the Defendant and/or cannot affect the Plaintiff's contract with the Defendant.

h. The Facilitation Deed specifically requires and recites that, at the time when the Plaintiff contracts with BCCI, the Defendant would not and/or did not have any subsisting rights under its contract and that such rights were already terminated. The Plaintiff is not concerned with how the Defendant's rights under its contract came to be terminated or extinguished."

10. As already indicated earlier, the learned Single Judge dismissed the Notice of Motion by holding that even if the agreement

dated 25th March 2009 between the plaintiff and the defendant has been rescinded by the plaintiff, the arbitration clause survives and that all the contentions sought to be raised in the suit can be raised before the arbitral tribunal.

11. At the hearing of this appeal, Mr.Dave, learned senior counsel for the plaintiff-Sony, has submitted that the plaintiff was already given all the media rights for IPL under the agreement dated 21st January 2008 and on 14th March 2009 Mr. Lalit Modi, the IPL Commissioner acting for BCCI had terminated the agreement dated 21st January 2008 and purported to confer those rights on the defendant Mauritius company in order to see that the plaintiff is required to approach the Mauritius company and only after agreeing to pay the facilitation fee to the Mauritius company to the tune of Rs.425 crores, the plaintiff is able to get back its rights under the agreement dated 21st January 2008. It is submitted that BCCI has already indicated in its letter dated 30th May 2010 to plaintiff-Sony that defendant Mauritius company was a totally unknown entity and was not meant to be a conduit for receipt of facilitation fee. Mr. Dave has also invited our attention to letter dated 30th May 2010 of BCCI to plaintiff-Sony i.e. MSM Satellite (Singapore) as under :-

> "We write with regard to the Media Rights Licence agreement dated 25th March 2009 executed by you and signed by Mr. Lalit K Modi purportedly on behalf of BCCI.
>
> It has come to our attention that you have entered into an agreement on the same day i.e., 25th March 2009 with M/s. World Sports Group (Mauritius) Ltd., wherein you have agreed to pay a sum of Rs.425 Crores towards

"facilitation fee" for services supposedly rendered by WSG Mauritius Ltd. to enable you to obtain the contract for Media Rights for the Indian Subcontinent by means of the agreement referred above.

You are hereby informed that BCCI is not aware of any facilitation services provided by World Sports Group (Mauritius) Ltd. World Sports Group (Mauritius) Ltd., had no role to play in the agreement signed by you with Mr. Lalit Kumar Modi for taking the Indian sub-continent rights. Monies expanded by you for the Indian Subcontinent rights referred above should rightfully be paid to BCCI alone and no other party. You are therefore requested to remit all amounts due and payable to WSG (Mauritius) Ltd., to the BCCI.

We are sure that MSM Satelite (Singapore)'s favourable decision in this regard would help the relationship between BCCI and MSM Satelite (Singapore) grow stronger in the years to come.

Thanking you

Yours faithfully

Sd/-
N. Srinivasan
Hon. Secretary".

12. After referring to the above documents at the hearing, Mr.Dave has vehemently submitted that the dispute which has been referred by defendant-Mauritius company purports to be a dispute about non-implementation of the Facilitation Deed dated 25th March 2009, that it is not an independent or isolated dispute between the plaintiff and the defendant but it is dependent and inseparably connected with other material issues which involve other parties also, such as, BCCI and WSG (India) Pvt. Ltd. and all these disputes are already subject matter

of the first suit which was filed before this Court on 25th June 2010. It was only after the notice of the said first suit was first served upon the defendant on 26th June 2010 that as a counter blast, the defendant approached ICC invoking the arbitration clause in the agreement dated 25th March 2009 which had already been rescinded by the plaintiff.

It is submitted that when the specific plea of the plaintiff-Sony is about the fraud and the non-availability with the defendant-Mauritius company of any rights allegedly obtained by the defendant-Mauritius company from BCCI then acting through Mr.Lalit K. Modi, the arbitrators cannot go into that dispute when BCCI is not a party to the arbitration proceedings which the defendant has referred to ICC. Strong reliance is placed on the following decisions :

(i) *Venture Global Engineering vs Satyam Computer Services Ltd. and another*, **(2008) 4 SCC 190**.

13. In reply, Dr. Abhishek Singhvi has submitted that Section 5 of the Arbitration Act specifically provides that notwithstanding anything contained in any other law for the time being in force, no judicial authority shall intervene except where so provided in this Part. Section 16 also provides that the arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement and that an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract and that even a decision by the arbitral tribunal that the contract is null and void, shall not entail *ipso jure* the invalidity of the arbitration clause. It is submitted that whatever objections the plaintiff has about maintainability of the

arbitration proceedings or about the jurisdiction of the arbitrators, can be raised before the arbitral tribunal and the very scheme of the Act that rejection of such objections can only be challenged by making an application for setting aside an arbitral award under Section 34 of the Act shows the clear restrictive intent against the judicial intervention.

14. It is further submitted by Dr. Singhvi that the so-called fraud is nothing but a false allegation made by the plaintiff. The reference to the agreement dated 23rd March 2009 in the agreement dated 25th March 2009 between the plaintiff and the defendant was only a typographical mistake and even in the press statement issued by the plaintiff at Exhibit “K”, there is no reference to the agreement dated 23rd March 2009. It is submitted that such a typographical mistake in the agreement dated 25th March 2009 by referring to the said agreement as merely dated 23rd March 2009 instead of agreement dated 15th March 2009 between BCCI and the defendant can never amount to fraud.

15. It is further submitted by Dr. Singhvi that as per the settled legal position, even in a case where allegations of fraud are made, the accuser cannot prevent the accused from going for arbitration and that it is only the privilege of the accused to plead that he would like to have the allegations of fraud against him tried in a Court of law instead of being tried before the arbitral tribunal. In support of this contention, reference is made to the observations made by the Apex Court in *N. Radhakrishnan v Maestro Engineers and others,* **(2010) 1 SCC 72,** wherein the Apex court quoted the following observations in *Abdul Kadir Shamsuddin Bubere v Madhav Prabhakar Oak,* **AIR 1962 SC 406 :**

> “17. There is no doubt that where serious allegations of fraud are made against a party who is charged with fraud desires that the matter should be tried in open court, that would be a sufficient cause for the court not to order an arbitration agreement to be filed and not to make the reference.”

Reference is also made to the observations made by the Apex Court in paragraph 26 in *N. Radhakrishnan* (supra) which reads as under :

> “26. In the present dispute faced by us, the appellant had made serious allegations against the respondents alleging them to commit malpractices in the account books and manipulate the finances of the partnership firm, which, in our opinion, cannot be properly dealt with by the arbitrator. As such, the High Court was justified in dismissing the petition of the appellant to refer the matter to an arbitrator.......”

16. Dr. Singhvi has also placed reliance upon the orders in *India Household and Healthcare Ltd. v L.G Household and Healthcare Ltd.*, **(2007) 5 SCC 510 and** *Meguin GMBH & Co. v Nandan Petrochem Ltd.*, **2007 (5) R.A.J. 239 (SC),** in support of the contention that even where fraud has been alleged, the question as to whether the entire contract is vitiated by reason of alleged commission of any fraud on the part of either of the parties thereto, the matter can be gone into by the arbitrator. Even the question as to the jurisdiction of the arbitrator can be gone into by the arbitral tribunal itself.

17. Dr. Singhvi for the defendant Mauritius Company has also relied on the following decisions in support of the contention that the Courts are not to interfere with the arbitral proceedings and that such a suit for restraining the defendant from going before arbitral tribunal is not maintainable.

17.1 Reliance is placed on a decision of the Apex Court in *CDC Financial Services (Mauritius) Ltd. v BPL Communications Ltd. and others*, **(2003) 12 SCC 140**, on the following observations :-

> "14. Whatever may be the merits of the writ application, we are of the view that it has been fairly conceded by the learned Senior Counsel appearing on behalf of Respondent 1 that the High Court should have had regard to Section 5 of the 1996 Act before granting the reliefs it did. Under Section 5 of the 1996 Act, courts are restrained from interfering with arbitration except in the manner provided in the 1996 Act. That the orders passed by the High Court would amount to a violation of this mandate is not seriously disputed by the respondents. We, accordingly, set aside the orders of the High Court without expressing our views on the merits of the contentions of the parties in any manner whatsoever.........."

17.2 Reliance is also placed on the decision of the Apex Court in *Secur Industries Ltd. v Godrej & Boyce Mfg. Co. Ltd. and another*, **(2004) 3 SCC 447**, particularly paragraphs 11 and 12 thereof which read as under :-

> "11. ...... With the applicability of Part I of the 1996 Act in all its force, the extent of judicial intervention in arbitrations is limited by the non

> obstante provisions of Section 5 of the 1996 Act, ...
>
> "......The validity of the proceedings before the arbitral tribunal is an issue which the Council, and not the court, could decide under Section 16 of the 1996 Act...."
>
> 12. The arguments which have been raised before us by the learned counsel on behalf of the respondent to a large extent related to the merits of the appellant's claim before the Council. Having regard to the scope of the authority of the arbitral tribunal under Section 16, this is not a matter which the court can adjudicate upon. Indeed it is incumbent on the court to refer the parties to arbitration under Section 8(1) of the 1996 Act if a suit is filed in a matter which is the subject-matter of an arbitration agreement. Furthermore, even while this question is pending decision before a court, the arbitral tribunal may proceed with the arbitration under Section 8(3) and make its award. The High Court could not, therefore, have stayed the proceedings, before the Council."
>
> (emphasis supplied)

17.3 Dr.Singhvi has also relied upon the decision of the Delhi High Court in *Bhushan Steel Ltd. v Singapore International Arbitration Centre and another*, decided on 4th June 2010 in **IA No.11355/2009 and CS (OS) No. 1392/2009, (MANU/DE/1270/2010)** particularly on the principles laid down in paragraphs 25 and 31 thereof, which read as under :-

> "25. It is thus clear that a Court can intervene only in the event that its intervention is provided for under the Act. One of the main objects of the Act is to minimise the supervisory role of the courts in the arbitral process. Section 5, as evident,

> is brought of the new Act to encourage the resolution of disputes expeditiously and in a cost effective manner. Therefore, the extent of judicial intervention is limited by the non-obstante provision of Section 5 of the Act. As per the settled law, the Court should not be obliged to bypass the provisions of the Act in exercise of its power and jurisdiction."
>
> xxxxx xxxxx xxxxx
>
> "31. ...... It is also clear that even in the case of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. ......"

18. Dr. Singhvi also relied on Article 6 of the Rules of Arbitration of the International Chamber of Commerce providing for effect of the arbitration agreement and particularly clause (4) thereof which reads as under :-

> "4. Unless otherwise agreed, the Arbitral Tribunal shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is non-existent, provided that the Arbitral Tribunal upholds the validity of the arbitration agreement. The Arbitral Tribunal shall continue to have jurisdiction to determine the respective rights of the parties and to adjudicate their claims and pleas even though the contract itself may be non-existent or null and void."

19. In rejoinder, Mr. Dave has referred to Section 45 of the Arbitration Act which reads as under :-

> **"45. Power of judicial authority to refer parties to arbitration.-** Notwithstanding anything contained in Part 1 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."
>
> (emphasis supplied)

It is submitted that the said section incorporates the salutary principle in the New York Convention which also provides that a Court should not refer the parties to arbitration, when it finds that the agreement is null and void, inoperative and incapable of being performed. It is further submitted that even while hearing an application under Section 11 of the Arbitration Act, the Chief Justice or his nominee has a power to go into such questions and to decline to appoint an arbitrator where it finds that the agreement incorporated in the arbitration clause is null and void, inoperative or incapable of being performed or is vitiated by fraud.

20. Mr. Dave has also placed heavy reliance on the following extracts from Russel on Arbitration (Twenty-Third Edition,2007) :

> "7-058 **Injunctions to restrain arbitral proceedings.** Injunctions to restrain arbitrations are, at least in England, few and far between and becoming fewer still over time. This is principally because of the acceptance of the principle that the arbitrator should usually determine his own jurisdiction and so to restrain an arbitration by way of injunction would be inconsistent with

the scheme of the Arbitration Act 1996. However, there are exceptional circumstances where an injunction to restrain an arbitration may be obtained. Such an injunction is different in nature from an injunction granted in support of arbitral proceedings, but it is convenient to mention this type of injunction at this stage. Subject to the extreme limitations on the exercise of the court's discretion set out below, the possibility of obtaining an injunction to restrain the continuation of arbitral proceedings can arise in the following cases:

Case 1: where one party commences an action before the court ad successfully opposes a stay (whether under s.9 or the court's inherent jurisdiction) on the ground that the arbitration agreement is invalid and the arbitral proceedings based on the invalid agreement continue in defiance of the court's findings. This case is also likely to cover situations where the court has decided that it, rather than the arbitrators, must decide an issue as to the jurisdiction of the arbitrators upon a s.9 stay application having been made and where there is a risk that the arbitrators might proceed to consider the same jurisdictional issue pending the court's decision."

(emphasis supplied)

21. Finally, Mr. Dave has stated at the bar that the appellant-plaintiff has no intention of evading, avoiding or delaying the liability to pay the amount, if any, to the BCCI but payment of any amount to respondent-defendant (Mauritius company) under the facilitation agreement by virtue of any award of the arbitrators for which the Mauritius company has moved the International Chamber of Commerce may not exonerate the plaintiff from its liability towards BCCI. By letter dated 30th May, 2010, BCCI has made it clear that any amount payable

by the plaintiff Sony to the Mauritius company under the facilitation agreement dated 25th April, 2010 shall be paid to BCCI. Any award by the arbitrators in the proceedings which the respondent-defendant (Mauritius company) has proposed to institute before the International Chamber of Commerce and where the arbitrators are sought to be appointed will not bind BCCI which will be a stranger to such an arbitration award. It is submitted that the plaintiff has no objection to pay the entire amount of Rs. 425 crores as payable by the plaintiff under the facilitation agreement out of which Rs.125 crores has already been paid to the defendant-Mauritius company and for recovering which the plaintiff has already filed the first suit before this court on 25th June, 2010. It is stated by Mr. Dave that the plaintiff is ready and willing to pay the balance amount of Rs. 300 crores to BCCI and after recovering Rs.125 crores and the interest thereon from defendant- Mauritius company to pay the said amount to BCCI. In other words, Mr. Dave has stated in unmistakable terms that the plaintiff is ready to pay BCCI Rs. 300 crores out of the amount of Rs.425 crores payable by the plaintiff under the facilitation agreement dated 25th March, 2010 and the balance amount of Rs.125 crores after getting back the same from defendant-Mauritius company.

22. Mr. Dave submitted that the appellant-plaintiff (Sony) also invokes the provisions of section 23 of the Indian Contract Act, 1872 and submits that the very agreement dated 25th March, 2009 under which the respondent- Mauritius company was to be paid Rs.425 crores for the so called “facilitation services” was against public policy. The entire agreement was franchised by Mr. Lalit Modi purporting to act for BCCI and respondent- Mauritius company and that if the respondent-defendant is allowed to initiate and continue with the arbitration proceedings for

the purpose of getting an arbitration award against the appellant-plaintiff for a sum of Rs.300 crores, the same will deprive BCCI (a body discharging public functions and amenable to writ jurisdiction of this Court) which will be stranger to the arbitration award sought by the defendant- Mauritius company. Mr. Dave states that they are ready to pay Rs.300 crores to BCCI, if they are not required to pay any amount to the defendant-Mauritius company.

23. After having heard the learned counsel for the parties, we have given anxious consideration to the rival submissions.

24. It is true that with the adoption of the UNCITRAL Model Law while enacting the Arbitration and Conciliation Act, 1996, the Indian Parliament has adopted judicial non-intervention as a general rule and, therefore, the courts would ordinarily not interfere with arbitration proceedings. Section 5 therefore, provides that in matters governed by Part-I of the Arbitration Act, 1996 which has been held to be applicable to international arbitration also, no judicial authority shall intervene except where provided in this part and sub-section (3) of section 8 also provides that notwithstanding pendency of an application under sub-section (1) of section 8 made by a party for referring the parties to arbitration and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made. Section 16 of the Arbitration Act, 1996 also provides that the arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to any existence or validity of the arbitration agreement and for that purpose, a decision by the arbitral tribunal that the contract is null and void, shall not entail *ipso jure* the invalidity of

the arbitration clause. Sub-section (5) of section 16 also provides that the arbitral tribunal shall decide on a plea that it does not have the jurisdiction or that an arbitral tribunal is exceeding the scope of its authority and that if the arbitral tribunal negating such plea, the arbitral tribunal shall continue with the arbitral proceedings and make an arbitral award and the party aggrieved by the rejection of the preliminary pleas has to wait till the arbitral award is made and, thereafter only it can make an application for setting aside such arbitral award in accordance with section 34. This is the general scheme of the Arbitration and Conciliation Act, 1996 as contained in Part 1 thereof and ordinarily, the plaintiff would not have been entitled to make any claim for an injunction to prevent the respondent-defendant from going ahead with the arbitral proceedings before the International Chamber of Commerce.

The question whether in the facts of the present case, the plaintiff- Sony has made out a case for claiming such an injunction.

25. The learned counsel for the respondent would even submit that it is not open to any judicial authority to grant an injunction against any arbitral proceedings till the arbitral tribunal makes an award and that the only stage at which even the minimal interference is permitted, is after the arbitral award is made. The aggrieved party can make an application for setting aside such arbitral award under section 34 of the Arbitration Act, 1996 and that at that stage also, the judicial interference is permissible on very limited grounds. It is strenuously urged that the courts must resist the temptation to do substantial justice in the facts of each case and that any such approach will have the tendency to distort the entire arbitration law. It is submitted that the very object of introducing the provisions of sections 5 and 16 of the Act would be

defeated, if the courts entertain any proceedings for granting injunction against the arbitral proceedings.

26. We have considered the above submission with utmost anxiety. What, however, cannot be overlooked is that the facilitation agreement between the plaintiff-Sony and the defendant-Mauritius company was not an independent or isolated agreement or transaction between the sole plaintiff and the sole defendant in the second suit, giving rise to the present appeal. As the narration of facts at the commencement of this judgment would indicate, the facilitation agreement dated 25th March, 2009 was a part of several agreements entered into amongst different parties commencing from 14th January, 2008. Even on 25th March, 2009, as many as four agreements were entered into which were as under:

March 25, 2009	Deed of termination between WSGI and MSMS: Terminating the option Deed of 21st Jan.2008
March 25, 2009	MSMS and BCCI entered into new MRLA for India Rights: MRLA dated 25th March, 2009
March 25, 2009	MSMS and WSGM entered into a MSMS-WSGM Facilitation Deed/ DEED;
March 25, 2009	WSGI and BCCI entered into a new MRLA for worldwide media rights (excluding Indian subcontinent)

27. It is the plaintiff's specific case that agreement between BCCI and plaintiff-Sony dated 25th March, 2009 and the facilitation deed dated 25th March, 2009 between the defendant-Mauritius company and plaintiff-Sony which were executed simultaneously are interlinked and have material cross references.

> " The MSMS-MRLA dated 25th March, 2009 and the Deed, which were executed simultaneously, are interlinked and have material cross references. For e.g., clause 6.2 of the Deed stipulates that the Deed shall automatically terminate upon the termination of the MSMS-MRLA dated 25th March, 2009 for any reason or if for any reason the Plaintiff ceases to be entitled to the media rights granted pursuant to the MSMS-MRLA dated 25th March, 2009. Similarly, it was interalia provided in clause 10.4 of the MSMS-MRLA DATED 25TH march, 2009 that upon receipt of the Defendant No.1's notice in accordance with the Deed, the BCCI may immediately terminate the MSMS-MRLA dated 25th March, 2009 subject to certain conditions mentioned therein."

28. It is, therefore, clear that the facilitation deed agreement dated 25th March, 2009 was not a stand apart agreement between the sole plaintiff and the sole defendant in the second suit. It was a part of the agreement entered into amongst four parties who are all parties to the first suit filed by the plaintiff on 25th June, 2010 where World Sport Group (India), the defendant-Mauritius company and BCCI are defendants. BCCI has specifically informed the plaintiff-Sony by letter dated 30th May, 2010 that the defendant-Mauritius company is not

entitled to any facilitation fees. Even at the cost of repetition, we reproduce the letter dated 30th May, 2010, which reads as under :-

"May 30, 2010

M/s. MSM Satellite (Singapore) Pte. Ltd.
5, Tampines Central 6,
#02-19, Telepark Building
Singapore-529482

Kind attn: Mr. Man Jit Singh

We write with regard to the Media Rights Licence agreement dated 25th March 2009 executed by you and signed by Mr. Lalit K. Modi purportedly on behalf of BCCI.

It has come to our attention that you have entered into an agreement on the same day i.e., 25th Maqrch 2009 with M/s. World Sports Group (Mauritius) Ltd., wherein you have agreed to pay a sum of Rs.425 Crores towards "facilitation fee" for services supposedly rendered by WSG Mauritius Ltd. to enable you to obtain the contract for Media Rights for the Indian Subcontinent by means of the agreement referred above.

You are hereby informed that BCCI is not aware of any facilitation services provided by World Sports Group (Mauritius) Ltd. World Sports Group (Mauritius) Ltd., had no role to play in the agreement signed by you with Mr. Lalit Kumar Modi for taking the Indian sub-continent rights. Monies expanded by you for the Indian Subcontinent rights referred above should rightfully be paid to BCCI alone and no other party. You are therefore requested to remit all amounts due and payable to WSG (mauritius) Ltd., to the BCCI.

We are sure that MSM Satellite (Singapore)'s favourable decision in this regard would help the

relationship between BCCI and MSM Satellite (Singapore) grow stronger in the year to come.

Thanking you

Yours faithfully
Sd/-
N Srinivasan
Hon. Secretary"

29. The above letter dated 30th May 2010 was written by BCCI to the plaintiff after BCCI initiated action against its IPL Commissioner Mr. Lalit Modi to whom it has already issued show cause notice and in one of those show cause notice, there are specific allegations to the following effect (as quoted in paragraph 22 of the plaint) :

"(a) WSG (Mauritius) Pvt. Ltd., appears to have been chosen against WSG (India) Pvt. Ltd., to enter into within the 72 hour validity contract dated 15-3-2009. Since in any case this contract was by mutual decision never to be implemented and WSG (Mauritius) Pvt. Ltd., was meant to be a conduit for receipt of "Facilitation Fee". WSG (Mauritius) Pvt. Ltd., was a totally unknown entity and no documents are available on record to show that this entity qualified the criteria under Clause 2.4. of the ITT.

(b) The entire exercise of having WSG (Mauritius) Pvt. Ltd., as a Licensee of media Rights with an obligation to sub license within 72 hours appears to be ruse to bait SONY to match a practically non existing and bogus bid. Instead of going for a fresh tender process on termination of the WSG Contract, you have taken upon yourself to negotiate with select parties without even knowing the value of the property belonging to BCCI only to enable the payment of "Facilitation Fee" by Sony."

30. The appellant-plaintiff's reply dated 2nd June, 2010 to BCCI reads as under :-

"June 2, 2010

To

Mr.Shashank Manohar (President)/
Mr.N. Srinivasan (Honorary Secretary)
The Board of Control For Cricket in India (`BCCI')
Wankhede Stadium, Mumbai.

Dear Sir,

We write further to the meeting our representatives had with you on 30th May, 2010 and in response to your letter of the same date.

You have made a representation to us at the meeting by way of inter alia your above letter, and documents shown to us at the meeting and in particular the letter dated on or about 24th March, 2009 from World Sports Group Mauritius (`WSG') to BCCI and the letter dated on or about 24th/25th March, 2009 from BCCI to WSG as briefly and partially shown to us, that on or about 24th March, 2009, the Indian Sub Continent Media Rights had already reverted to BCCI and consequently on 25th March 2009 there existed no Media Rights with WSG that would enable them to provide facilitation services/relinquishment of rights in favour of MSM Satellite (Singapore) Pte Ltd (`MSMS'). According to you on the basis of such misrepresentation WSG induced MSMS to agree to pay monies under the Deed for The Provision of Facilitation Services dated 25th March, 2009 (`Deed') which amount actually belonged to the BCCI and hence, you concluded that no amount was lawfully payable by MSMS to WSG under the aforesaid Deed. Accordingly you have called upon MSMS to pay over the balance facilitation fee to BCCI.

MSMS wishes to state in response that it has taken a serious note of your representation and considering the gravity involved and the ramifications thereof, MSMS

has been advised by its counsel that MSMS should favorably consider BCCI's demand for the balance amount of the facilitation fees amount to Rs.300 Crores as per annexed payment schedule (Annexure A) subject to BCCI fulfilling the following requests :

1. BCCI will provide MSMS with copies of the relevant correspondence with WSG including the letters dated 24th March and 25th March, 2009 as briefly and partially shown to MSMS during the aforesaid meeting and also the agreements dated 15th and 23rd March, 2009 between BCCI and WSG along with any other relevant documents in support of your letter dated 30th May, 2010;

2. BCCI expressly confirms that the Media Rights License Agreement dated 25th March 2009 (`MRLA') is valid and binding and shall be acted upon by the parties in good faith and in compliance thereof;

3. BCCI agrees to delete Clause 10.4 of the MRLA and also to enter into such other agreements as may be mutually agreed with MSMS to more fully carry out the terms of the understanding set out herein;

4. If any proceedings are initiated against MSMS before a competent court/authority in relation to any payments that may be made to BCCI pursuant to its above letter of 30 May 2010, BCCI will in good faith actively assist and support MSMS in establishing its defence, and

5. The understanding as set out herein and in any future understanding in this respect shall be treated in strict confidence by both parties.

We look forward to an early meeting.

Yours sincerely,
for MSM Satellite (Singapore) Pte Ltd.
Sd/-
Name : Andrew Kaplan
Title : Director."

31. In the above factual background, the submission made by the learned counsel for the appellant-plaintiff (Sony) that the facilitation agreement is contrary to public policy of India assumes utmost importance. Admittedly, BCCI is not a party to the arbitration proceedings initiated by the respondent- Mauritius company. BCCI will not have any say in the said arbitration proceedings on the footing that in view of the clauses of the facilitation deed taken by itself and as there is an independent contract between the sole plaintiff and the sole defendant in the second suit, giving rise to the present appeal, the arbitral tribunal will make an award requiring the plaintiff to pay the defendant the amount of Rs.300 crores over and above Rs.125 crores already paid by the plaintiff. The question is whether such an award will stand the scrutiny on the touchstone of public policy of India. While considering the said question, it would be relevant, therefore, to refer to the aforesaid factual background.

32. The contention of the learned counsel for respondent-Mauritius company that the ground of fraud is available only to the accused and not to the accuser for avoiding arbitration proceedings and that the defendant-Mauritius company is the accused and the plaintiff is the accuser and, therefore, the arbitral proceedings cannot be injuncted at the instance of the plaintiff overlooks the fact that the accusation of fraud is not merely made by the plaintiff-Sony but that plaintiff-Sony is relying on the factum of accusation having been made by BCCI against the then IPL Commissioner Mr. Lalit Modi and the respondent-Mauritius company. BCCI has been held to be a body discharging public functions (vide *M/s.Zee Tele Films Ltd. and another vs Union of*

India and others, **AIR 2005 SC 2677**). If the accusations of fraud made by BCCI against Mr. Lalit Modi and the respondent- Mauritius company are found to be true, it would be obvious that an arbitral award directing the plaintiff-Sony to pay the respondent- Mauritius company any sum under the facilitation agreement would be contrary to public policy.

33. It is obvious that arbitral tribunal having only two parties before it - the appellant herein and the respondent-Mauritius company, will not have any power to adjudicate upon the accusations of fraud made by BCCI against Mr. Lalit Modi and the respondent- Mauritius company. It, therefore, appears to us that this is one of those rare cases, where there are exceptional circumstances where an injunction to restrain an arbitration may be granted. This is a clear case where there is a risk that the arbitrator might proceed to consider the same jurisdictional issue which is pending the decision of this court in Suit (Lodging) No.1901 of 2010 filed by the appellant on 25th June, 2010 against WSG (India) Pvt. Ltd,, respondent- Mauritius company and the BCCI.

34. In this context, it will be relevant to refer to the provision of para 2 of the Arbitration and Conciliation Act, 1996 which provides for enforcement of certain foreign awards. Section 45 of the Act reads as under:

> **“45. Power of judicial authority to refer parties to arbitration.-** Notwithstanding anything contained in Part 1 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.”

Provisions of section 45 quoted hereinabove are also in consonance with the New York convention on the recognition and enforcement of foreign arbitral awards and particularly clause 3 of Article II thereof.

35. It is also observed by Russell on Arbitration (Twenty-Third Edition-2007) as under:

“7-058 **Injunctions to restrain arbitral proceedings.** Injunctions to restrain arbitrations are, at least in England, few and far between and becoming fewer still over time. This is principally because of the acceptance of the principle that the arbitrator should usually determine his own jurisdiction and so to restrain an arbitration by way of injunction would be inconsistent with the scheme of the Arbitration Act 1996. However, there are exceptional circumstances where an injunction to restrain an arbitration may be obtained. Such an injunction is different in nature from an injunction granted in support of arbitral proceedings, but it is convenient to mention this type of injunction at this stage. Subject to the extreme limitations on the exercise of the court’s discretion set out below, the possibility of obtaining an injunction to restrain the continuation of arbitral proceedings can arise in the following cases:

Case 1: where one party commences an action before the court ad successfully opposes a stay (whether under s.9 or the court’s inherent jurisdiction) on the ground that the arbitration agreement is

> invalid and the arbitral proceedings based on the invalid agreement continue in defiance of the court's findings. This case is also likely to cover situations where the court has decided that it, rather than the arbitrators, must decide an issue as to the jurisdiction of the arbitrators upon a s.9 stay application having been made and where there is a risk that the arbitrators might proceed to consider the same jurisdictional issue pending the court's decision." (emphasis supplied)

The Court will exercise its discretion to grant injunction restraining the further conduct of an arbitration only in rare cases and even if such injunction could be granted only in rarest of the rare cases, this is one such rarest of rare case.

36. We have considered the principle laid down by the Apex Court in *Secur Industries Ltd. V. Godrej & Boyce Mfg. Co. Ltd. And another*, (2004)3 SCC 447. The Apex Court did hold in the said case that with the applicability of part-I of the 1996 Act to the extent of judicial intervention in arbitration is limited by the non-obstante provision of section 5 and that the validity of the proceedings before the arbitral tribunal is an issue which the arbitratgor and not the Court could decide under section 16 of the Act. The Court, however, further observed as under:

> "12. The arguments which have been raised before us by the learned counsel on behalf of the respondent to a large extent related to the merits of the appellant's claim before the Council. Having regard to the scope of the authority of the arbitral tribunal under Section 16, this is not a matter which the court can adjudicate upon. Indeed it is incumbent on the court to refer the parties to arbitration under Section 8(1) of the 1996 Act if a

> suit is filed in a matter which is the subject-matter of an arbitration agreement. Furthermore, even while this question is pending decision before a court, the arbitral tribunal may proceed with the arbitration under Section 8(3) and make its award. The High Court could not, therefore, have stayed the proceedings before the Council."

37. In so far as the arbitration and sanctity of such agreements is concerned, reliance is placed upon Section 5 of the Arbitration and Conciliation Act, 1996 and also Sections 8 and 16 of the Act. Reliance on the other hand is placed on Section 45 of the Act on the words notwithstanding contained in Part I of the Act or in Code of Civil Procedure, 1908, the judicial authority shall at the request of one of the parties or any person claiming through or under him refer the parties to arbitration unless he finds that the arbitration application is null and void, inoperative and incapable of being performed. In a decision reported in *Eastern Mineral & Trading Agency vs Steel Authority of India*, **2000 (3) RAJ 115,** it has been held that Section 45 appears in Part II and therefore it over-rides Part I which includes Section 5. Therefore, a judicial authority shall not intervene except where so provided in this Part. Section 5 therefore does not come in the way of applicability of Section 45. Our attention has also been invited to the words "shall" appearing in this proviso and it is urged that the term in its ordinary significance is mandatory and therefore there is a mandate, provided the conditions therein are fulfilled and the agreement is found to be null and void, inoperative and incapable of being performed otherwise, there is no obligation to refer the parties to arbitration. Therefore, we have no hesitation in proceeding on the basis that the Arbitration and Conciliation Act, 1996 does not rule out intervention by the Court

although Section 45 confers powers on judicial authority to refer parties to arbitration that is a power which will have to be exercised only after the Court finds that the agreement is not null and void, inoperative and incapable of being performed. To this extent, the power to examine the arbitration agreement between the parties is available.

38. Such provisions in the Arbitration Act have been looked upon as vastly reducing the extent to which the judiciary can interfere with the arbitration process. Such a provision has been subjected to some controversy and dissent. In **Hudson's Building and Engineering Contracts, Eleventh Edition**, page 1579, the provision has been criticised in the following terms :-

> "It would be seen that there has been a widespread movement by influential interests involved in the arbitration process against control by the Courts, supported by the many modern governments who perceive a public financial advantage in diverting litigation away from the public funded judiciary into the privatised sector which arbitration represents."

Cautioning that, "It may perhaps be added that not only uncorrected errors of law, but elements of over-confidence, unfairness and inquisitorial and domineering attitudes can be expected to increase with the withdrawal of appellate powers and sheltered by the lack of publicity provided by arbitration".

39. It is said that the Courts in England have not favoured the curtailment of powers of the Court. It has been observed that regarding

the correct balance of the relationship between international arbitration and national Courts, it is impossible to doubt that at least in some instances the intervention of the Court may be not only permissible but highly beneficial. (See *Coppee Lavalin SA/NV vs Ken-Re Chemicals and Fertilisers Ltd*., **(1994) 2 All ER 449**. (emphasis supplied)

40. Even in the decisions that have been brought to our notice by Dr.Singhvi, it has been held that in case of allegations of fraud and serious malpractices on the part of the parties, such a situation can only be settled in Court through furtherance of judicial evidence by either party and such a situation cannot be properly gone into by the Arbitrator. The reason for this appears to be obvious.

41. Section 28 of the Indian Contract Act, 1872 reads thus :

> "28. Agreements in restraint of legal proceedings, void. - Every agreement -
>
> (a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, or
>
> (b) which entinguishes the rights of any party thereto, or discharges any party thereto from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent. "

42. Every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract,

by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may enforce his rights, is void to that extent. Further, Section 23 of the Indian Contract Act,1872 would also throw some light on this aspect. In old English decisions *Thomson vs Charnock*, **8 T.R. 139 (England)** and other cases referred in Sanjiv Row's Contract Act and law relating to tenders etc., 9th Edition, (page 1493), it has been held that the law does not allow parties to make contracts whereby they bargain away in advance the right to resort to the Courts for the protection of their rights and the determination of their liabilities. Therefore, such agreements which take away rights of parties to approach civil Court even when the issues involved pertain to fraud would not only be hit by the aforementioned provisions but would be contrary to public policy as well.

43. In *Oil and Natural Gas Corporation Ltd. vs SAW Pipes Ltd.*, **AIR 2003 SC 2629**, the Supreme Court had an occasion to consider the ambit and scope of Section 34 of the Arbitration and Conciliation Act, 1996 and particularly Section 34(2)(b)(ii). The Supreme Court held that the expression “public policy” does not admit of a precise definition and may vary from generation to generation and from time to time. The Supreme Court relied upon its earlier ruling in the case of *Central Inland Water Transport Corporation Limited and another vs Brojo Nath Ganguli and another*, **(1986) 3 SCC 156**, and further decision in the case of *Renusagar Power Co. Ltd. vs General Electric Co.*, **1994 Supp (1) SCC 644**. The Supreme Court therefore observed that this expression is not static. In construing this expression, the Judges must look beyond the narrow fields of past precedents. Therefore, the object in inserting Section 23 and Section 28 in the

Indian Contract Act, 1872 from which assistance could be drawn, appears to be that a stipulation that no action should be brought in a Court of law for enforcing the rights under a contract would be void. Similarly, an agreement to refer arbitration, differences that may arise under a contract, does not oust the jurisdiction of the Court and is no bar to action, but may be a ground for staying action under the Arbitration Act. In England, it has been held that it would be against the policy to give effect to an agreement that a right should not be enforced through the medium of the ordinary tribunals. (See *Chelmsford L.C. In Scott vs Liverpool (Corporation),* **1958 L.J.C. 235** & *Zarnikow vs Roth,* **(1922) 2 Kings Bench 478**).

44. Applying these tests to the facts of the present case would show that the appellant-plaintiff instituted a Suit in this Court against the defendant on the basis that it is organized under the laws of Singapore. It owns and operates cable and satellite television channels including the popular SET MAX channel. The defendant is a company incorporated in Mauritius carrying on business as a sports marketing agency.

45. The Board of Control for Cricket in India (for short "BCCI") owns and controls the commercial rights to each of the Indian Premier League (for short "IPL"), matches and player auctions related to IPL. After setting out the format of the IPL it is urged that global media rights and Indian sub-continent internet and mobile rights pertaining to IPL were granted by BCCI to World Sport Group India (Pvt.) Ltd., referred to as 'WSGI" vide an Indian Premier League Media Rights License Agreement (referred to in the plaint as WSGI-MRLA" agreement dated 21st January 2008).

46. On the same date i.e. 21st January 2008, plaintiff and BCCI entered into the Indian Premier League Media Rights License Agreement which is referred to as MSMS-MRLA agreement. Under this agreement, the BCCI granted exclusive and non-exclusive media rights to the plaintiffs. Similarly, on the same date the plaintiff and WSGI entered into an Option Deed dated 21st January 2008 providing an option to the plaintiff for extending the duration of its rights under the MSMS-MRLA dated 21st January 2008 till the year 2017. After successful completion of the IPL Season-I and in February 2009 while preparation for IPL-Season-2 were in full swing, the appellant-plaintiff received numerous legal notices from IMG, a sports, Entertaining and Media company, acting for and on behalf of BCCI alleging various breaches by the plaintiff of the media rights license agreement entered into by the plaintiff and the BCCI on 21st January 2008. The plaintiff denied that breaches were committed and negotiations were held to amicably resolve the dispute arising out of these allegations. However, while the plaintiff and the BCCI were engaged in the negotiations, the BCCI by an e-mail dated 14th March 2009 purported to terminate this agreement. Thereupon proceedings were filed being Arbitration Petition No.215 of 2009. A limited injunction was granted and the matter was adjourned but the BCCI informed the Advocates for the plaintiff that on 15th March 2009 BCCI entered into an agreement dated 15th March 2009, what the defendant/respondent termed as WSGM-MRLA agreement. Clause 13.1 of this agreement has been relied upon by the plaintiff in paragraph 8 of the plaint and it is urged that without proper consent of the BCCI the WSGM-MRLA would not be able to assign, sub-contract or otherwise part with the burden of the benefit of the agreement or any part thereof but could sub-license the agreement

within 72 hours of signature, failing which the Indian sub-continent media rights would automatically revert to BCCI by operation of Clause 13.5 of the same. Alleging that under the 21st January 2008 agreement between WSGI AND BCCI, the global media rights were originally granted to WSGI by the BCCI and this agreement provides that in case of termination of the agreement between the appellant and BCCI (the agreement termed as MSMS-MRLA), BCCI and WSGI would enter into good faith negotiations for exploitation for Indian sub-continent rights. It is alleged that even when the arguments were completed on 16th March 2009 and orders were reserved by the learned Single Judge, commercial negotiations between the appellant and BCCI acting through Mr. Lalit Modi continued, parallel to the Court proceedings in view of the imminent commencement of IPL-Season-2 in April 2009. It is alleged that Directors of the respondent and WSGI were also present. The Court declined to grant interim relief in the arbitration petition because third party rights had been created in favour of the respondent-Mauritius company and the respondent was not a party to the arbitration petition. It is in such circumstances that the plaintiff re-negotiated with the respondent-Mauritius company, WSGI and BCCI for securing the rights and the e-mails that are referred to in paragraphs 11 and 12 of the plaint, according to the appellant indicate that the person having sole exclusive authority to negotiate and execute IPL related contracts on behalf of BCCI was Mr. Lalit Modi. The appellant believed that BCCI had duly licensed the global media rights to the defendant-Mauritius company with the right to grant sub-license. Although the appellant-plaintiff was desirous of securing contract only with BCCI rather than becoming a sub-licensee of the defendant-Mauritius company, they continued negotiations with the defendants to acquire Indian sub-continent media rights relying on the representations in the e-mails and

sole representative of the defendants. It is in such circumstances that the collective representation referred to in paragraph 15 had been allegedly relied upon by the plaintiff and thus they entered into two fresh agreements on 25th March 2009 which included the Deed for Provision of Facilitation Services dated 25th March 2009. Under these deeds, the plaintiff agreed to compensate the defendant-Mauritius company for its alleged services in facilitating the execution of the MSMS-MRLA agreement dated 25th March 2009 and relinquished the media rights purported to have been granted in its favour by BCCI. The deed contained a representation by defendant that the purported MRLA agreement dated 23rd March 2009 between the defendant and BCCI was mutually terminated as on 25th March 2009.

47. In paragraph 17, the plaintiff referred to the execution of the agreement dated 25th March 2009 agreeing to mutually terminate the Option Deed dated 21st January 2008 which has been entered into between the plaintiff and WSGI for extending the plaintiff's rights under the MSMS-MRLA dated 21st January 2008 till the year 2017.

48. Thus, it is alleged that the MSMS-MRLA agreement dated 25th March 2009 and the deed which were executed simultaneously are interlinked and have material cross references. Reference is made to clause 6.2. of the deed which stipulates that the deed shall be automatically terminated upon termination of MSMS-MRLA dated 25th March 2009 for any reason or for any reason the appellant ceases to be entitled to the media rights granted pursuant to this agreement. Clause 10.4 of the MSMS-MRLA dated 25th March 2009 provided that upon receipt of the respondent’s notice in accordance with the deed, the BCCI

can immediately terminate the agreement dated 25th March 2009 subject to certain conditions.

49. The plaintiff in paragraph 19 of the plaint states that it agreed to pay the BCCI the exact amount as rights fee which were supposed to be paid by the respondent under the WSGM-MRLA dated 15th March 2009. The plaintiff was made to believe that it was paying the facilitation fees under the deed to the defendant-Mauritius company for it having relinquished its media rights under the purported MRLA in favour of the plaintiff. However, as alleged in paragraph 20 of the plaint, information received from BCCI after suspension of Mr. Lalit Modi, IPL Commissioner and after having access to the letters and correspondence as well as certain other agreements which were not known to the plaintiff at the relevant time, revealed that the defendant-Mauritius company had fraudulently induced the plaintiff-Sonyinto executing the deed by suppressing the fact that the media rights forming subject matter of MSMS-MRLA agreement dated 25th March 2009 had in fact reverted to BCCI and that as on the date of deed, the defendant-Mauritius companydid not hold any rights of whatsoever nature with regard to the Indian sub-continent media rights of the IPL. A reference is made to the show cause notice issued by BCCI to Mr. Lalit Modi wherein particularly the contracts in question have been referred to and the allegations in the media of alleged unlawful consideration having been paid by the plaintiff for acquiring the relevant media rights disturbed them and that is why they issued a press statement dated 23rd April 2010. A reference has been made to the meetings of the officials of BCCI and the plaintiff in paragraphs 24 and 25 of the plaint and then further reference is made to the contentions of BCCI. It is alleged that the BCCI informed the plaintiff that during the period 15th March to 24th

March 2009, the media rights were licensed to the defendant-Mauritius company for the express purpose of licensing them to a broadcaster and BCCI had not authorised the defendant to facilitate any agreement with BCCI and/or any other party as clearly evidenced. It is in such circumstances that the allegation of fraud, suppression of facts and wrongful representations are made and their gravity, according to the plaintiff, is evidenced by the fact that till documents provided by BCCI some of the aspects were not known to them. It is in such circumstances that reference is made to the allegations leading to the filing of a Suit on 25th June 2010 in this Court by the appellant-plaintiff against the respondent-Mauritius company, WSGI and BCCI. The Suit is pending. The prayers in the Suit are set out and it is alleged that the notices were duly served on 25/26th June 2010. The Court recorded the statement that BCCI would not terminate the appellant's agreement during the pendency of the notice of motion, but subsequently the appellant-plaintiff was served with a copy of the letter addressed by the respondent-Mauritius company to the International Chamber of Commerce enclosing therewith a request for arbitration as contemplated under the Facilitation Deed. It is, therefore, alleged that upon becoming aware of the Indian proceedings and with a view to frustrate them instead of participating in them, the respondent-Mauritius company has approached the ICC Court of Arbitration with a request for arbitration containing reliefs which are directly and substantially in issue before this Court in the Indian proceedings. The allegations in paragraphs 44, 45, 46 and 47 of the plaint are about the gross abuse of judicial process, proceedings in Singapore being vexatious, oppressive and forum *non conveniense*. It is alleged clearly that if BCCI is considering institution of civil and criminal proceedings against WSGI for the fraud purported by WSGI and the respondent-Mauritius company and that would be

initiated in India. It is alleged that the Facilitation Deed was signed by the respondent-defendant in Mauritius. The fraud committed by the respondent-defendant is in Mumbai. The respondent-Mauritius company made false representations to the officials of the plaintiff's holding company within the jurisdiction of this Court and, therefore, apart from this Court, there is no other Court which could be construed as Court of natural jurisdiction. Further, there being serious allegations of fraud and which required detailed examination of witnesses, the same are not suitable for arbitration but have to be decided by Court. That is emphasized in paragraphs 50 and 51 of the plaint. It is in this light that the final reliefs are claimed.

50. Therefore, it would be necessary to reproduce the clause which is known as "Governing Law". (Clause 9 of the Deed for Provision for Facilitation Services dated 25th March 2009). The same reads as under :-

> "8 GOVERNING LAW
>
> This Deed shall be governed by and construed in accordance with the laws of England and Wales, without regard to choice of law principles. All actions or proceedings arising in connection with, touching upon or relating to this Deed, the breach thereof and/or the scope of the provisions of this Section shall be submitted to the International Chamber of Commerce (the "Chamber") for final and binding arbitration under its Rules of Arbitration, to be held in Singapore, in the English language before a single arbitrator who shall be a retired judge with at least ten years of commercial experience. The arbitrator shall be selected by mutual agreement of the Parties, or, if the Parties cannot agree, then by striking from a list of arbitrators supplied by the Chamber. If the Parties are unable to agree on the arbitrator, the Chamber shall

> choose one for them. The arbitration shall be a confidential proceeding, closed to the general public. The arbitrator shall assess the cost of the arbitration against the losing party. In addition, the prevailing party in any arbitration or legal proceeding relating to this Deed shall be entitled to all reasonable expenses (including, without limitation, reasonable attorney's fees). Notwithstanding the foregoing, the arbitrator may require that such fees be borne in such other manner as the arbitrator determines is required in order for this arbitration provision to be enforceable under applicable law. The arbitrator shall issue a written opinion stating the essential findings and conclusions upon which the arbitrator's award is based. The arbitrator shall have the power to enter temporary restraining orders and preliminary and permanent injunctions. No party shall be entitled or permitted to commence or maintain any action in a court of law with respect to any matter in dispute until such matter shall have been submitted to arbitration as herein provided and then only for the enforcement of the arbitrator's award; provided, however, that prior to the appointment of the arbitrator or for remedies beyond the jurisdiction of an arbitrator, at any time, 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, without thereby waiving its right to arbitration of the dispute or controversy under this section. THE PARTIES HEREBY WAIVE THEIR RIGHT TO JURY TRIAL WITH RESPECT TO ALL CLAIMS AND ISSUES ARISING UNDER, IN CONNECTION WITH, TOUCHING UPON OR RELATING TO THIS DEED, THE BREACH THEREOF AND/OR THE SCOPE OF THE PROVISIONS OF THIS SECTION, WHETHER SOUNDING IN CONTRACT OR TORT, AND INCLUDING ANY CLAIM FOR FRAUDULENT INDUCEMENT THEREOF."

51. A bare perusal of this clause would indicate that it speaks of, firstly, the Governing Law. Secondly, all actions or proceedings

arising in connection with, touching upon or relating to the deed, the breach thereof and/or the scope of this Section shall be submitted to the International Chamber of Commerce for final and binding arbitration. Thirdly, the arbitration would be subject to its rules and will be held in Singapore in the English language before a single arbitrator who shall be a retired Judge with at least ten years of commercial experience. Fourthly, the mode of selection of the arbitrator is set out. Importantly, the arbitration shall be a confidential proceeding, closed to the general public. The arbitrator shall issue a written opinion stating the essential findings and conclusions upon which the arbitrator's award is based. He will have powers to issue temporary restraining orders and injunctions and preliminary and permanent injunctions. Lastly, no party shall be entitled or permitted to commence or maintain any action in a Court of law <u>with respect to any matter in dispute</u> until such matter shall have to be submitted to arbitration as herein provided and then only for the enforcement of the arbitrator's award, provided, however that prior to the appointment of the arbitrator or for remedies beyond the jurisdiction of an arbitrator, at any time, 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 but without waiving their right to arbitration of the dispute. <u>The right to trial by jury has been waived by parties</u>. (emphasis supplied).

52. To our mind, such a clause fore-closes an open trial in a Court of law except to the extent permitted therein. The parties have to necessarily submit themselves to a confidential proceeding which is closed to the general public. Further, there is no assurance that the arbitrator will give detailed reasons for the findings and conclusions in

accord with fairness and justice. If the clause is understood to mean a waiver of right to public trial in respect of all claims and issues arising under, in connection with, touching upon or relating to this deed, its breach or the scope of its provision whether in contract or tort, including any claim for fraudulent inducement thereof are out of purview of an open trial in a Court of law and approach to a Court of law is only prior to the appointment of the arbitrator or for remedies beyond the jurisdiction of an arbitrator, then, it is apparent to us that the aspects and issues raised by the appellant-plaintiff before the learned Single Judge and before us would be out of the purview of the jurisdiction of competent court in India. The Deed for Provision of Facilitation services is between a company based in Mauritius and another in Singapore, although they are entering into an arrangement in connection with acquisition of media rights to cricket including with respect to IPL. In other words, they have worked together in connection with these media rights earlier and the recitals are that defendant-World Sports Group (Mauritius) Limited, its affiliates is associated with the appellant in finalising the agreement with BCCI styled as BCCI-MSM agreement and in relation to bids for media rights in connection with IPL and in return for performing the facilitation services, the appellant-plaintiff-Sony has agreed to pay to WSG a facilitation fee and provide bank guarantees for which the deed is executed. The term “BCCI” is defined in the agreement in the interpretation clause. There is a reference to BCCI-MSM agreement and that means the IPL media rights licensed agreement entered into on the same date as this deed between the BCCI and the appellant. Then, there is a definition of “BCCI termination notice”. Thereafter, facilitation fee is defined to mean a sum of 425 crores (in Indian rupees) payable in accordance with clause 3 and the WSG agreement means the IPL agreement dated 23rd March 2009

between BCCI and respondent. If clauses 2, 3, 4, 5, 6, 7 and 8 are perused together with the Governing Law, it is apparent to us that they pertain to media rights in cricket and particularly with respect to Indian Premier League. The learned Senior Counsel appearing for both sides do not dispute that all rights including media rights are controlled by BCCI. They do not dispute that Indian Premier League is a tournament organized by BCCI.

53. In a decision reported in **AIR 2005 SC 2677** (*M/s.Zee Tele Films Ltd. and another vs Union of India and others*), the Supreme Court has held that BCCI may not be "State or other authority" within the meaning of Article 12 of the Constitution of India but it is discharging public duties which are in the nature of State functions such as selecting team to represent India in international matches, to make rules governing activities for cricket players, umpires and other persons involved in game of cricket. The Supreme Court has further held that the Board enjoys monopoly in cricket. It exercises enormous power which is neither in doubt nor in dispute. The Board is not financially, functionally or administratively dominated by the Government nor it is under control in the sense that it is not all pervasive but limited. The limited control is purely regulatory. While holding that some of the functions of the Board partake nature of public duties or State actions, as far as cricket in India is concerned, this is what is held in this decision :-

> "WHAT CRICKET MEANS TO INDIA :
>
> 197. We have laid down the tests aforesaid and the approach which needs to be adopted in determining the issue as to whether the Board is a State or not. Before we embark on this enqiry, it would be necessary to keep in mind as to what cricket means to the citizens of this country.

> 198. Cricket in India is the most popular game. When India plays in international fora, it attracts the attention of millions of people. The win or loss of the game brings `joy' or `sorrow' to them. To some lovers of the fame, it is a passion, to a lot more it is an obsession, nay a craze. For a large number of viewers, it is not enthusiasm alone but involvement."

54. Therefore, we are called upon to decide the issue as to when such is the status of the Board and cricket in India in all the agreements that the Board executes or enters into or permits or authorises to do, in cases of disputes arising therefrom or thereunder, whether they be kept out of the scrutiny of Indian Courts. In other words, if the Board authorises some of the parties to deal with the media rights pertaining to cricket and such parties or entities may not be India based, then, serious allegations of fraud and mal practices made by such parties against each other, should be subject matter of action only before a forum chosen by them and no Court of law in India will be able to touch upon or reach them even if they affect and concern the BCCI. **Ultimately, the finances, funds and rights of BCCI are in issue**. If parties who claim through or derive such rights from BCCI, enter into an agreement whereunder adjudication of dispute touching the contracts will be done excluding BCCI and in an arbitral tribunal based on a foreign soil, that is something which cannot be held to be in public interest or in furtherance of public policy of India.

55. The allegations in the plaint and particularly the statement that the appellant-plaintiff was induced to execute the agreement and pay the fees on the basis that they are paying the same to BCCI, cannot

be lightly brushed aside. The respondent-Mauritius company has objected to the relief claimed by the appellant by urging that the facilitation deed is governed by and construed in accordance with the laws in England and Wales without regard to the choice of law principle. Both parties to the suit are companies incorporated outside India and the arbitration agreement/ clause is widely worded. However, at the same time the respondent is aware that what is alleged is mis-representation by a third party but it is urged that it is not made to the plaintiff-appellant but to its holding company. Further, it is alleged by the appellant-plaintiff that but for the mis-representation, appellant would have negotiated with BCCI directly. It alleges that it had negotiated only with BCCI and the respondent had no role. Throughout in the affidavit in reply filed to oppose the notice of motion and while tracing the events leading to the execution of the contracts, at more than one place, the respondent-Mauritius company makes a reference to BCCI. In paragraph 23 of their reply that is filed before the learned Single Judge on 12th July 2010, the respondent asserts that WSGI, BCCI and the respondent entered into a deed of mutually agreed termination of the earlier rights. The parties agreed to a mutual termination in consideration of new contracts negotiated and to be executed. Those were Indian sub-continent rights to the respondent-Mauritius company and for other world rights to WSGI. Accordingly, the respondent makes reference to the contract with the BCCI relating to the television rights for Indian sub-continent 2009-2017 dated 15th March 2009 under which it claimed authority from BCCI to sub-license. Yet, in paragraph 35, the respondent states that it never represented or held out that it had a contract dated 23rd March 2009 or any contract with BCCI for the Indian sub-continent rights other than the 15th March 2009 agreement. There are certain statements in paragraph 37 and in sub-clause (c) the

respondent asserts that its only representation was contained in the facilitation deed and that was about its existing rights being terminated or extinguished at the time of executing the facilitation deed. Further, when the respondent says that there is no question of representation because of what is stated in paragraph 37(b)(i) to (iv) it asserts in paragraph 37(3) that it facilitated the process of the appellant contracting directly with BCCI. It was also urged before the learned Single Judge that there was no relinquishment in the appellant-plaintiff's favour. The respondent's rights had to end before the respondent could give any rights in faovur of the appellant. In paragraph 38 the deponent of the affidavit Mr. Harish Krishnamachar (constituted attorney of the defendant) states that he has checked with all persons involved negotiations on behalf of the defendant and no one has ever made any representation that the defendant had a contract dated 23rd March 2009. Without being technical, it is clear that it is the Constituted Attorney who is deposing about some facts which are in the personal knowledge of those involved in the negotiations. Therefore, his assertion must be understood accordingly. All that has been stated in this affidavit is that once the appellant-plaintiff enters into a facilitation deed with the stipulation of arbitration knowing fully well the effect and implications thereof, then, the appellant-plaintiff cannot urge that the forum chosen is inconvenient to parties because it alleges mis-representation and fraud.

56. We are of the view that the statements made in the affidavit over-look the allegations in the plaint and essentially of fraud. The allegations are indeed serious. It is not as if we are commenting upon the correctness or otherwise of the rival version. Suffice it to state that when such allegations are made in the plaint and the record indicates

that BCCI not being a party to the arbitration, the arbitral venue being at Singapore, the governing laws being as decided by parties, all this adversely affects the interest of BCCI and the general public. When in the proceedings between parties the role of BCCI is bound to be highlighted, then, absence of BCCI is a vital factor. As observed by Sabyasachi Mukherji, J. for the Calcutta High Court in *General Enterprises and others vs Jardine Handerson Ltd.*, **AIR 1978 CAL. 407**, (para 15) "..... as the saying goes that to stage Hamlet without the Prince of Denmark would be improper....."

57. By brushing aside such a vital party and taking the matter out of the purview of the Indian Courts would have serious consequences. The funds involved are in relation to the rights of BCCI because it is the BCCI which organizes the tournament. If the answers to the issues raised in the affidavits are to be given that should only be at an open trial where the public has an access. Ultimately, how television rights are dealt with by BCCI and who are the beneficiaries of the deals of BCCI and whether the officers of BCCI had any involvement therein are matters which must be known to the cricketing public. They will be known only if there is no confidentiality in the trial. Such important matters involving serious allegations of fraud and wrongful inducement cannot be said to be confidential. More so, when the position of BCCI is appreciated. The trial Court should have, therefore, adverted to these contentions raised by parties and should not have rested its conclusions only by perusing the arbitration clause. We are of the opinion that the learned Judge has proceeded on an erroneous basis, to hold that the jurisdiction of the arbitrator is sought to be excluded only upon alleging fraud. The trial Court considered the matter only as a dispute under the

facilitation deed and that the claim of the appellant is that it is not bound and liable to make payment under the contract or the further payments because the agreement was vitiated by fraud.

58. With greatest respect to the learned Single Judge, the conclusion that these are defences of the appellant-plaintiff and they can be gone into by the arbitral tribunal considering the wording of the arbitration agreement, is incorrect. The learned Judge was in error in concluding that the cause of action of the plaintiff-appellant in the suit is their defence in the arbitration. All these conclusions are based upon a narrow view of the matter, the transactions and the dealings. The learned Judge over-looked a significant aspect arising out of the role of BCCI. It is BCCI which is distributing and handing over the rights and it is through BCCI that the appellant-plaintiff and the respondent-defendant derived them. Therefore, to take a view that the case of fraud can be gone into by the arbitrator, with respect, would not be valid and proper. The same is also vitiated because the learned Judge proceeded on the basis that by virtue of Section 5 of Arbitration and Conciliation Act, 1996, the Court cannot intervene and interfere with the arbitration agreement. Even that conclusion runs counter to the decisions which are relied on by the respondent-defendant. These decisions clearly indicate that when vital issues of fraud and public policy are raised and when interests of third parties are involved and affected, then, the choice is not left to parties. It is for the Court to determine as to whether it will allow the matters to be gone into by a domestic tribunal in confidentiality or whether they are fit to be decided by a Court of law in an open trial. Once we reach the conclusion that when the issues arising out of fraud as raised in the present proceedings have a bearing on the position of BCCI in the game of cricket, the involvement of the general public in

the game and the television rights which are conferred for viewing the games by them, so also presence of BCCI being necessary, then, the matter is fit for an open public trial by a Court of law. That cannot be left to be decided by a tribunal chosen by parties. The repercussions of allowing such matters to be decided by a domestic tribunal chosen by parties would be serious and in the longer run affect the judicial process itself. If such a course is permitted, that might run counter to the object and purpose of inserting Sections 23 and 28 in the Indian Contract Act, 1872. In other words, the impact of all this on Indian laws would be tremendous. We would be failing in our duty if we do not notice the same and take appropriate corrective steps.

59. Additionally, in this case, one suit instituted by the appellant, to which BCCI is party, is pending in this Court since 25th June 2010. The respondent would term it a collusive action but once some proceeding relating to the same contract is pending in a Court of law, then, all the more the matter must be dealt with by that Court of law. Ultimately, all contracts refer to BCCI. Whether prior or subsequent, all of them arise out of the same right, namely, television and media rights of IPL. They are inter-connected and inter-related, prima facie. Therefore, to see the clause relating to Governing Law in isolation would be improper and erroneous. In any event, the clause is entitled as “Governing Law”. It deals with applicability of laws in relation to the subject contract. The forum for redressal of disputes is but one facet of the same. Therefore and when there is inter-connection and close proximity in the obligations of parties under the subject deed with their earlier dealings, then, to allow a domestic tribunal to deal with disputes only under the facilitation deed would mean segregating and separating the claims. It would amount to allowing splitting up of

matters and disputes pending in India and abroad. Thus, there is a possibility of conflicting verdicts and that would have an impact on applicability of Indian laws, which may ultimately be held to be applicable, at least in proceedings pending in India. It is in this sense that we feel that the implications of all this on Indian judicial process is an aspect which cannot be kept aside. In **AIR 1991 SC 2234** (*Byram Pestonji Gariwala vs Union Bank of India and others*), the Supreme Court held that Indian legal system is the product of history. It is rooted in our soil; nurtured and nourished by our culture; languages and traditions; fostered and sharpened by our genius and quest for social justice; it is not a mere copy of English Common law; though inspired and guided by it. Therefore, with respect, we cannot sustain the restricted view of the learned Single Judge.

60. The question is whether in the facts of the present case, it was incumbent upon the Court hearing Suit (Lodging) No. 1901 of 2010 to refer all the parties to the said suit (including BCCI) to arbitration. As already discussed elaborately earlier, since the dispute between the appellant and the respondent herein is exclusively linked with the dispute between BCCI on the one hand and Mr. Lalit Modi and respondent-Mauritius company on the other hand and the larger dispute is pending decision in Suit (Lodging) No.1901 of 2010, the dispute between the appellant-Sony and the respondent-Mauritius company cannot be referred to arbitration.

61. The decision of the Apex Court in *CDC Financial Services (Mauritius) Ltd. V. BPL Communications Ltd. and another,* **(2003) 12**

SCC 140 was rendered in view of the concession made on behalf of the respondents therein that the orders passed by the High Court interfering with the arbitration were in violation of mandate contained in section 5 has already been discussed hereinabove. The said case did not deal with the fact situation where the rights of the third party/authority were involved.

62. In view of the above discussion, we are inclined to grant an injunction to restrain the respondent-Mauritius company from proceeding with the arbitral proceedings initiated by the respondent before the International Chamber of Commerce on 28th June, 2010 after the plaintiff filed Suit (Lodging) No.1901 of 2010 against World Sport Group (India), the respondent- Mauritius company and BCCI. Even so, having regard to the fact that injunction is an equitable remedy and that the legislative scheme of minimal judicial intervention is in order to ensure that the party not agreeable to go for arbitration does not succeed in avoiding or delaying discharge of its liability by taking recourse to judicial proceedings for restraining arbitral proceedings, we consider it appropriate to impose a condition that the appellant-plaintiff MSM Satellite (Singapore) Private Limited shall, without prejudice to the rights and contentions of the parties, deposit a sum of Rs.300 crores before the Registrar (O.S.)/ Prothonotary & Senior Master of this court in Suit (Lodging) No.1901 of 2010 within six weeks from today. The deposit shall abide by the outcome of the said suit and the amount shall not be permitted to be withdrawn by any one without prior permission of the court taking up Suit (Lodging) No.1901 of 2010.

63. In the result, the appeal is allowed. The order dated 9th August 2010 of the learned Single Judge is set aside. Notice of Motion No. 1809 of 2010 in Suit No.1828 of 2010 is allowed. During pendency of Suit No.1828 of 2010 and Suit No.1869 of 2010 (Suit (Lodging) No. 1901 of 2010), respondent-defendant World Sport Group (Mauritius) Limited is restrained from continuing with the arbitral proceedings on the basis of the facilitation deed dated 25th March, 2009 between the appellant-plaintiff MSM Satellite (Singapore) Private Limited and respondent-defendant World Sport Group (Mauritius) Limited, subject to the condition that the appellant-plaintiff deposits a sum of Rs.300 crores before the Registrar (O.S.)/ Prothonotary & Senior Master of this court in Suit No.1869 of 2010 (Suit (Lodging) No.1901 of 2010) within six weeks from today. To enable the plaintiff to comply with the said condition, for a period of six weeks from today, the respondent-defendant World Sports Group (Mauritius) Limited is restrained from continuing with the above arbitral proceedings.

64. Upon deposit, the amount shall be invested with a Nationalised Bank for a period of one year, under the cumulative interest scheme, with instructions to the Bank to continue to renew the deposit until further orders of this Court in Suit No.1869 of 2010 (Suit (Lodging) No.1901 of 2010).

63. If the condition of depositing the amount is not complied with within the above time limit, the injunction shall stand vacated upon expiry of the said time limit.

64. Since the appeal is disposed of, notice of motion filed in the appeal does not survive and stands disposed of.

CHIEF JUSTICE

S.C. DHARMADHIKARI, J.