Bombay High Court
Avitel Post Studioz Ltd & Ors vs Hsbc Pi Holdings (Mauritius) Ltd on 31 July, 2014

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.196 OF 2014
IN
ARBITRATION PETITION NO.1062 OF 2012

Avitel Post Studioz Ltd & ors. .. Appellants
vs.
HSBC PI Holdings (Mauritius) Ltd. .. Respondent.

Mr. Saurabh Kirpal with Mr. Z.B.Kamdin i/b. Pandya & Co. for the Appellants.
Dr. Virendra Tulzapurkar, Senior Advocate with Mr.N.H. Seervai, Senior Advocate, Mr. Nikhil Sakhardanade, Mr. Rohan Rajadhyaksha, Mr. A. Iyer, Mr. Agarwalla and Ms Priyanka Shetty

i/b AZB & Partner for Respondent.

CORAM: MOHIT S. SHAH, C.J. &
M.S.SONAK, J.

JUDGMENT RESERVED ON : 19 June 2014

JUDGMENT PRONOUNCED ON : 31 July 2014

JUDGMENT (PER M.S.SONAK, J.):

1] This appeal is directed against the judgment and order dated 22 January 2014 in Arbitration Petition No.1062 of 2012 instituted under Section 9 of the Arbitration and Conciliation Act, 1996 (the Act) restraining the appellants from withdrawing the amounts retained by the Corporation Bank in the appellants' account to the extent of USD 60 Million and in the event the balance in the said account with the Corporation Bank is less than USD 60 Million, a direction to the appellants to deposit the short 1 of 40 2 j-196.14 fall in the said account, so as to maintain the balance of USD 60 Millions. The admitted position is that on the date when the impugned judgment and order came to be passed, the amount in the appellants Corporation Bank account was in the range of Rs.60 Crores or USD 10 Million, which in terms of the impugned judgment and order, the appellants have been restrained to withdraw. Further, the impugned judgment and order issues an interim mandatory injunction to deposit the short fall, i.e., about USD 50 Million in the Corporation Bank within a period of four weeks from the date of the order.

2] The factual matrix in which the aforesaid judgment and order came to be made has been set out in great details in the impugned judgment and order itself. However, a brief reference to some pertinent facts and circumstances is necessary for the purposes of appreciating the challenges raised in the present appeal.

3] Appellant No.1 is a company incorporated under the provisions of the Companies Act, 1956 having its registered office at Mumbai (hereinafter referred to as "Avitel India"). Appellant No.1 is stated to be engaged in the business of production of animated works, media past production and film restoration services. Appellant No.1 is a parent company in the Avitel Group, inasmuch as it owns 100% share in Avitel Holdings Limited (hereinafter referred to as "Avitel Mauritius"), which in turns owns 100% share in Avitel Post Studioz FZ LLC (hereinafter referred to 2 of 40 3 j-196.14 as "Avitel Dubai"). Avitel Dubai was the entity represented by the Avitel India and respondent Nos.2 to 4 (hereinafter referred to as "Jains").

4] Respondent No.1 is a company incorporated under the laws of Mauritius and has its registered office at Mauritius (hereinafter referred to as "HSBC"). Respondent No.1 is an investment holding company for the Principal Investments Asia Division of HSBC.

5] It is the case of HSBC that the appellants had represented to the HSBC that the Avitel Group was at a very advanced stage of finalizing a contract with British Broadcasting Corporation (BBC) and had signed a MOU for the said purpose to convert the BBC's film library from 2D to 3D and that such contract was expected to generate a revenue of USD 300 Million in the first phase, which revenue was expected to ultimately increase upto USD 1 Billion. On basis of such representations, which the appellants knew as being false, the appellants induced the HSBC to invest an amount of USD 60 Millions for purchase of equipments to specifically enable Avitel Dubai to service the BBC contract. The appellants also represented to the HSBC that the Avitel Group had the benefit of number of material contracts, mainly with three customers, which contracts were valued in the range of USD 658 Million. Again this representation was false to knowledge of the appellants and was made solely for the purposes of inducing the HSBC to make the aforesaid investment in the 3 of

40 4 j-196.14 Avitel Group.

6] On 21 April 2011, the appellants and the HSBC entered into a share subscription agreement, in terms whereof the HSBC subscribed 7.8% of equity capital in Avitel India. This was followed by a share holders agreement dated 11 May 2011.

7] Upon the HSBC acquiring knowledge that the BBC had not entered into any contract with Avitel Group and all the representations held out by the appellants in that regard as also in regard to material contracts with three customers being false and made for sole purposes of inducing the HSBC to make an investment of USD 60 Millions, the HSBC on 11 May 2012 invoked the arbitration agreements under the Share Subscription Agreement (SSA) and Share Holders Agreement (SHA) and sought for emergency relief under the provisions of Singapore International Arbitration Council Rules 2010 (SIAC).

8] The Arbitral Tribunal at Singapore passed two unanimous final partial awards dismissing the jurisdictional challenges raised by the appellants on 17 December 2012 and15th March 2013. The jurisdictional awards, inter alia, hold as under:-

> (a) that the Singapore law and not the Indian law was the governing law of the arbitration agreement;
>
> (b) that under the Singapore law, allegations of fraud and/or complicated issues of fact and law are 4 of 40 5 j-196.14 arbitrable;
>
> (c) that the Arbitral Tribunal has jurisdiction to adjudicate the disputes between parties under the SSA and SHA.

9] The Arbitral Tribunal at Singapore has also granted some interim measures in favour of the HSBC and against the appellants on 28 and 29 May 2012. In regard to the SHA, the Arbitral Tribunal has passed unanimous final award on 3 November 2013. In regard to the SSA, final hearing before the Arbitral Tribunal at Singapore has concluded on 6 November 2013 and final award is awaited.

10] In the meantime, the HSBC instituted proceedings under Section 9 of the Act seeking inter alia for the disclosures & freezing of the appellants' bank accounts and further to direct the appellants to deposit amounts to the extent of claims raised by the HSBC, approximately to the extent of USD 60 Million in regard to SSA and SHA, in which the impugned judgment and order dated 22 January 2014 came to be passed.

11] We have heard Mr.Saurabh Kirpal, learned counsel for the appellants and Dr. Virendra Tulzapurkar, learned senior counsel for the respondent at great length. With consent of learned counsel for the parties, we propose to dispose of the appeal finally.

12] Mr. Kirpal, learned counsel for the appellants has

broadly made the following submissions in support of the appeal:

> (a) That the HSBC is merely a disgruntled share holder, but not a creditor in respect of appellant No.1. The investment of USD 60 Million made by the HSBC ceased to have character of 'investment' and was effectively transferred into capital of the appellant No.1 consequent upon issue and allotment of shares to the HSBC. Such capital was in fact utilized by appellant No.1 for purchase of equipments. Since the case of HSBC is that, post investment, there has been misuse or siphoning of the capital of appellant No.1 company, the HSBC can at highest initiate proceedings under sections 397 and 398 of the Companies Act, 1956 for mismanagement. Further, as a share holder, the HSBC can claim no rights in the assets of the company, which is precisely what the HSBC seeks to achieve by initiating arbitration proceedings and application for the interim relief under section 9 of the Act. This according to Mr. Kirpal is clearly impermissible, both in principle and upon authority of the Supreme Court in Hindustan Lever Employees v. Hindustan Lever Ltd. (1995) Suppl (1) SCC 499 ;

(b) The law governing arbitration agreement in the present case, is the Indian law. This is clear upon reference to clauses 15 and 16 of the SSA and 6 of 40 7 j-196.14 corresponding clauses of SHA. In such circumstances, the arbitration proceedings in Singapore are clearly without jurisdiction. By instituting proceedings under section 9 of the Act, the HSBC virtually seeks indirectly to enforce the interim awards passed by the Arbitral Tribunal at Singapore. Since the arbitration proceedings at Singapore are without jurisdiction, the Indian Courts ought not to entertain the application for interim relief under section 9 of the Act;

(c) In any case and without prejudice, it was submitted that the proceedings under section 9 of the Act virtually seek enforcement of emergency award dated 29 May 2012 by which the appellants' bank accounts were sought to be frozen and directions issued to secure the claim of the HSBC. Relying upon the decision of the Delhi High Court in HFCL v. UOI (OMP No.464 of 2009) decided on 18 August 2009, it was submitted that a petition under section 9 of the Act for enforcement of an award is clearly not maintainable;

(d) Assuming that arbitral proceedings were competent in Singapore, for a foreign award to be enforced or executed in India, it is necessary that the conditions of enforceability set out in section 48 of the Act are complied with. In terms of section 48(2) (a) of 7 of 40 8 j-196.14 the Act, no award can be enforced if, the subject matter itself is not capable of settlement by arbitration under law of India. In the present case, the HSBC has made serious allegations of fraud and criminality and it is well settled that the issues of such nature are not capable of settlement by arbitration. It is submitted that if ultimately the awards that may be made in Singapore are incapable of being enforced in India, then surely there is no case made out for even considering grant of interim reliefs by resort to section 9 of the Act, particularly as such interim reliefs are meant to be only in aid of final relief. If no final relief can be enforced in India, then there is obviously no question of the Indian Courts entertaining in plea for grant of interim relief by resort to section 9 of the Act;

(e) Even otherwise, on merits the impugned judgment and order is vulnerable, broadly on the following grounds:

> (i) In matters where serious allegations of fraud have been made, it is imperative that there must be some material and evidence to make good such allegation and mere pleadings are not sufficient. Further, such allegations, even in a civil dispute, must be established beyond reasonable doubt and not merely on basis of preponderance of 8 of 40 9 j-196.14 probability;

(ii) On the basis of the allegations of fraud made in the HSBC claim, the HSBC lodged a first information report with the Economic Offences Wings, Mumbai (EOW). The EOW, upon detailed investigation has submitted a report under section 173 of Code of Criminal Procedure (Cr.P.C.) recording a conclusion that no case of fraud has been made out against the appellants. Learned Single Judge, ought to have considered this report and on the said basis ruled that no prima-facie case has been made out by the HSBC for grant of any interim measures;

(iii) In the present case, particularly since no special circumstances have been pleaded or established, measure of damages cannot be the amount of loss ultimately stated to be sustained by the HSBC. The measure of damages, can at the highest be the difference between the price which the HSBC paid for shares and the price which HSBC would have received, had it sold the shares in the market forthwith, after the purpose. This principle, which has been laid down by the Supreme 9 of 40 10 j-196.14 Court in M/s. Trojan and C. v. RM.N.N.

Nagappa Chettiar - AIR 1953 Supreme Court 235, has been entirely ignored whilst passing the impugned judgment and order directing the appellants to deposit USD 60 Million, which represents the entire share price paid by the HSBC, allegedly on the basis of fraudulent representation by the appellants;

(iv) In matters of grant of interim mandatory injunction, the applicant has to satisfy the Court that its case is of higher standard than a prima facie case which is normally sufficient for grant of prohibitory injunction. This much has been laid down by the Supreme Court in Dorab Cawasji Warden vs. Coomi Sorab Warden & ors - (1990) 2 SCC 117. Inasmuch as, this principle has been

overlooked, the impugned judgment and order calls for interference;

(v) The impugned order virtually grants final relief to HSBC, at the interim stage. This is clearly impermissible.

13] Dr. Tulzapurkar, learned senior counsel for the HSBC, at the outset, submitted that :

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(a) The HSBC claim was not in its capacity as a share holder. The HSBC claim, was basically in the capacity of an entity which was induced to enter into a contract of investment, without free consent. The consent was not free because it was caused by the fraud and misrepresentation as defined under sections 17 and 18 of the Indian Contract Act, 1872 or principles analogous thereto. In such circumstances, it was submitted that there was no question of resort to the provisions of sections 397 and 398 of the Companies Act, 1956;

(b) The law governing arbitration agreement in the present case is the Singapore law and not the Indian law. The Arbitral Tribunal at Singapore, has already passed two unanimous final partial awards dated 17 December 2012 and 15 March 2013 holding so. Despite opportunity, the appellants have not chosen to challenge the same and consequentially this issue of jurisdiction has attained finality as between the HSBC and the appellants. Accordingly, it was submitted that by applying principle of 'issue estoppel' the appellants are not entitled to even raise the issue of jurisdiction in the proceedings under section 9 of the Act. The provisions of section 9 of the Act clearly entitle a party to an arbitration agreement to seek interim measures before or during arbitral proceedings and therefore, 11 of 40 12 j-196.14 there is no jurisdictional infirmity whatsoever in learned Single Judge entertaining the application under section 9 of the Act;

(c) Relying upon several judgments of the Supreme Court, including, in particular, the recent decision in Swiss Timing Limited vs. Organising Committee, Commonwealth Games (Arbitration Petition No.34 of 2013) decided on 28 May 2014, it was submitted that even under the Indian law, there is no bar to the issue of fraud being arbitrable. The previous decisions of the Supreme Court in N. Radhakrishnan vs. Maestro Engineers and others- (2010) 1 SCC 72 and others, which suggest a different view, are clearly distinguishable and in any case have been held to be per incuriam by the Supreme Court itself in Swiss Timing Ltd (supra). As such, Dr. Tulzapurkar submitted that there shall be no ground to resist the enforcement of the awards that may be made by the Arbitral Tribunal at Singapore, as and when occasion would arise for such enforcement;

(d) There is no requirement to establish allegations of fraud beyond reasonable doubt in civil proceedings. The test to be applied is and continues to be that of preponderance of probability. Applying such test, 12 of 40 13 j-196.14 learned Single Judge has rightly come to the conclusion that fraud was indeed practised by the appellants upon the HSBC, which fraud vitiated the consent for the contract of investment;

(e) In the context of Economic Offences Wing report under section 173 of the Code of Criminal Procedure (Cr.P.C.), it was submitted that the same was rightly not relied upon or considered by the learned Single Judge, since in terms of the provisions contained in section 190 of Cr.P.C., as also several authorities, upon which reliance was placed, there arises no question of taking cognizance of such report in civil proceedings. The Magistrate to whom such report is made is empowered to take cognizance of the offence irrespective of the view expressed in the report or to direct the police to carry out further investigation in the matter;

(f) Relying upon the authority of the Supreme Court in Wander Ltd. & anr. vs. Antoz India P. Ltd. - 1990 (supp) SCC 727, it was submitted that as an appellate court, we should desist reassessment of the material on record and seek to reach a conclusion different from the one reached by the learned Single Judge, particularly since the learned Single Judge has reasonably and in a judicious manner considered the material on record and exercised discretion by way of 13 of 40 14 j-196.14 grant of interim measures.

14] The rival contentions now fall for our evaluation.

15] We are unable to accept Mr. Kirpal's contention that the HSBC, being merely a disgruntled share holder could only have resorted to the provisions relating to operation and mismanagement of minority share holders in terms of sections 397 and 398 of the Companies Act, 1956. In the present case, the HSBC is primarily concerned with misrepresentation and fraud, by reason of which the HSBC was induced to enter into a contract of investment with the appellants and part with an amount of approximately USD 60 Millions in pursuance thereof. No doubt, there is reference to siphoning of capital, but that is mainly in support of the allegation of fraud and misrepresentation. This is not a case where the HSBC accepts that the contract by which it was induced to make the investment and purchase shares was legal and valid and its grouse concerns only the subsequent acts of mismanagement or otherwise by major shareholders of appellant No.1. The HSBC questions the very contract, in terms whereof the HSBC has made an investment of USD 60 Millions, as being vitiated on account of there being no free consent due to fraud and misrepresentation. The decision in Hindustan Level Employees Union (supra), does not even remotely deal with a situation of present kind. Accordingly, reliance placed thereupon is clearly misplaced.

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16] On the issue of the law governing arbitration

agreement being the Indian law, Mr. Kirpal invited our attention to clause 15 of the SSA, which reads thus:

> "15. Governing Law: This Agreement shall be governed by and construed in accordance with the laws of the Republic of India without regard to applicable conflict of laws principles".

The counsel submitted that the law of arbitration agreement, unless specified to the contrary will follow the governing law of contract. There is absolutely no indication in both SSA and SHA that the law of arbitration agreement in the present case, ought to be any law other than the governing law, i.e., Indian law. In this regard, counsel placed reliance upon the decisions of the Supreme Court in National Thermal Power Corporation (NTPC) vs. Singer Company & ors - (1992) 3 SCC 551 and Sumitomo Heavy Industries Ltd. vs. ONGC Ltd.& ors (1998) 1 SCC 305.

17] On the other hand, Dr. Tulzapurkar invited our attention to clause 16 of the SSA, which reads thus:-

> "Clause 16
>
> 16. DISPUTE RESOLUTION 16.1 Arbitration 16.1.1 Any dispute, controversy or claim arising out of or in connection with this Agreement, including any question regarding its 15 of 40 16 j-196.14 existence, validity, interpretation, breach or termination shall be referred to and finally resolved by binding arbitration at the Singapore International Arbitration Centre ("SIAC") in accordance with the Singapore International Arbitration Rules in force at the date of this Agreement ("Rules"), which Rules are deemed to be incorporated by reference into this clause and as may be amended by the rest of this clause.
>
> 16.1.2 The seat of arbitration shall be Singapore ...
>
> 16.1.6ig The parties waive any right to apply to any court of law and/or other judicial
>
> authority to determine any preliminary point of law and/or review any question of law and/or the merits, in so far as such waiver may be validly made. The parties shall not be deemed, however, to have waived any right to challenge any award on the ground that the tribunal lacked substantive jurisdiction and/or the ground of serious irregularity affecting the tribunal, the proceedings or the award to the extent allowed by the law of the seat of the arbitration.

16.1.7 Nothing, in this Clause 16.1 shall be construed as preventing any party from seeking conservatory or interim relief in any court of competent jurisdiction ...

16.4 Application of Arbitration Act Save for section 9, Part I of the Indian Arbitration and Conciliation Act, 1996 ("the Arbitration Act"), the provisions of Part I of the Arbitration Act shall not apply to the terms of this Agreement."

16 of 40 17 j-196.14 18] In particular, Dr.Tulzapurkar emphasized that the parties had in terms agreed that any dispute controversy or claim arising out of or in connection with the agreements, including any question regarding its existence, validity, interpretation, breach or termination shall be referred to and finally resolved by binding arbitration at the SIAC in accordance with the SIAC Rules and that the seat of arbitration shall be at Singapore.

19] Dr. Tulzapurkar, with reference to Clause 16.4, submitted that the parties had clearly agreed that save for section 9 of the Act, Part-I of the Act shall not apply to the terms of this agreement. Thus according to Dr. Tulzapurkar, the parties to the arbitration agreement had clearly specified that the law of arbitration agreement will be the Singapore law, notwithstanding the position that the governing law for the purposes of the agreement is the law of Republic of India.

20] In any case, Dr.Tulzapurkar submitted that the appellants ought to be estopped from even raising such an issue, in the light of jurisdictional awards dated 17 December 2012 and 15 March 2013, which hold in clear terms that the Singapore law and not the Indian law was the governing law for the arbitration agreement and the said jurisdictional awards have attained finality, for want of challenge by the appellants. Dr. Tulzapurkar, invoked the principle of 'issue estoppel' and relied upon the decisions in Indo-Pharma Pharmaceutical Works Private Limited vs. Pharamceutical Company of India - 1977 (80) BLR 73, Ishwar Dutt 17 of 40 18 j-196.14 vs. Land Acquisition Collector and anr. - (2005) 7 SCC 190, M.Nagabhushana vs. State of Karanataka & ors. - (2011) 3 SCC 408 and Bhanu Kumar Jain vs. Archana Kumar & anr. - (2005) 1 SCC 787, which lay down that a judgment after a proper trial by the Court of competent jurisdiction should be regarded as final and conclusive determination of the questions litigated and should forever set the controversy at rest. This means that when a proceeding based on a particular cause of action has attained finality, the principle of res judicata which is a specie of the principle of estoppel should be fully applied.

21] The principle of issue estoppel has been explained in Wade & Forsyth on Administrative Law, 9th Edition at page 243 and quoted by the Supreme Court in Ishwar Dutt (supra), as follows;

> "One special variety of estoppel is res judicata. This results from the rule which prevents the parties to a judicial determination from litigating the same question over again, even though the determination is demonstrably wrong. Except in proceedings by way of appeal, the parties bound by the judgment are estopped from questioning it. As between one another, they may neither pursue the same cause of action again, nor may they again litigate any issue which was an essential element in the decision. These two aspects are sometimes distinguished as 'cause of action estoppel' and 'issue estoppel'.

22] In our opinion, there is no necessity to decide the submission premised upon the principle of issue estoppel in the present proceedings. This is because we are satisfied that in the 18 of 40 19 j-196.14 present case the law governing arbitration would be the law of Singapore. Clause 15 of the SSA, provides that agreement shall be governed by and construed in accordance with the law of Republic of India without regard to applicable conflict of laws principles. Clause 16 of SSA, provides that the seat of arbitration shall be at Singapore and the arbitration shall be in accordance with SIAC Rules. Further, Clause 16.4 of the SSA makes it clear that save and except section 9 of the Act, Part-I thereof is not to apply to the terms of the arbitration agreement. The Supreme Court in National Thermal Power Corporation (supra) and Sumitomo Heavy Industries Ltd. (supra) has held that normally the law of arbitration agreement is the same as the substantive law of contract, unless a different intention is either expressed or implied. In light of categorical provisions contained in SSA and SHA, it is clear that the parties have expressly or in any case by implication agreed that the law of arbitration shall be the SIAC Rules, i.e., laws of Singapore.

23] In Bharat Aluminium Co. Ltd. vs. Kaiser Aluminium Technical Services Inc. - 2012 (9) SCC 552, the Supreme Court has held that the seat of arbitration would determine the governing law of arbitration agreement. In paragraph 197 of the said decision however, the Supreme Court has held that same will apply with prospective effect. A Division Bench of this Court in Konkola Coppper Mines (PLC) vs. Stewarts and Lloyds of India Limited 2013 (5) Bom CR 29 upon consideration of the decision in Bharat Aluminium Co. Ltd. (supra) has held that the Supreme 19 of 40 20 j-196.14 Court has merely declared the law as it always stood. In the present case, there is no dispute that the seat of arbitration is at Singapore.

24] In any case, if the entire decision of the Supreme Court in Bharat Aluminium (supra) is to be regarded as having only a prospective effect, even then the principles in cases of National Thermal Power Corporation (supra) and Sumitomo Heavy Industries Ltd. (supra), would apply. In fact, this is the case set up by the appellants themselves. Therefore, even by applying the principles in the said cases to the facts and circumstances of the present case, we cannot fault the decision of the learned Single Judge that the parties either expressly, or in any case by implication intended to exclude the applicability of Part-I of the Act, save and except section 9 of the Act thereof. This is clear from reference to Clause 16 of, as well as analogous clauses in, the SHA.

25] For all the aforesaid reasons, we see no merit in the submission of Mr. Kirpal that the law governing arbitration in the present case, is the Indian law.

26] This takes us to the next contention of Mr. Kirpal that the proceedings under section 9 of the Act, virtually seek enforcement of the emergency award dated 29 May 2012, by which interim measures, similar to those now granted by the learned Single Judge by the impugned judgment and order, came 20 of 40 21 j-196.14 to be granted in favour of HSBC. Mr. Kirpal, relying upon the decision of the Delhi High Court in Himachal Futuristic Communication Ltd. (HFCL) vs. Union of India (OMP No.464 of 2009) decided on 18 August 2009 submitted that a petition under section 9 for enforcement of an award is clearly not maintainable.

27] In HFCL (supra), learned Single Judge of Delhi High Court was basically faced with a situation where interim measures akin to those contemplated under Order 38 Rule 5 of CPC were applied after making of arbitral award, but before its enforcement. In this context, the learned Single Judge of the Delhi High Court observed that the applicant for interim measures, had neither pleaded nor established any of the ingredients necessary for invoking the provisions of Order 38 Rule 5 of the CPC as against the Union of India. In that context, it was observed that powers under section 9 of the Act are not the same as in execution proceedings, where different parameters would apply. That apart, the learned Single Judge of the Delhi High Court was not concerned with a clause akin to clause 16.4 of SSA, in the present case which specifies that the save for section 9, Part-I of the Act shall not apply to the terms of the agreement. The parties in the present case have specifically retained unto themselves the right to invoke section 9 of the Act in matters of seeking interim measures in Indian Courts. Section 9 of the Act provides that interim measures can be applied for before or during arbitral proceedings or at any time after making of the arbitral award.

28] It is to be noted that even without there having been

any emergency or interim awards from the Arbitral Tribunal at Singapore, in light of the provisions contained in clause 16.4 SSA, the HSBC could have invoked the provisions of section 9 of the Act. Merely because, in the present case such emergency or interim awards have been made by the Arbitral Tribunal at Singapore, that would make no difference, particularly when it comes to determination of the jurisdiction of the Indian Courts to grant interim measures by resort to section 9 of the Act. Ultimately, it has to be borne-in-mind that we are dealing with an international commercial arbitration, where perhaps the emergency or interim awards may be enforceable in other parts of the globe, without any further ado, on account of inapplicability of restrictions akin to those contained in sections 46 to 49 of the Act. The decisions in HFCL (supra) is clearly distinguishable, particularly as no such issues at all arose in the said case.

29] Mr. Kirpal, then laboured extensively upon his submission that in terms of section 48(2)(a) of the Act, any award that may be passed by the Arbitral Tribunal at Singapore would be incapable of being enforced in India, as according to him the subject matter of the present dispute was not at all capable of settlement by arbitration under the law of India. In this regard, Mr. Kirpal submitted that the HSBC has leveled serious allegations of fraud and even impersonation. Based upon the very same allegations, the HSBC even went to the extent of lodging a First Information Report (FIR)

against the appellants invoking the 22 of 40 23 j-196.14 provisions of sections 419, 420, 467, 468 and 120-B of Indian Penal Code (IPC). These provisions deal with offences of cheating by impersonation, forgery for the purposes of cheating, and criminal conspiracy. Mr. Kirpal submitted that it is well settled that issues of serious allegations of fraud and criminality are incapable of settlement by arbitration under the law of India. Therefore, in terms of section 48(2)(a), if any final award made by the Arbitral Tribunal at Singapore is incapable of being enforced in India, then surely, there arises no question of granting any interim measures by the Indian Courts, particularly as interim measures are meant to be only in aid of final relief. Mr. Kirpal placed reliance on the decision of the Supreme Court in Afcon Infrastructure Ltd. v. Cherian Varkey Constructions Pvt. Ltd. (2010) 8 SCC 24, Booz Allen and Hamilton v. SBI Home Finance (2011) 5 SCC 532, N.

Radhakrishnan (supra)and Goldstar metal Solutions v. Dattaro G.

Kavtankar in Arb. Appeal No.12 of 2013 dt. 13 March 2013, which according to him lay down that under the arbitration laws of India, serious allegations of fraud or criminality are incapable of settlement by arbitration.

30] Having considered the aforesaid submissions and having perused the decisions as aforesaid, we are of the opinion, that said judgments do not lay down any general or peremptory rule that allegations of fraud, in all cases, are incapable of settlement by arbitration under the law of India. There is a real though subtle difference between 'suitability' and 'arbitrability' in the context of subject matter of disputes. In order to be conscious 23 of 40 24 j-196.14 of this difference, regard shall have to be had to the nature of allegations, the context in which the same are made and the ultimate relief which is being applied for on basis of such allegations. If the subject matter of dispute has an eminently civil profile, then it may not be proper to conclude that the subject matter of dispute is incapable of settlement by arbitration, merely because fraud or misrepresentation as defined under Section 17 and 18 of the Indian Contract Act, 1872 may have been alleged as one of the grounds for questioning the contract.

31] In the context of provisions of Contract Act 1872, fraud and misrepresentation are some of the well accepted grounds for questioning validity of a contract by the entity, upon whom the same are alleged to have been practised. Section 10 of the Contract Act, 1872 provides that all agreements are contracts, if they are made by free consent of the parties, competent to contract, for lawful consideration, with lawful object which is not expressly declared to be void. Therefore, 'free consent' is one of the essential ingredients for a valid contract under the Contract Act. Section 13 of the Contract Act provides that two or more persons are said to consent, when they agree upon the same thing in the same sense. Section 14 of the Contract Act provides that a consent is said to be 'free' when it is not caused, inter alia by 'fraud' as defined under section 17 or 'misrepresentation' as defined under section 18 of the Contract Act. Sections 17 and 18 of the Contract Act define in great details, the expressions 'fraud' and 'misrepresentation'. The principle difference between fraud and 24 of 40 25 j-196.14 misrepresentation is that in cases of fraud the person, who makes the representation does not himself believe it to be true, whilst in cases of misrepresentation, the person himself believes it to be true. Thus, 'fraud' and 'misrepresentation' as defined under sections 17 and 18 of the Contract Act are well accepted grounds which would vitiate 'free consent' and consequently

the contract itself.

Therefore, as a general rule, it cannot be said that the moment allegations of fraud and misrepresentation are made in the context of a contract, the subject matter of the dispute is rendered incapable of resolution by arbitration.

32] In Booz Allen and Hamilton (supra), upon which reliance was placed by Mr. Kirpal, the Supreme Court has noted with approval its earlier decision in Olympus Superstructures (P) Ltd. v. Meena Vijay Khetan, (1999) 5 SCC 651, in which the contention that a dispute relating to specific performance of a contract cannot be referred to arbitration, was repelled. In the said decision, the Supreme Court did observe that certain disputes like criminal offences of a public nature, disputes as to status such as divorce cannot be referred to arbitration. It was further held that if in respect of the facts relating to a criminal matter, say, physical injury, if there is a right to damages for personal injury, then such a dispute can be referred to arbitration (Keir v. Leeman, (1846) 9 QB 371). Similarly, it was held that a husband and a wife may refer to arbitration, the terms on which they shall separate, because they can make a valid agreement between themselves on that matter.

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33] In paragraph 23 of the decision in N. Radhakrishnan

(supra), the Supreme Court has held that the facts of the said case do not warrant the matter to be tried and decided by the arbitrator, rather, for furtherance of justice, it should be tried in a court of law which would be more competent and have the means to decide such complicated matters involving various questions and issues raised in the dispute. Similarly, in paragraph 26, the Supreme Court after noticing the allegation made, has held that the disputes cannot be 'properly' dealt with by the arbitrator. It does appear therefore, that the Supreme Court was concerned with the issue of 'suitability' rather than 'arbitrability' of the disputes.

34] In any case, the Supreme Court in Swiss Timing Limited (supra), upon analysis of its decision in N. Radhakrishnan (supra) has held that the decision in N. Radhakrishnan (supra) is 'per incuriam' on two grounds:

> (i) Firstly, the judgment in Hindustan Petroleum Corporation Limited vs. Pink City Midway Petroleums, (2003) 6 SCC 503 though referred has not been distinguished but at the same time is not followed also. The judgment in P. Anand Gajapathi Raju v.

P.V.G. Raju (dead), (2000) 4 SCC 539 was not even brought to the notice of this Court. Therefore, the same has neither been followed nor considered;

(ii) Secondly, the provision contained in section 16 of the Arbitration Act, 1996 were also not brought to the notice of the this Court.

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35] Mr. Kirpal, however contended that the decision of the

Supreme Court in Swiss Timing (supra) was rendered by a Single Judge whereas the decision in N.Radhakrishnan (supra) is by a bench of two Judges and therefore we must follow the principle laid down in N.Radhakrishnan(supra).

36] Mr. Kirpal, then invited out attention to paragraph 35 in the decision of Swiss Timing (supra), wherein it is observed thus:

"35.

ig The purpose of the aforesaid solitary rule is to avoid embarrassment to the accused. In contrast, the findings recorded by the arbitral tribunal in its award would not be binding in criminal proceedings. Even otherwise, the Constitution Bench in the aforesaid case has clearly held that no hard and fast rule can be laid down that civil proceedings in all matters ought to be stayed when criminal proceedings are also pending. As I have indicated earlier in case the award is made in favour of the petitioner herein, the respondents will be at liberty to resist the enforcement of the same on the ground of subsequent conviction of either the Chairman or the officials of the contracting parties."

.. (emphasis supplied) 37] Based upon the aforesaid italicised portion, Mr. Kirpal submitted that enforcement of any arbitral award, in which allegations of fraud are upheld, can always be resisted. Therefore, according to Mr. Kirpal, any award that may be made by the Arbitral Tribunal at Singapore upholding the HSBC allegation of fraud against the appellants, would be unenforceable in India in 27 of 40 28 j-196.14 the wake of categorical provisions contained in section 48(2)(a) of the Act. The

> parameters of determination at the stage of reference to arbitration and at the stage of enforcement of an award are different and distinct. This according to Mr. Kirpal, is clear by reference to the aforesaid italicised portion of paragraph 35 in Swiss Timing (supra).

38] In the aforesaid regard, we must note that though the decision in Swiss Timing (supra) has been delivered by a Single Judge of the Supreme Court, nevertheless, the same is after taking into consideration the earlier decision in N.Radhakrishnan(supra).

There are two specific reasons indicated as to why in its opinion, the decision in N.Radhakrishnan (supra) is 'per incuriam'. In such circumstances, it is not open for us to follow the dictum in N.Radhakrishnan (supra) even if we were to agree with Mr. Kirpal that the said decision lays down absolute proposition that issues of fraud are per se non-arbitrable.

39] Again, based upon the italicised portion of paragraph 35 in the decision of Swiss Timing (supra), we are not prepared to accept that some broad proposition with regard to difference in parameters at the stage of reference and at the stage of enforcement has been laid down by the Supreme Court. In fact, such a broad proposition may run counter to the decision of the Supreme Court in SBP & Co. v. Patel Engineering Ltd.- (2005) 8 SCC 618 and Chloro Controls India Private Limited v. Severn Trent 28 of 40 29 j-196.14 Water Purification INC & ors.-(2013) 1 SCC 641. But however, we choose not to dilate on this issue, as in our opinion, the same really does not arise for our consideration in the facts and circumstances of the present case.

40] The HSBC, in its claim statement before the Arbitral Tribunal at Singapore has alleged 'misrepresentation' and 'breach of warranty' on the part of Avitel India and also sought for indemnification from the 'Jains' in the aforesaid connection. The HSBC, in paragraphs 73 to 83 of the claim statement has set out the representations held out by Avitel India and the Jains, which induced the HSBC to enter into the transaction documents and invest USD 60 Million. It has been pleaded that all such representations were false and misleading to the knowledge of Avitel India and Jains. There is reference to contracts represented as existing between Avitel India and Kinden, when in fact Kinden was not even in existence during the period between 13 October 2010 and 25 October 2011, when HSBC invested in the Avitel Group. There is similar reference to contracts, represented as existing between Avitel and Purple Passion, which again was stated as dissolved on 23 November 2010 and therefore not in existence when HSBC invested in the Avitel Group. There is reference to the role played by one John Linwood or rather the person who is alleged to have played the role of John Linwood in the context of BBC Contract, which ultimately never materialized. There is reference to representations held out in form of tax returns, accounts and legal compliances which were misleading 29 of 40 30 j-196.14 and untrue, to the knowledge of Avitel and Jains. On such basis, HSBC has raised a claim for damages which is presently being adjudicated by Arbitral Tribunal at Singapore. In fact, even the final arguments have been concluded in November 2013 and the final award is now expected at any time.

41] If the aforesaid allegations/pleadings as set out in the claim before the Arbitral Tribunal at Singapore are taken into consideration, then they establish an eminent civil profile of the disputes

that has arisen between the parties. The allegations of fraud and misrepresentation are primarily in the context of fraud and misrepresentation as defined under sections 17 and 18 of the Contract Act or in any case principles analogous thereto. As noted earlier, these are well accepted and valid pleas for questioning a contract on the ground that such agreement was made without free consent. Making of such allegations does not, in our opinion, render the subject matter of dispute to be incompetent of settlement by arbitration under the law of India. Besides, there is no dispute whatsoever that the law governing arbitration agreement in the present case is the Singapore law and that under the Singapore law there is no bar to the arbitral adjudication upon issues of fraud and misrepresentation.

42] For all the aforesaid reasons and in facts and circumstances of the present case, we are unable to find fault with the decision of the learned Single Judge on the issue of non arbitrability of allegations of fraud and misrepresentation.

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Accordingly, we see no merit in Mr. Kirpal's submission based upon non-enforceability of any award that may eventually be made by the Arbitral Tribunal at Singapore upholding allegation of fraud and misrepresentation levelled by HSBC against the appellants.

43] Insofar as merits of the impugned judgment and order are concerned, we must remind ourselves that parameters of interference are limited to what have been set out by the Supreme Court in Wander Ltd. (supra). In appeals against the exercise of discretion by the learned Single Judge, as an appellate court, we are not to interfere with the exercise of discretion and substitute our own discretion, unless we are satisfied that discretion is shown to have been exercised arbitrarily, capriciously, perversely or where the Court has ignored the settled principles of law regulating grant or refusal of interim measures. The appeal against the exercise of discretion is primarily an appeal on principle. In such an appeal, as the appellate court, we would be loathe to interfere, solely on the ground that, if we had considered the matter in the first instance, we might have come to any contrary conclusion.

44] The criticism of Mr. Kirpal that the learned Single Judge has returned prima-faice findings of fraud and misrepresentation, merely on the basis of pleadings and without there being any material to support the same, is unfounded. The impugned judgment and order indicates that material in form of 31 of 40 32 j-196.14 several documents has been taken into consideration to reach the prima facie findings. There is reference to representations held out by the appellants that the BBC contract was almost concluded or in any case, would be concluded, no sooner the equipment necessary for conversion of 2D films to 3D films is acquired. Such representations, eventually turned out to be false, to the knowledge of the appellants themselves. There is reference to representations held out

by the appellants with regard to contracts with customers like M/s. Purple Passion valued at Millions of Dollars, which representations ultimately turned out to be false, to the knowledge of the appellants. In fact, there is prima-facie material on record which establishes that the entity M/s. Purple Passion had been dissolved even prior to the date of execution of agreements between the parties. There is reference to some material on record, which prima-facie suggest that no explanation was forthcoming from the appellants as to the manner in which USD 60 Million invested by the HSBC came to be spent. The appellants placed no clear material on record in this regard, thereby lending force to the contention of HSBC that out of USD 60 Million, an amount of almost USD 51 Million was circulated back into the account of appellant No.3, in stead of being used to purchase of equipments, necessary to secure the BBC contract. Applying the Wander Ltd. (supra) principle, this is no occasion to re-appreciate the material on record. Suffice to note that the prima-facie findings particularly in the context of grant of prohibitory injunction, are by no means arbitrary, capricious or perverse.

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45] Mr. Kirpal is again not right in his submission that the

standard of proof necessary in a civil case involving allegation of fraud is the same as the standard of proof necessary in a criminal case, that is, proof beyond reasonable doubt. In Gulabchand vs. Kudilal & ors., AIR 1966 Supreme Court 1734, the Supreme Court has ruled that the definition of the words 'proved', 'disproved' and 'not proved' given in section 3 of the Evidence Act makes it apparent that it applies the same standard of proof in all civil cases and it makes no difference between cases in which charges of a fraudulent and criminal character are made and the cases in which such charges are not made. This does not mean that the Court will not, whilst striking the balance of probability, keep in mind the presumption of innocence, but it is wrong to insist that such charges must be proved clearly beyond reasonable doubt.

46] Insofar as the EOW report is concerned, the learned Single Judge was quite right in not adverting to the same in light of the provisions contained in section 173 and 190 of Code of Criminal Procedure (Cr.P.C.). There can be no dispute that the EOW report is relatable to section 173(2) of the Cr.P.C. It is settled position in law that when the Magistrate who is dealing with a report submitted by the police under section 173 (2) of the Cr.P.C., may either agree with the said report and close the proceedings, or may take the view, on a consideration of such report, that the opinion formed by the police is not based upon full and complete investigation, in which case the Magistrate will have ample jurisdiction to give direction to the police under section 156 (3) of 33 of 40 34

j-196.14 Cr.P.C. to make further investigation. Again, the Magistrate is also empowered to take cognizance of the offence under section 190(1)(b) of Cr.P.C., notwithstanding any contrary opinion of the police as expressed in the report. This position is made clear by the Supreme Court itself in Abhinandan Jhaand ors vs. Dinesh Mishra - AIR 1968 SC 117, M/s. India Card Pvt. Ltd. vs. State of Karnataka & anr. - (1989) 2 Supreme Court Cases 132 and H.S. Bains, Director Small Saving-cum-Deputy Secretary Finance, Punjab, Chandigarh vs. State (Union Territory of Chandigarh)-(1980) 4 SCC 631. In light of this position, we see no error on the part of the learned Single Judge in not adverting to the EOW report for determining whether prima-facie case has been made out by the HSBC or not.

47] In the course of arguments, Mr. Kirpal submitted that learned Single Judge in exercising powers under section 9 of the Act, has virtually proceeded to grant final relief to HSBC. Such submission is misconceived. The interim relief as granted, primarily directs Avitel India to secure the claim amount by way of deposit/retention of the same in its Corporation Bank Account in India. Final relief, if and when granted, would perhaps enable HSBC to obtain the claim amount for its own appropriation. Thus, this is not a case where learned Single Judge, in exercising powers under section 9 of the Act, has proceeded to grant final reliefs to HSBC.

48] By the impugned judgment and order, however, learned Single Judge has not only granted prohibitory injunction restraining the appellants from withdrawing any amounts from out of their Corporation Bank account, but further issued an interim mandatory injunction directing the appellants to deposit in the said account, an amount of approximately USD 50 Million, so that there is a balance of USD 60 Million maintained in the said account. Insofar as grant of prohibitory injunction is concerned, it is sufficient if an applicant makes out a prima-facie case and further establishes that the balance of convenience is in its favour and that irreparable loss and prejudice would occasion the applicant, in case relief of prohibitory injunction is declined. However, when it comes to grant of interim mandatory injunction, the position is slightly different.

49] In Dorab Cawasji Warden (supra) , the Supreme Court has ruled that though the Courts have the power to grant interim injunction, such power ought not to be exercised as a matter of course. Interim mandatory injunctions may be granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts which have been illegally done or the restoration of that which was wrongfully taken by the party complaining. The general guidelines to be applied in the matter of granting interim mandatory injunction are as follows:

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(i) the plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima- facie case, i.e., normally require for a prohibitory injunction;

(ii) It is necessary to prevent or serious injury which normally cannot be compensated in terms of money;

(iii) The balance of convenience is in favour of one seeking such relief;

50] In the aforesaid decision, the Supreme Court has itself made it clear that the grant of relief of interim mandatory injunction being essentially an equitable relief, the grant or refusal of the same shall ultimately rest in the sound judicial discretion of the court to be exercised in light of the facts and circumstances of each case. Therefore, aforesaid guidelines can neither be regarded as exhaustive nor complete or absolute rules and there may be exceptional circumstances needing action, applying them as a pre-

requisite for grant or refusal of such injunction would be a sound exercise judicial discretion.

51] In Metro Marins & anr. vs. Bonus Watch Co. (P.) Ltd & ors - (2004) 7 SCC 478, the Supreme Court reiterated the position laid down in Dorab Cawasji Warden (supra) that interim mandatory injunction can be granted only in exceptional cases coming within the exception noticed in the said judgment and that the grant of interim mandatory injunction must not amount 36 of 40 37 j-196.14 to grant of a pre trial decree.

52] Applying the aforesaid principles, we have to evaluate as to whether pre-requisite for grant of interim mandatory injunction could be said to have been complied with in the present case.

53] As noted earlier, HSBC invested an amount of USD 60 Million in April - May 2011 contemporaneous with execution of SSA dated 21 April 2011 and SHA dated 11 May 2011. The decision to invest, was undoubtedly a commercial decision. Prior to such decision, there is material on record which suggests that, HSBC had carried out due diligence by engaging leading agencies like Ernst & Young, Clifford Chance at an expense of approximately Rs.3 Crores.

54] The disputes arose between the parties after about a year from the date of execution of SSA and SHA, which is evident from the circumstance that HSBC invoked arbitration agreement on or about

11 May 2011. There is, however, no clear material on record which establishes the position regards value of of 7.8 % of equity capital held by HSBC in Avitel India soon after the investment of USD 60 Million and acquisition of stake, to the extent of 7.8%. Mr. Kirpal submitted that in absence of any special circumstances, the measure of damages cannot be the amount of loss ultimately sustained by the representee, i.e., HSBC. The measure of damages, can at the highest be difference between 37 of 40 38 j-196.14 the price paid by HSBC and the price, which the HSBC would have received, if it had resold in the market forthwith after the purchase provided, provided of course, there was a fair market for the shares at that stage. In M/s Torjan & Co (supra), the Supreme Court, when dealing with a situation where a party was fraudulently induced to purchase shares and consequently suffered damages has, observed thus:-

> "15. Now the rule is well settled that damages due either for breach of contract or for tort or (sic) damages which, so far as money can compensate, will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act. Difficulty, however, arises in measuring the amount of this money compensation. A general principle cannot be laid down for measuring it, and every case must to some extent depend upon its own circumstance.
>
> It is however, clear that in the absence of any special circumstances the measure of damages cannot be the amount of the loss ultimately sustained by the representee. It can only, be the difference between the price which he paid and the price which he would have received if he had resold them in the market forthwith after the purchase provided, of course, that there were a fair market then. The question to be decided in such a case is what could the plaintiff have obtained if he had resold forthwith which he, had been induced to purchase by the fraud of the defendants. In other words, the made of dealing with damages in such a case is to see what it would have cost him to get out of the situation, i.e., how much worse off was his estate owing to the bargain in which he entered into."
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> 38 of 40 39 j-196.14 55] The HSBC claim statement before the Arbitral Tribunal at Singapore seems to accept, or at any rate indicate consciousness, as regards the aforesaid position. In respect of misrepresentation, HSBC has claimed damages to the extent of its investment sum of USD 60 Million, "less the value of HSBC investment in Avitel India to be assessed, but likely nil". In these circumstances, it cannot be said that HSBC had made out a case of a standard higher than a prima-facie case, requisite for an interim mandatory injunction to require Avitel India to deposit the entire amount of USD 60 Million in its Corporation Bank Account in India by way of security. It must be noted that in this case HSBC has also not offered to sell or surrender its shares/equities in Avitel India, but rather, HSBC seeks to retain the same whilst seeking damages proportionate to its entire extent of investment.

56] As noticed earlier, an interim mandatory injunction can only be granted in exceptional cases and that too preserve or restore status quo of the last non-contesting status, which preceded the

controversy. The grant of interim mandatory injunction must not amount to grant of pre trial decree. Such relief is essentially an equitable relief and discretion in that regard has to be exercised in light of facts and circumstances of each case. In the facts and circumstances of the present case, we are of the opinion that interests of justice would be served, if the appellants are directed to deposit an additional amount equivalent to USD 20 Million in its Corporation Bank Account at Mumbai, so that total deposit in the said account is maintained at USD 30 39 of 40 40 j-196.14 Million. This is on the basis that the HSBC can be said to have made out a fairly strong case, of a standard higher than a mere prima-facie case, for an award of such amount in the aribtral proceedings at Singapore. This direction to deposit, is certainly, without prejudice to the rights and contentions of the parties before the Arbitral Tribunal at Singapore. Accordingly, we may not be taken to have expressed any final opinion either upon the merits of the contentions of either parties or quantum of damages.

57] For the aforesaid reasons, we partly allow the present appeal. The direction to the appellants to deposit the shortfall in the Corporation Bank Account at Mumbai, so as to maintain balance of USD 60 Million is substituted by a direction to the appellants to deposit the shortfall in the said account, so as to maintain a balance of USD 30 Million within four weeks from today. Save and except the aforesaid modification, rest of the directions in the impugned judgment and order dated 22 January 2014, are hereby upheld and maintained.

58] Appeal is disposed of accordingly. In the facts and circumstances of the present case, there shall be no order as to costs.

(CHIEF JUSTICE) (M.S.SONAK, J.) dssherla 40 of 40