Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY APPEAL (L) NO. 10 OF 2013

Rakesh Malhotra
having his office at Supermax Personal Care Pvt. Ltd., A Wing, Hamilton, 6th Floor, Patlipada, Ghodbunder Road, Thane (W). ...Appellant

versus

1. **Rajinder Kumar Malhotra,**
   5/A Manek Building, L.D. Ruparel Marg, Napean Sea Road, Mumbai – 400 006
2. **Veena Rajinder Malhotra**,
   having her address in India at 15/A Manek Building, L.D. Ruparel Marg, Napean Sea Road, Mumbai – 400 006
3. **Transauto & Mechaids Pvt. Ltd.**,
   having its registered office at AB/14B, Nandanvan Cooperative Industrial Estate, Wagle Estate, Thane 400 604
4. **Hanif Mohd Ismail Shaikh**,
   residing at Seva Vikas Mandal, R. No. D-111, Sewri Cross Road, Wadala, Mumbai – 400 031.
5. **Subhash D. Chaudhari,**
   Flat No. 201, Morning Star, Sherly Rajan Road, Bandra (W), Mumbai – 400 050

6. **Dhruv Vallabhdas Thakkar,**
residing at 569/5, Nina Vihar, 5th Road, Khar, Mumbai – 400 052.
7. **Paresh Biharilal Vyas,**
r/o 703, Raheja Estate, A- Wing, Park Land II, Kulupwada Road, Borivali (E), Mumbai – 400 066
8. **Amit Bhansali**,
having his office at Supermax Personal Care Pvt. Ltd., A Wing Hamilton, 6th floor, Patilpada, Ghodbunder Road, Thane (West) ...Respondents

ALONG WITH

COMPANY APPEAL (L) NO. 11 OF 2013

Rakesh Malhotra,
having his office at Supermax Personal Care Pvt. Ltd., A Wing, Hamilton, 6th Floor, Patlipada, Ghodbunder Road, Thane (W). ...Appellant

versus

1. **Sapphire Properties Pvt. Ltd.,**
A Company incorporated under the Companies Act, having its registered Office at Plot No. 1, Phase IV IDA Jeedimetla, Kingsar, Hyderabad, Andhra Pradesh – 500 055
2. **Unique Properties & Securities Pvt. Ltd.**,
A Company incorporated under the Companies Act, having its registered Office at 4th floor, Malhotra House, Fort, Mumbai - 400 001
3. **Talla Nageshwar Rao,**
An adult, Indian Inhabitant residing at

703, H. No. 3-5-868, Hyderabad – 500 029

4. **Jasraj Bhagwandas Goyal,**
Indian Inhabitant residing at 8/A, Ganga-Jamuna, 17th Road, Santacruz (West), Mumbai – 400 054

5. **Transauto & Mechaids Pvt. Ltd.**,
having its registered office at AB/14B, Nandanvan Cooperative Industrial Estate, Wagle Estate, Thane 400 604

6. **Amit Bhansali**,
having his office at Supermax Personal Care Pvt. Ltd., A Wing Hamilton, 6th floor, Patilpada, Ghodbunder Road, Thane (West) ...Respondents

AND

COMPANY APPEAL NO. 23 OF 2013

(COMPANY APPEAL (L) NO.12 OF 2013)

Rakesh Malhotra,
having his office at Supermax Personal Care Pvt. Ltd., A Wing, Hamilton, 6th Floor, Patlipada, Ghodbunder Road, Thane (W). ...Appellant

versus

1. **Rajinder Kumar Malhotra,**
5/A Manek Building, L.D. Ruparel Marg, Napean Sea Road, Mumbai – 400 006

2. **Vidyut Metallics Private Limited**,
having its registered office at 4th floor, Malhotra House, Fort, Mumbai - 400 001

3. **Paresh Biharilal Vyas,**
r/o 703, Raheja Estate, A- Wing, Park

Land II, Kulupwada Road, Borivali (E), Mumbai – 400 066

4. **Subhash D. Chaudhari,**
Flat No. 201, Morning Star, Sherly Rajan Road, Bandra (W), Mumbai – 400 050

5. **Transauto & Mechaids Pvt. Ltd.**, having its registered office at AB/14B, Nandanvan Cooperative Industrial Estate, Wagle Estate, Thane 400 604

6. **Amit Bhansali**, having his office at Supermax Personal Care Pvt. Ltd., A Wing Hamilton, 6th floor, Patilpada, Ghodbunder Road, Thane (West)

7. **Abhishek Kumar,**
Having his office at Supermax Personal Care Pvt. Ltd., A Wing Hamilton, 6th floor, Patilpada, Ghodbunder Road, Thane (West)

8. **Ms. Jaanvi Tekchandani**, having his office at Supermax Personal Care Pvt. Ltd., A Wing Hamilton, 6th floor, Patilpada, Ghodbunder Road, Thane (West) ...Respondents

AND

COMPANY APPEAL NO. 24 OF 2013

(COMPANY APPEAL (L) NO. 13 OF 2013)

Rakesh Malhotra,
having his office at Supermax Personal Care Pvt. Ltd., A Wing, Hamilton, 6th Floor, Patlipada, Ghodbunder Road, Thane (W). ...Appellant

versus

1. **RSM Properties Pvt. Ltd.,**
having its registered office at Plot No.1, Phase IV IDA, Jeedimetla, Kingsar, Hyderbad-500 055, Andhra Pradesh.
2. **Super-Max International Pvt. Ltd.**,
a company incorporated under the Companies Act, 1956, having its registered office at 4th floor, Malhotra House, Fort, Mumbai-400 001
3. **Gopal Krishna Vittal Nayak,**
adult Indian Inhabitant r/o 2, Trimbakashray, Behind Mahila Samiti School, Thane-421021.
4. **Alexandar G. Tone,**
Indian Inhabitant, residing at Row House B-6, Tinevilla, 22, Sailee Avenue CHSL, Sai Krupa Complex, Kashi Mira Road, Thane – 401 104.
5. **Transauto and Mechaids Pvt. Ltd.**,
a Company incorporated under the provisions of the Companies Act, 1956, having its registered office at AB/14B, N
6. **Amit Bhansali**,
having his office at Supermax Personal Care Pvt. Ltd., A Wing Hamilton, 6th floor, Patilpada, Ghodbunder Road, Thane (West)
7. **Paresh Biharilal Vyas,**
r/o. 793, Raheja Estate, A-Wing, Park Land II, Kulupwada Road, Borivali (E), Mumbai – 400 066.
8. **Mohammed Hanif Mohamed Ismail Shaikh,**
Supermax Personal Care Pvt. Ltd., A Wing Hamilton, 6th floor, Patilpada, Ghodbunder Road, Thane (West) ...Respondents

AND

COMPANY APPEAL NO. 15 OF 2013

(COMPANY APPEAL (L) NO. 16 OF 2013)

Rajinder Kumar Malhotra,
15/A Manek Building, L.D. Ruparel Marg,
Napean Sea Road,
Mumbai – 400 006 ...Appellant

versus

1. **Vidyut Metallics Pvt. Ltd.,**
having its registered office at 4th floor,
Malhotra House, Fort, Mumbai - 400
001
2. **Paresh Biharilal Vyas,**
Adult, Indian Inhabitant residing at
703, Raheja Estate, A- Wing, Park
Land 2, Kulupwada Road, Borivali (E),
Mumbai – 400 066
3. **Subhash D. Chaudhari,**
Adult, Indian Inhabitant residing at
Flat No. 201, Morning Star,
Sherly Rajan Road, Bandra (W),
Mumbai – 400 050
4. **Transauto & Mechaids Pvt. Ltd.**,
having its registered office at AB/14B,
Nandanvan Cooperative Industrial
Estate, Wagle Estate, Thane 400 604
5. **Amit Bhansali**,
Adult, Indian Inhabitant having his
office at Supermax Personal Care Pvt.
Ltd., A Wing Hamilton, 6th floor,
Patilpada, Ghodbunder Road,
Thane (West)

6. **Rakesh Malhotra,**
Having his office at Supermax Personal Care Pvt. Ltd., A Wing Hamilton, 6th floor, Patilpada, Ghodbunder Road, Thane (West)

7. **Abhishek Kumar**,
Adult, Indian Inhabitant having his office at Supermax Personal Care Pvt. Ltd., A Wing Hamilton, 6th floor, Patilpada, Ghodbunder Road, Thane (West)

8. **Jaanvi Tekchandani,**
Adult, Indian Inhabitant, having her office at Supermax Personal Care Pvt. Ltd., A Wing Hamilton, 6th floor, Patilpada, Ghodbunder Road, Thane (West) …Respondents

AND

COMPANY APPEAL NO. 16 OF 2013

(COMPANY APPEAL (L) NO. 17 OF 2013)

Sapphire Properties Pvt. Ltd.,
A Company incorporated under the Companies Act, having its registered Office at Plot No. 1, Phase IV IDA Jeedimetla, Kingsar, Hyderabad, Andhra Pradesh – 500 055 ...Appellant

versus

1. **Unique Properties & Securities Pvt. Ltd.** ,
A Company incorporated under the Companies Act, having its registered Office at 4th floor, Malhotra House, Fort, Mumbai - 400 001

2. **Talla Nageshwar Rao,**
An adult, Indian Inhabitant residing at 703, H. No. 3-5-868, Hyderabad – 500 029
3. **Jasraj Bhagwandas Goyal,**
Indian Inhabitant residing at 8/A, Ganga-Jamuna, 17th Road, Santacruz (West), Mumbai – 400 054
4. **Transauto & Mechaids Pvt. Ltd.**,
having its registered office at AB/14B, Nandanvan Cooperative Industrial Estate, Wagle Estate, Thane 400 604
5. **Amit Bhansali**,
Adult, Indian Inhabitant having his office at Supermax Personal Care Pvt. Ltd., A Wing Hamilton, 6th floor, Patilpada, Ghodbunder Road, Thane (West)
6. **Rakesh Malhotra,**
Having his office at Supermax Personal Care Pvt. Ltd., A Wing Hamilton, 6th floor, Patilpada, Ghodbunder Road, Thane (West) ...Respondents

AND

COMPANY APPEAL NO. 17 OF 2013

(COMPANY APPEAL (L) NO. 18 OF 2013)

RSM Properties Pvt. Ltd.,
A Company incorporated under the Companies Act, having its registered Office at Plot No. 1, Phase IV IDA Jeedimetla, Kingsar, Hyderabad, Andhra Pradesh – 500 055 ...Appellant

versus

1. **Supermax International Pvt. Ltd.** , A Company incorporated under the Companies Act, having its registered Office at 4th floor, Malhotra House, Fort, Mumbai - 400 001
2. **Gopalkrishna Vittal Nayak,** Adult, Indian Inhabitant residing at Trimbakashray, Behind Mahila Samiti School, Thane – 421 021. 703,
3. **Alexandar G. Tone,** adult, Indian Inhabitant residing at Row House B-6, Tone Villa, 22, Sailee Avenue CHS Ltd., Sai Krupa Complex, Kashi Mira Road, Thane – 401 104.
4. **Transauto & Mechaids Pvt. Ltd.**, having its registered office at AB/14B, Nandanvan Cooperative Industrial Estate, Wagle Estate, Thane 400 604
5. **Amit Bhansali**, Adult, Indian Inhabitant having his office at Supermax Personal Care Pvt. Ltd., A Wing Hamilton, 6th floor, Patilpada, Ghodbunder Road, Thane (West)
6. **Rakesh Malhotra,** Having his office at Supermax Personal Care Pvt. Ltd., A Wing Hamilton, 6th floor, Patilpada, Ghodbunder Road, Thane (West)
7. **Paresh Biharilal Vyas,** adult Indian Inhabitant residing at 703, Raheja Estate, A Wing, Park Land 2, Kulupwada Road, Borivali (East), Mumbai – 400 066
8. **Mohamed Hanif Mohamed Ismail Shaikh,** Adult Indian Inhabitant, Supermax

Personal Care Pvt. Ltd., Opp. Eternity Mall, Teenhath Naka, LBS Marg, Thane (West).

9. **Sunil Raj,**
adult Indian Inhabitant having his address at Supermax Personal Care Pvt. Ltd. Opp. Eternity Mall, Teenhath Naka, LBS Marg, Thane (West). ...Respondents

AND

COMPANY APPEAL NO. 18 OF 2013

(COMPANY APPEAL (L) NO. 19 OF 2013)

1. **Rajinder Kumar Malhotra,**
15/A Manek Building, L.D. Ruparel Marg, Napean Sea Road, Mumbai – 400 006
2. **Veena Rajinder Malhotra**,
having her address in India at 15/A Manek Building, L.D. Ruparel Marg, Napean Sea Road, Mumbai – 400 006 ...Appellants

versus

1. **Transauto & Mechaids Pvt. Ltd.**,
having its registered office at AB/14B, Nandanvan Cooperative Industrial Estate, Wagle Estate, Thane 400 604
2. **Hanif Mohd Ismail Shaikh**
adult of Indian Inhabitant residing at Seva Vikas Mandal, R.No. D-111, Sewri Cross Road, Wadala, Mumbai – 400 031

3. **Subhash D. Chaudhari,**
Adult, Indian Inhabitant residing at
Flat No. 201, Morning Star,
Sherly Rajan Road, Bandra (W),
Mumbai – 400 050
4. **Dhruv Vallabhdas Thakkar**,
adult of Indian Inhabitant residing at
569/5, Nina Vihar, 5th Road, Khar,
Mumbai – 400 052
5. **Paresh Biharilal Vyas,**
Adult, Indian Inhabitant residing at
703, Raheja Estate, A- Wing, Park
Land 2, Kulupwada Road, Borivali (E),
Mumbai – 400 066
6. **Amit Bhansali**,
Adult, Indian Inhabitant having his
office at Supermax Personal Care Pvt.
Ltd., A Wing Hamilton, 6th floor,
Patilpada, Ghodbunder Road,
Thane (West)
7. **Rakesh Malhotra,**
Having his office at Supermax
Personal Care Pvt. Ltd., A Wing
Hamilton, 6th floor, Patilpada,
Ghodbunder Road, Thane (West) ...Respondents

APPEARANCES

Mr. D.D. Madon, *Senior Advocate, with Mr. Simil Purohit, Mr. Amol Baware, Mr. V.S. Charalwar, i/b Udwadia Udeshi & Argus Partners* **FOR THE APPELLANT IN**

1. **COMPANY APPEAL (L) NO. 10 OF 2013,**
2. **COMPANY APPEAL (L) NO. 11 OF 2013,**
3. **COMPANY APPEAL 23 OF 2013** *(Company Appeal (L) No. 12 of 2013)***, AND**
4. **COMPANY APPEAL 24 OF 2013** *(Company Appeal (L) No. 13 of 2013)*

and for the contesting Respondent in the other appeals

Mr. Aspi Chinoy, *Senior Advocate, with Mr. J.P. Sen, Senior Advocate, Mr. M.S. Doctor, i/b M/s. Federal & Rashmikant* **FOR THE APPELLANTS IN**

1. **COMPANY APPEAL NO. 15 OF 2013** *(Company Appeal (L) No. 16 of 2013)*,
2. **COMPANY APPEAL NO. 16 OF 2013** *(Company Appeal (L) No. 17 of 2013)*,
3. **COMPANY APPEAL NO. 17 OF 2013** *(Company Appeal (L) No. 18 of 2013)*, **AND**
4. **COMPANY APPEAL NO. 18 OF 2013** *(Company Appeal (L) No. 19 of 2013)*

and for the contesting respondents in the other appeals

CORAM : G.S.Patel, J.

JUDGMENT RESERVED ON : 20th March 2014
11th July 2014

JUDGMENT PRONOUNCED ON : 12th/20th August 2014

JUDGMENT : (Per G.S. Patel, J.)

1. Is a dispute brought before the Company Law Board invoking the provisions of Sections 397, 398 and 402 of the Companies Act, 1956 at all referable to a private tribunal, viz., an arbitral panel for resolution? Does a decision of a foreign court on the question of whether a dispute is covered by an arbitration agreement bind the Company Law Board? These are among the questions of law canvassed in this group of appeals.

A. STRUCTURE

2. The following table of contents is intended to serve as a guide to the structure of this judgment. A list of the authorities cited or referred is appended for convenience.

…continued/-

B. SUMMARY

3. All eight appeals, under section 10F of the Companies Act, 1956, are directed against an order dated 31st January 2013 of the Company Law Board ("**CLB**"). One Rakesh Rajinder Malhotra is the Appellant in the first four appeals: Company Appeal (L) No. 10 of 2013, Company Appeal (L) No. 11 of 2013, Company Appeal No. 23 of 2013 (Company Appeal (L) No.12 Of 2013), Company Appeal No. 24 of 2013 (Company Appeal (L) No. 13 of 2013). Rakesh Malhotra's father, one Rajinder Kumar Malhotra, is the Appellant in Company Appeal No. 15 of 2013 (Company Appeal (L) No. 16 of 2013). He and his wife, Rakesh's mother, Veena Rajinder Malhotra are the two Appellants in Company Appeal No. 18 of 2013 (Company Appeal (L) No. 19 of 2013). One Sapphire Properties Private Limited is the Appellant in Company Appeal No. 16 of 2013 (Company Appeal (L) No. 17 of 2013). One RSM Properties Private Limited is the Appellant in Company Appeal No. 17 of 2013 (Company Appeal (L) No. 18 of 2013). Rakesh is the contesting Respondent in these four appeals, all in the nature of cross-appeals.

4. Although the array of parties is complex and, at first glance, bewildering, the principal contest is between Rakesh Malhotra ("**Rakesh**") on one side, and his father, Rajinder Kumar Malhotra ("**RKM**"), his mother, Mrs. Veena Rajinder Malhotra, RKM and Mrs. Veena Malhotra's younger son (Rakesh's younger brother), Rajiv Malhotra ("**Rajiv**") and Rajiv's wife, Kunika Rajiv Malhotra, on the other. It is, in other words, Rakesh against the rest of his family.

5. The battle is for control over the Supermax empire of corporate entities. This group is said to be the world's second-largest manufacturer of razor blades and allied products. Rakesh and Rajiv, the two sons of RKM and Mrs. Veena Malhotra, soon joined the family business, each handling a different sphere of activity. There are and were several companies in this group, some of them Indian, others overseas. The Indian companies, before the restructuring that followed in 2010, were all entirely held by RKM and Mrs. Veena Malhotra (with Rajiv and Mrs. Kunika Malhotra holding some small equity). In 2008, a restructuring was proposed. The Indian companies' assets, businesses, and plants were to be transferred to a newly incorporated company under Rakesh's control. The Indian companies were to receive substantial funds in consideration. RKM, his wife and younger son would continue to hold the equity in these Indian companies. Private equity capital infusion into the overseas entities or holding companies was also envisaged. A consultancy/ advisory firm was engaged. It identified a private equity investor. The principal object of the proposed restructuring was to allow RKM and Rajiv an exit from full-time involvement in the affairs of the Supermax group, while Rakesh was to assume control of the business. A Subscription and Shareholder Deed and, later, a Supplementary Deed were executed in 2010. The principal Deed had an arbitration clause providing for a London Court of International Arbitration in Geneva. There followed certain business restructuring agreements effecting the principal and supplementary agreements. Importantly, Rakesh was given sole authority to represent the Malhotra family in all these transactions. He also had sole bank account operating authority. Though Rajiv,

too, had a similar authority, his was jointly with Rakesh. Clearly, the family had complete faith and trust in Rakesh.

6. RKM claims that Rakesh betrayed this trust. After the transfers were effected, Rakesh, using his sole authority, deployed the funds received by the Indian companies held by RKM not only to grant loans (a matter contemplated by the agreements under certain conditions), but also to guarantee bank loans and facilities to the newly formed Indian company under Rakesh's control. These funds were also used to pay the financial consultants' fees. A peculiar situation had resulted: following the restructuring and transfer agreements, the directors of the RKM-held Indian companies were now all employees of the entities controlled and held by Rakesh. On finding that these liabilities had been incurred and funds deployed, RKM attempted to gain information from the directors of his own companies, the ones he controlled. They refused to divulge this information, being all beholden to Rakesh.

7. RKM filed four company petitions before the Company Law Board in Mumbai and one before the Company Law Board in Chennai under Section 397 and 398 read with Section 402 of the Companies Act, 1956 alleging oppression and mismanagement. After an ad-interim order was obtained but before these matters could move further, Rakesh obtained an *ex-parte* ad-interim anti-suit injunction from the Commercial Court of the Queen's Bench Division of the Royal Courts of Justice in the UK. That action was contested. Ultimately, that injunction was dissolved by a judgment dated 30th October 2012.

8. Before the Company Law Board in Mumbai, Rakesh then filed applications invoking the arbitration clause in the main agreement and seeking a reference to arbitration of all disputes, under Section 45 of the Arbitration & Conciliation Act, 1996. The Company Law Board Mumbai framed four questions for determination. On 31st January 2013, it dismissed Rakesh's applications. Rakesh filed four appeals. RKM filed cross-objections.

9. One of the questions framed by the Company Law Board was whether disputes under Sections 397-402 are at all arbitrable, having regard to the nature and source of the relief-giving statutory power. The Company Law Board held that such actions are not referable to arbitration. This is the principal issue before me as well. For the reasons that follow, I have upheld this finding, but subject to a caveat, viz., that the oppression and mismanagement petition must be found to be not *mala fide*, oppressive, vexatious and an attempt at 'dressing up' to evade an arbitration clause.

10. The Company Law Board also found that it was not bound by the earlier decision of 30th October 2012 of the UK Court, and that the disputes before it were covered by the arbitration clause. In view of my first finding, this issue would not arise and it was not, strictly speaking, necessary to decide it. But since I was addressed on these issues at great length I have addressed them as well. I have been unable to uphold the decision of the Company Law Board. I have found that the decision of the UK Court vacating the injunction was not covered by any of the exceptions to Section 13 of the Code of Civil Procedure, 1908; specifically, Section 13(c). It was, thus, binding on the Company Law Board. Consequently, and even

independently, the Company Law Board's finding that the disputes before it were covered by the arbitration clause is incorrect in law.

11. As a result, I have dismissed Rakesh's appeals and allowed in part RKM's cross-objections/cross-appeals.

12. The Company Law Board in the impugned order also appointed a retired Judge of this Court as an independent Observer-cum-Facilitator. That order was subsequently varied by an order of Mr. Justice Jamdar in these Appeals, and another retired judge of this Court was appointed as an Observer. In view of the final disposal of these appeals, those interim orders of this court also do not survive.

…continued/-

C. THE FACTUAL BACKGROUND

I. The SuperMax Group

13. Founded in the late 1940's, the Supermax group claims to be the world's second-largest manufacturer of razor blades and related products. In its product category, it is said to be among the world's fastest-growing companies. It has a presence in over 70 countries across the globe.

14. Companies in the Supermax Group were held through a Cayman Islands company, Super Max Offshore Holding ("**SMOH**"). In turn, SMOH was a subsidiary of a Mauritius company, Super Max Mauritius ("**SMM**"), and the entirety of SMM was held by a Lichtenstein foundation, the Arvee Family Foundation ("**Arvee Foundation**"). Between them, RKM and his wife, Mrs. Veena Malhotra, are effectively the owners of a raft of Indian companies ("**RKM Companies**"). These companies manufactured products for the Supermax group, or owned land or held intellectual property rights used by the Supermax group. One of these companies is Transauto & Mechaids Pvt Ltd ("**Transauto**"), held entirely by RKM and Veena Malhotra. Transauto has four subsidiaries, Vidyut Metallics Pvt. Ltd. ("**VMPL**"); RCC (Sales) Pvt. Ltd. ("**RCC**"); Unique Properties and Securities Pvt. Ltd. ("**Unique**"); and Supermax International Pvt. Ltd. ("**SIPL**"). Transauto and its four subsidiaries are referred to as "**the Five Transauto Companies**". Rajiv, his wife Kunika and, in one case, Rakesh held negligible shares in some of these. For all

intents and purposes, these companies were entirely held by RKM and Mrs. Veena Malhotra.

15. In time, Rakesh and Rajiv joined RKM in the family business. Rakesh looked after sales, while Rajiv attended to the manufacturing activities. Neither was at any time on the board of the RKM Companies, the directors of which were all employees. There were, thus, two sets of companies: the Supermax Group, including SMOH and SMM, and the Indian RKM Companies.

II. The Restructuring Proposal & The Subscription & Shareholder Deed

16. Some time in 2008, there seems to have been a decision to restructure the Supermax Group. RKM and Rajiv were to exit day-to-day involvement in the Supermax Group companies. Rakesh was to assume control of these. The restructuring envisaged private equity investment in the Supermax Group companies; and the RKM Companies were to transfer, sell or lease their assets, plants and businesses to the Supermax Group companies. The RKM Companies would receive, in consideration, substantial compensation from the infusion of private equity funds. Rakesh, for the Supermax Group, engaged a corporate financial advisory, one Allegro Capital Advisors Pvt Ltd ("**Allegro**"). Allegro, in turn, identified one Actis Emerging Markets 3 LP ("**Actis**") as a source of private equity financing. Actis was to take an equity stake in SMOH, SMM and a new Indian company, Tigaksha Metallics Pvt. Ltd. ("**TMPL**").

17. On 4th November 2010, a Subscription and Shareholder Deed ("**SSD**") was executed between RKM, Rakesh, Rajiv, Actis and the controlling entities of the Supermax Group: Arvee Foundation, SMM, SMOH and TMPL. The SSD required Actis to bring in US$ 225 million for an equity subscription of 25–29.17% of the holding companies, SMOH and TMPL. The RKM Indian Companies (Transauto and its four subsidiaries) were to transfer or sell their businesses, assets and intellectual property rights to a new company, Super Max Personal Care Private Limited ("**SPCPL**"). In return, the Indian RKM Companies were to receive an aggregate amount of US$ 53 million (then about Rs.238 crores) from Actis's private equity investment. These acquisitions and transfers were to be effected through restructuring agreements. The SSD did not, it must be noted, deal with the further activities of the Indian RKM Companies following this proposed transfer. They also did not restrict the Indian RKM Companies' use of these funds.

18. Some clauses of the SSD must be noted in brief. One of these, clause 18.10, bound the Malhotra family to provide loans to the Supermax group should certain conditions be met. I am not concerned with the details of this clause; I only mention it as an indication of how closely involved the individual Malhotra family members were with the entire scheme. More important, perhaps, is clause 41.1. This is a clause that, in and of itself, shows the immense trust placed in Rakesh, particularly by his father, RKM. This is reinforced by events that followed shortly thereafter. This clause, however, said in terms that each of the Malhotra parties to the SSD had appointed Rakesh as their representative for all purposes. He was empowered, on their behalf, to do all that was needed to be

done by the Malhotra parties. Clause 43.2 of the SSD had an arbitration clause. It provided for arbitration in Geneva under the Arbitration Rules of the London Court of International Arbitration ("**LCIA**").

III. The Business Restructing Agreements and the Supplemental Deed

19. In December 2010/January 2011, the Indian RKM Companies opened accounts with Citibank. Rakesh was given sole transactional authority. Rajiv, too, was a signatory on these accounts, but jointly with Rakesh. Rakesh was entrusted with the effecting of the contemplated transactions, including transferring the agreed consideration to the Indian RKM Companies. In November and December 2010, VMPL and RCC entered into separate Business Transfer Agreements with the newly formed company SPCPL. VMPL's and RCC's business, assets and employees were transferred to SPCPL for US$24.58 million (Rs.110.50 crores) and US$ 6.06 million (Rs.27.3 crores). An amount of US$ 15 million was set aside in a separate account for a two-year period as a contingency fund to meet any claims raised by SPCPL. At about this time, the intellectual property holdings of SIPL were transferred to one Supermax IPR Holdings AG for US$ 20.13 million (about Rs.90 crores). Unique sold its immovable property at Hyderabad for US$ 2.1 million (about Rs.10.70 crores). As a result, the directors of the five Indian RKM Companies (the Five Transauto Companies), employees all, became the employees of the Supermax Group while continuing to be directors of the Indian RKM Companies.

20. Exactly five months after the SSD, almost to the day, on 4th March 2011, the parties executed a Supplemental Deed ("**SD**"). This amended some of the terms of the original SSD and added new ones. Taken together, the SSD and the SD (collectively, the "**SSD/SD**") now envisioned Rakesh being given control of the Supermax Group, with Actis, the private equity investor, holding 25-29.17% of the equity, as also the manufacturing units, assets and intellectual property rights, with RKM receiving US$ 53 million, or about Rs.238 crores, in the RKM Companies that he controlled.

21. On 24th March 2011, the SSD and SD were substantially completed. Rakesh was now in control of the Supermax Group and its businesses. Actis had acquired its 25–29.17% stake. The five Indian RKM Companies (the Five Transauto Companies) had transferred their businesses, assets and employees to the Supermax Group. RKM believed that the amounts the Indian RKM Companies were to receive, viz., US$ 53 million (with US$ 15 million set aside for contingencies) had been in fact received. At this time, almost all these matters were in Rakesh's hands; and it was during this period, too, that RKM was away from India on account of a serious illness.

IV. The onset of disputes

22. Several months later, on 23rd January 2012, RKM and Rajiv learned from an email from one of Rakesh's employees to an employee of VMPL that, in the interregnum, Rakesh, exercising his clearly vast powers, had arranged for the Indian RKM Companies to guarantee loans made by the Punjab National Bank ("**PNB**") to

SPCPL (the newly formed company in the Supermax Group). RKM now found himself in a most peculiar situation: all the directors of the Indian companies he controlled and held were, on account of the transfers, employees of Rakesh's Supermax Group. These directors refused to give RKM access to records, registers and accounts. Rakesh directed them not to communicate with RKM or Rajiv. He even threatened them with disciplinary action should they do so.

23. RKM believed that Rakesh would now attempt to divert funds out of the Five Transauto Companies, or would otherwise compromise their asset portfolios. In January 2012, RKM wrote to Andhra Bank, PNB and Citibank, the three banks he then believed or knew to have provided credit facilities to the Five Transauto Companies, seeking a freeze of their accounts with these banks. The companies' directors were copied on these letters. A few days later, on 30th January 2012, RKM sent legal notices to the directors and authorised signatories of the Five Transauto Companies saying that any actions by them would be held illegal.

V. RKM files Company Petitions before the CLB alleging oppression and mismanagement

24. On 6th February 2012, RKM by himself, along with Veena Malhotra and through two companies he held, Sapphire Properties Pvt. Ltd. ("**Sapphire**") and RSM Properties Pvt. Ltd. ("**RSM**") filed four company petitions (Company Petitions Nos. 11, 12, 13 and 14 of 2012) relating to Transauto, Unique, VMPL, SIPL in Mumbai and one Company Petition No.14 of 2012 in relation to RCC before the CLB in Chennai. In these, RKM accused the directors of the

Five Transauto Companies (all employees of Rakesh through the Supermax Group) of mismanagement and of acts oppressive to RKM, who held 100% of the equity of all five companies. Orders were also sought under Section 402 of the Companies Act, 1956, including for removal of the existing directors, appointment of new directors, setting aside the restructuring agreement and post-restructuring transactions. Wide interim orders were also sought, including, *inter alia*, restraining these directors and Rakesh from operating bank accounts, utilizing bank account balances, transferring assets and creating liabilities.

25. On 9th February 2012, the CLB Mumbai granted RKM ad-interim reliefs in all four petitions before it. The directors of those four Transauto companies were restrained from dealing with the assets of the companies, except for statutory and salary payments to employees.

26. On 15th February 2012, RKM issued a notice under section 169 of the Companies Act, 1956 requisitioning an extraordinary general meeting of the members of Transauto on 27th March 2012.

VI. The UK Commercial Court Ex-parte Injunction & Its Subsequent Dissolution

27. A day before the extraordinary general meeting, on 26th March 2012, RKM was served with a copy of an *ex-parte* order passed by Mr. Justice Gloster of the Commercial Court, Queen's Bench Division, High Court of Justice, UK. That order was an anti-suit injunction granted at Rakesh's behest. RKM was restrained

from proceeding with the petitions before the CLB and from holding the extraordinary general meeting. The papers in this proceeding and Rakesh's witness statement were also served. Rakesh's plaint before the Commercial Court of the QBD proceeded on this basis:

(a) That RKM's Company Petitions all raised issues that were within the ambit of the arbitration agreement in the SSD, and that the SSD was governed by English law and provided for arbitration under the LCIA Rules in Geneva;

(b) That RKM's Company Petitions sought an impermissible roll-back of the restructuring agreements and transfers effected under the SSD;

(c) That simultaneously with the SSD, there was an "oral agreement" between Rakesh, RKM and Rajiv to the effect that Rakesh was to be given unfettered control of the funds to be received by the Five Transauto Companies / the Indian RKM Companies;

(d) That, under this oral understanding, Rakesh was at liberty to use these funds for paying Allegro's professional fees and for securing working capital or credit facility loans to the newly-formed company, SPCPL or the post-restructuring Supermax Group businesses;

(e) That Clauses 18.10 and 41.1 of the SSD made it clear that Rakesh was at liberty to use these funds of the Indian RKM Companies without notice or intimation to RKM;

28. The *ex-parte* anti-suit injunction continued till October 2012. RKM contested these proceedings. During these, RKM came to know that Rakesh had got the Five Transauto Companies to guarantee loans from PNB and Oriental Bank of Commerce to SPCPL. In addition, the Indian RKM Companies had guaranteed a loan of Rs.80 crores from HDFC Bank to SPCPL. Though this was supposedly done in March 2012 and therefore contrary to the CLB ad-interim injunction of 9th February 2012, the continuance of the UK Court's anti-suit injunction meant that RKM could not move the CLB.

29. On 30th October 2012, Mr. Justice Walker of the Commercial Court in the Queen's Bench Division of the High Court of Justice, UK delivered a judgment on Rakesh's application for an injunction.[1] Walker J. held that the anti-suit injunction could not be allowed to continue. He found that RKM's Company Petitions only assailed post-transfer and post-restructuring dealings and transactions. On facts, he found that RKM was unaware of the securities and guarantees given by the Indian RKM Companies. He also held that, correctly read, Clause 18.10 of the SSD did not set out any

[1] It seems that the decision was first issued in draft and then finalized and ultimately issued in its final form on 9th January 2013. The decision is also available online at: http://www.bailii.org/ew/cases/EWHC/Comm/2012/3020.html

agreement that Rakesh would be at liberty to use the funds of the Five Transauto Companies as he wished for the business of the restructured Supermax Group; and that Clause 41.1, which gave Rakesh wide authority on behalf of the Malhotra parties, was no *carte blanche* to him to act beyond his remit as a signatory; certainly not without authorisation from RKM, that clause not being in the nature of a Power of Attorney with unbridled authority. Importantly for our present purposes, Walker J. also found that RKM's claims before the CLB did not fall within the scope of the arbitration Clause 43.2 of the SSD. He also held that the SSD and its arbitration clause did not include the manner in which the directors of the Five Transauto Companies had dealt with the funds of those companies following the restructuring.

30. Several consequences followed. With the injunction vacated, the extraordinary general meeting originally scheduled for 27th March 2012 was held on 31st October 2012 (the day after Walker J. released his order). At this extraordinary general meeting, all existing directors of Transauto were removed and replaced with RKM's nominees. A Board Meeting of Transauto was then held on 6th November 2012. The Board resolved to call extraordinary general meetings of Transauto's four subsidiaries to remove the directors of each and replace them with RKM's nominees. At subsequent hearings before the CLB, a *status quo* order came to be issued on 19th November 2012 regarding the boards of directors of the three Transauto's subsidiaries then before the CLB Mumbai. There was also a subsequent order of 21st December 2012 to the same effect.

VII. The applications for reference to arbitration before the CLB

31. On 19th December 2012, Rakesh filed applications before the CLB seeking orders of reference of disputes to arbitration under section 45 of the Arbitration & Conciliation Act, 1996 ("**the Arbitration Act**"). These applications were contested. Among the defences that RKM took, three are material for the purposes of these appeals. The first was that all Five Transauto Companies and their directors were not parties to the SSD, and that the subject matter of the Company Petition was outside the ambit of the Arbitration Clause 43.2 of the SSD. This is of consequence because, among other things, of the decision of the Supreme Court in *Chloro Controls India (P) Ltd v Severn Trent Water Purification, Inc. & Ors.*[2] The second defence was that the question of whether or not the disputes fell within the arbitration clause was a matter already concluded by the UK Court, and that was done in a proceeding initiated by Rakesh. That finding was conclusive and binding, and Rakesh could not now re-agitate the same issue in another forum, having lost in the one of his choice. The third point of opposition was that, in and of themselves, petitions seeking reliefs under Sections 397 and 398 of the Companies Act, 1956, read with Section 402 could not be referred to arbitration at all.

VIII. The impugned order

32. On 31st January 2013 came the impugned order. The CLB dismissed Rakesh's application for reference to arbitration under

---

2 (2013) 1 SCC 641

Section 45 of the Arbitration Act. RKM was allowed to reconstitute the boards of directors of three of the five companies (he had in late December 2012 held extraordinary general meetings to reconstitute the boards of SIPL and VMPL, but the CLB had ordered a *status quo* on those as well). The CLB appointed an independent Observer-cum-Facilitator on the Board of Directors of the Five Transauto Companies. I will examine the impugned order in some detail presently after completing the factual narrative.

IX. The present Appeals

33. Rakesh filed the first four of the present group of appeals. These were admitted on 6/7th February 203. The impugned order dated 31st January 2013 was stayed, and the previous *status quo* orders of the CLB were continued. A few days later, RKM filed four Company Appeals assailing the impugned order to the extent that it appointed an Observer-cum-Facilitator. Certain findings in Rakesh's favour in his Company Applications for reference to arbitration are also challenged. These appeals were also admitted. Even after these appeals were admitted, RKM sought information about the deployment of funds received by the Five Transauto Companies under the business transfer agreements. These disclosures, RKM contends, have either been refused or are incomplete. RKM then filed Company Applications seeking disclosure, on which certain orders were passed.

…continued/-

D. RKM'S COMPANY PETITIONS BEFORE THE CLB, MUMBAI IN SUMMARY

34. The 1st respondent in each of the CLB Mumbai Company Petitions is the corresponding Transauto company.

35. Company Petition No. 11 of 2012—the Transauto Petition: (*Rajinder Kumar Malhotra & Veena Malhotra v Transauto & Mechaids Pvt Ltd and Ors.*) The Petitioners are RKM and his wife, Mrs. Veena Malhotra. They sue as the holders of 100% of the shares of Transauto, the 1st Respondent. Mrs. Malhotra holds one share. RKM holds the rest. Respondents Nos.2, 3 and 4 are directors of Transauto; and Respondents Nos. 5, 6 and 7 are those authorised to operate Transauto's bank accounts. Respondent No.7 is Rakesh.

36. Company Petition No. 12 of 2012—the Unique Petition: (*Sapphire Properties Pvt Ltd v Unique Properties & Securities Pvt. Ltd. & Ors.*) The Petitioner, Sapphire Properties Pvt. Ltd. is held entirely by RKM (14,999 shares) and Rajiv (one share). Sapphire is one of only two shareholders of Unique. It holds one share in Unique. Transauto, joined as the 4th Respondent, owns the rest, some 99.9% of Unique's equity. Respondents Nos. 2 and 3 are Unique's directors, and Respondents Nos. 5 and 6 are those authorised to operate Unique's bank accounts.

37. Company Petition No. 13 of 2012—the Vidyut Petition: (*Rajinder Kumar Malhotra v Vidyut Metallics Pvt. Ltd. & Ors.*) Here the Petitioner is RKM, who holds 47.3% of VMPL's equity. Of the rest, 53% is held by Transauto and 0.01% by Rakesh (Respondents

Nos. 4 and 6). The other respondents are the directors and authorised signatories, as is Rakesh, of VMPL's bank accounts.

38. Company Petition No. 14 of 2012—the Supermax Petition: (*RSM Properties Pvt. Ltd. v SuperMax International Pvt. Ltd. & Ors.*) The Petitioner, RSM, is one of only two shareholders of SIPL. RSM itself is 100% owned by RKM and Rajiv (who hold 14,999 and one share respectively). The other shareholder of SIPL is Transauto, the 4th Respondent to this petition, with 99.9% of RSM's equity. Respondents Nos. 2 and 3 are directors. Respondents Nos. 5 to 9 are those with authority to operate the company's bank accounts; Rakesh is Respondent No. 6.

39. For completeness: the fifth petition (also numbered as Company Petition No.14 of 2012) before the CLB Chennai is the RCC petition. The Petitioners are RKM, Rajiv's wife Kunika and Rajiv, being three of the company's four members. The fourth shareholder is Transauto. It holds 91.96% of RCC's equity, while RKM, Kunika and Rajiv hold the rest. Rakesh is the 8th Respondent, joined as the one authorised to operate RCC's bank accounts, as are Respondents Nos. 7, 10 and 11. The other respondents are directors.

40. The petitions are broadly similar. They all allege oppression and mismanagement by their respective directors. They all contend that these directors act only on Rakesh's instructions and are under his influence. With some variations, all seek substantially these reliefs:

(a) For orders convening extraordinary general meetings to remove the current directors and appoint new directors in their place;

(b) For orders under Sections 397-402 of the Companies Act, 1956 to prevent ongoing mismanagement;

(c) For orders of disclosure, particularly of financial matters;

(d) For an order of compensation payable to the company in question; and

(e) For orders to set aside, terminate and modify all dealings with the company's assets after 18th March 2011.

41. Mr. Chinoy, learned Senior Counsel for RKM and his fellow petitioners, at once pointed out that this date of 18th March 2011 was an error. This was admitted before Walker J. in the UK proceedings.[3] Any order with effect from this date would undo the restructuring agreements and the corresponding transfers. The intention was to refer to the post-restructuring period, not to undermine the transfers under those restructuring agreements. Before the UK Court, RKM and Rajiv undertook to amend the necessary paragraphs of the petitions before the CLB so as to refer to such dealings effected "after the completion of the Restructuring Agreements", with the added clarification that those Restructuring

[3] Approved judgment of Walker J., Section F2.1

Agreements were not sought to be dislodged or impeached in any way.[4]

…continued/-

[4] Paragraph G1/128 of Walker, J's decision

E. THE IMPUGNED ORDER DATED 31ST JANUARY 2013; QUESTIONS FOR DETERMINATION BY CLB; ITS FINDINGS

42. After setting out in some detail the factual matrix, the CLB framed four points for determination:

> 1. Whether the applications [*by Rakesh*] are barred by the principles of *res-judicata* and estoppel as contended by the Petitioners [*RKM*]?
>
> 2. Whether the applications [*by Rakesh*] are not maintainable for the reasons pleaded in the reply(s)?
>
> **3. <u>Whether the nature of differences, disputes and the relief sought for are incapable of reference to arbitration?</u>**
>
> 4. Whether the interim order directing the parties to maintain *status quo* with regard to the composition of the Board of Directors of the Respondent No.1 Company, i.e., C.P. No.12, 13 and 14 [*Unique, VMPL and SIPL*] deserves to be vacated?

43. Before me, almost the entirety of the discussion has been on the third of these. Clearly, this goes to the root of the matter. For, if the disputes raised in RKM's Company Petitions are not referable to arbitration at all, then Rakesh's Company Applications were correctly dismissed, and the CLB must then proceed with the

Company Petitions on merits. The question of *res-judicata* speaks to the impermissibility of Rakesh seeking a reference to arbitration Walker J. having already held, on Rakesh's own application, that the disputes before the CLB fell outside the Arbitration Clause 43.2 of the SSD. Indeed, this is not an issue of *res-judicata* under Section 11 of the Code of Civil Procedure, 1908 so much as one under Section 13 of the Code. The issue arises only if it is held that the disputes raised and reliefs sought under sections 397, 398 and 402 of the Companies Act, 1956 are at all referable to arbitration in the first place. The "maintainability" question appears, at least from the CLB's order, to have been whether Rakesh's applications ought to be dismissed because the parties to the CLB petitions were not the same as those to the SSD/SD.

44. What did the CLB hold?

(a) On the first point, the CLB held itself not bound by the decision of a foreign court, and that it was free to take its own view. It decided the issue against RKM.

(b) The submissions on the second point, maintainability, centred on the commonality of parties. Specifically, that since the parties to RKM's Company Petitions were not parties to the SSD/SD, no reference to arbitration under section 45 of the Arbitration Act was maintainable. *Chloro Controls* was pressed into service. The CLB held that the applications were maintainable.

(c) On the third point, as to whether, having regard to the nature of disputes raised and reliefs sought, any

reference to arbitration could even be made, the CLB held that no such reference could be made.

(d) Fourth, it appointed an independent Observer-cum-Facilitator on the Board of Directors of the Five Transauto Companies. It also freed the Petitioners from the earlier *status quo* orders and allowed them to proceed with the reconstitution of the first respondent companies' boards.

…continued/-

F. THE QUESTIONS FOR DETERMINATION IN THESE APPEALS

45. The submissions and arguments on both sides on the four points framed for determination by the CLB are complex and intricately intertwined. Rakesh sought an injunction against RKM from proceeding with the Company Petitions before the CLB *inter alia* on the ground that there was an all-encompassing arbitration clause 43.2 in the SSD. Walker J. of the UK Commercial Court found against Rakesh, i.e., that the disputes in the company petitions before the CLB were not within the ambit of the arbitration clause. One question, therefore, that arises is how far that decision of Walker J. binds the CLB. The CLB concluded that it was not bound by Walker J.'s decision and was free to address the question independently. In doing so, it seems to have arrived at a conclusion antipodal to that of Walker J., namely, that the arbitration clause was wide enough to cover the disputes in the company petitions. It, however, also held that such disputes, even if covered by an arbitration clause were incapable of being referred to arbitration having regard to the nature of sections 397, 398 and 402 of the Companies Act, 1956. That, actually, becomes the primary question.

46. I should perhaps set the arguments in what appears to me to be their correct logical sequence:

(1) *One*, can disputes under sections 397 and 398 read with section 402 of the Companies Act, 1956, ever be referred to arbitration?

(2) *Two*, if they cannot, the result is simple: the CLB must proceed with the petitions that are now before it, and no question then any longer arise of any reference to arbitration of those disputes, or even whether the arbitration clause is wide enough to cover these disputes and whether Walker J.'s decision was binding on the CLB.

(3) *Three*, if, on the other hand, disputes under sections 397 and 398 read with section 402 of the Companies Act, 1956 are referable to arbitration, as Mr. Madon, learned Senior Counsel for Rakesh, suggests, then whether Walker J.'s decision concluded the question in such a way that the CLB could not even have considered it? and, consequently:

(a) If the CLB was bound by Walker J.'s decision, then the same result as in (2) above must follow, i.e., that the CLB must proceed with the Company Petitions before it;

(b) If the CLB was correct in holding that it was not bound by Walker J.'s decision, then whether it was correct in its finding that the disputes before

it in the Company Petitions were covered by the arbitration clause? This is the only situation in which the disputes could be referred to arbitration. In deciding this, the question of dissimilarity of parties would also need to be addressed.

47. For Mr. Madon to succeed in his Appeals, therefore, all three questions must be answered in his favour, viz.: (1) that disputes under Sections 397/398 read with Section 402 are arbitrable; (2) that the decision of Walker J., does not bind the CLB and that the CLB correctly held so; and (3) that the disputes in the Company Petitions before the CLB are covered by the arbitration clause in the SSD. Should he fail on even one of these, no reference to arbitration is possible.

…continued/-

G. SUBMISSIONS ON BEHALF OF RKM REGARDING ARBITRATION AND THE SCOPE OF SECTIONS 397-402 OF THE COMPANIES ACT, 1956

48. Given the nature of the controversy before me, and for greater clarity, it seems to me that the correct place to start is not with Mr. Madon's submissions, but those of Mr. Chinoy, learned Senior Counsel for RKM and the other Petitioners before the CLB. For, if he is correct in saying that the source and nature of the power under Section 402 of the Companies Act, 1956 is such that any dispute invoking it is inherently incapable of being referred to a private dispute resolution tribunal, then Rakesh's appeals must fail. This is, in substance, the finding of the CLB. Mr. Madon has assailed this finding as being entirely incorrect in law. But before I consider his submissions it is, I think, essential to understand precisely how Mr. Chinoy places his case.

49. At this stage, I must note that it is not Mr. Chinoy's case that the facts of this present case alone do not lend themselves to arbitrability. His canvas is far wider: the submission is that in *no* case that properly (i.e., not in a vexatious, mischievous or *mala fide* manner) invokes Sections 397, 398 and 402 of the Companies Act, 1956, whatever be the wording of the prayers or the petitions, can there ever be a reference to arbitration. There need not be an express ouster or a bar. The test must be in relation to the source of power, not how the relief is cast or split up; and, equally, it is not possible to refer some reliefs to an arbitral resolution while retaining others for a determination by the CLB.

50. First, the provisions of the statute. Sections 397, 398, 399 and 402 of the Companies Act, 1956 read:

> **Sec 397—Application to Company Law Board for relief in cases of oppression.**
>
> (1) Any members of a company who complain that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members (including any one or more of themselves) may apply to the Company Law Board for an order under this section, provided such members have a right so to apply in virtue of section 399.
>
> (2) If, on any application under sub-section (1), the Company Law Board is of opinion
>
> (a) that the company's affairs are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members; and
>
> (b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up;

the Company Law Board may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.

Sec 398—Application to Company Law Board for relief in cases of mismanagement.

(1) Any members of a company who complain

(a) that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company; or

(b) that a material change (not being a change brought about by, or in the interests of, any creditors including debenture holders, or any class of shareholders, of the company) has taken place in the management or control of the company, whether by an alteration in its Board of directors or manager, or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to public interest

or in a manner prejudicial to the interests of the company;

may apply to the Company Law Board for an order under this section, provided such members have a right so to apply in virtue of section 399.

(2) If, on any application under sub-section (1), the Company Law Board is of opinion that the affairs of the company are being conducted as aforesaid or that by reason of any material change as aforesaid in the management or control of the company, it is likely that the affairs of the company will be conducted as aforesaid, the Company Law Board may, with a view to bringing to an end or preventing the matters complained of or apprehended, make such order as it thinks fit.

Sec 399—Right to apply under sections 397 and 398.

(1) The following members of a company shall have the right to apply under section 397 or 398:

(a) in the case of a company having a share capital, not less than one hundred members of the company or not less than one-tenth of the total number of its members, whichever is less, or any member or members holding not less than one-tenth

of the issued share capital of the company, provided that the applicant or applicants have paid all calls and other sums due on their shares;

(b) in the case of a company not having a share capital, not less than one-fifth of the total number of its members.

(2) For the purposes of sub-section (1), where any share or shares are held by two or more persons jointly, they shall be counted only as one member.

(3) Where any members of a company are entitled to make an application in virtue of sub-section (1), any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them.

(4) The Central Government may, if in its opinion circumstances exist which make it just and equitable so to do, authorize any member or members of the company to apply to the Company Law Board under section 397 or 398, notwithstanding that the requirements of clause (a) or clause (b), as the case may be, of sub-section (1) are not fulfilled.

(5) The Central Government may, before authorizing any member or members as aforesaid, require such member or members to give security for such amount as the Central Government may deem reasonable,

for the payment of any costs which the Company Law Board dealing with the application may order such member or members to pay to any other person or persons who are parties to the application.

Sec 402—Powers of Company Law Board on application under section 397 or 398.

Without prejudice to the generality of the powers of the Company Law Board under section 397 or 398, any order under either section may provide for:

(a) the regulation of the conduct of the company's affairs in future;

(b) the purchase of the shares or interests of any members of the company by other members thereof or by the company;

(c) in the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital.

(d) the termination, setting aside or modification of any agreement, howsoever arrived at, between the company on the one hand, and any of the following persons, on the other, namely

(i) the managing director.

(ii) any other director,

(iii) * * *

(iv) ***

(v) the manager,

upon such terms and conditions as may, in the opinion of the Company Law Board, be just and equitable in all the circumstances of the case;

(e) the termination, setting aside or modification of any agreement between the company and any person not referred to in clause (d), provided that no such agreement shall be terminated, set aside or modified except after due notice to the party concerned and provided further that no such agreement shall be modified except after obtaining the consent of the party concerned;

(f) the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of the application under section 397 or 398, which would, if made or done by or against an individual, be

> deemed in his insolvency to be a fraudulent preference;
>
> (g) any other matter for which in the opinion of the Company Law Board it is just and equitable that provision should be made.

51. Two decisions form the core of Mr. Chinoy's construct. The first is that of the Supreme Court in *Haryana Telecom Ltd v Sterlite Industries (India) Ltd.*[5] This was a case under Section 8 of the Arbitration Act, and, at least for the present purposes, it matters little that it was not under Section 45 of that Act. Paragraphs 4 and 5 of that decision, in the SCC report, read thus:

> 4. Sub-section (1) of Section 8 provides that where the judicial authority before whom an action is brought in a matter, will refer the parties to arbitration the said matter in accordance with the arbitration agreement. **This, however, postulates, in our opinion, that what can be referred to the arbitrator is only that dispute or matter which the arbitrator is competent or empowered to decide**.
>
> 5. The claim in a petition for winding up is not for money. The petition filed under the Companies Act would be to the effect, in a matter like this, that the company has become commercially insolvent and, therefore, should be wound up. The power to order winding up of a company is

[5] (1999) 5 SCC 688

> contained under the Companies Act and is conferred on the court. **An arbitrator, notwithstanding any agreement between the parties would have no jurisdiction to order winding up of a company. The matter which is pending before the High Court in which the application was filed by the petitioner herein was relating to winding up of the company. That could obviously not be referred to the arbitration** and, therefore, the High Court, in our opinion was right in rejecting the application.
>
> (*Emphasis supplied*)

52. The same reasoning, Mr. Chinoy submits, must extend to every application under Sections 397, 398 and 402 of the Companies Act, 1956, and it matters not that *Haryana Telecom* arose from a winding up petition and not one alleging oppression and mismanagement. In particular, the powers of the CLB under Section 402 are very wide. They permit orders to be made against third parties and, subject to certain restrictions, in respect even of ancillary transactions. These powers are clearly beyond the remit of any arbitral panel. It is no answer, Mr. Chinoy contends, to say that in this particular case there is no such relief sought. The question is not of any particular relief or any particular party. It is whether the source of power permits any such reference to a private dispute resolution forum. In Company Petition No.11 of 2012 before the CLB, where Transauto is the 1st Respondent, for instance, RKM sought (a) orders calling an extraordinary general meeting of Transauto to consider the agenda item for removal for removal of the existing directors and for appointment of new directors; (b)

orders directing SIPL, Unique and RCC (Transauto's subsidiaries) to similarly call extraordinary general meetings to remove their respective existing directors and to appoint RKM's nominees as new directors; (c) orders and directions under sections 397, 398 and 402 of the Companies Act, 1956 to end acts of mismanagement; (d) orders of disclosure of payments made by Transauto to third parties, encumbrances created on Transauto's assets, guarantees issued by Transauto and liabilities incurred or undertaking by the Company with effect from March 2011; (e) an order of compensation to Transauto; (f) orders setting aside, terminating and modifying all agreements purportedly executed by the Company, payments made by the Company, transfers and other dealings with the Company's assets or properties for the period after the restructuring agreements were effected.[6] The interim reliefs sought were of a similarly wide nature. These were even more specific. They included *inter alia* prayers for orders of restraint in respect of the bank account with Punjab National Bank ("**PNB**"), although PNB was not a party to the petition. There is no possibility, Mr. Chinoy submits, of all of these reliefs being granted by the private arbitral tribunal. It is only the CLB that could ever grant these reliefs.

53. The second decision that is crucial to Mr. Chinoy's case is that of a Division Bench of this Court in *Bennett Coleman & Co. v Union of India & Ors.*[7] The Court in that case was concerned *inter alia* with the powers of the court when acting in proceedings

---

6 Not 18th March 2011, the date originally used in the petitions. As noted earlier, RKM and Rajiv undertook to amend the CLB petitions to reflect a correction of this error.

7 1977 (47) Comp Cas 92

instituted under section 397 and 398 read with Section 402 of the Companies Act, 1956.[8] In that case, the order under appeal had directed reconstitution of the Board of Directors. The Division Bench addressed the question of the ambit of the court's jurisdiction and amplitude of the orders under these sections. The submission before the Division Bench was that the court's powers under these sections must be ready as subject to other provisions of the Act dealing with normal corporate management. This submission was explicitly rejected as the court (in our case the CLB), the Division Bench held, has the power to supplant the entire corporate management or rather corporate mismanagement even by appointing an administrator or a special officer or a committee of advisors to take charge of the affairs of the company. The Division Bench specifically rejected the argument that the absence of a *non-obstante* clause in these sections was of any significance. The following extract is from the report in Company Cases. It is quoted at some length only because it is the second strut to Mr. Chinoy's case.[9]

> [*p. 113*] In our view, the submissions made by Mr. Sen on the point of legality or otherwise of the impugned orders **will have to be appreciated in the context of the principal question as to what are the powers of the court when it is acting in proceedings instituted under section 397 and 398 read with section 402 of the**

---

8 This was prior to the establishment of the Company Law Boards.

9 The Company Cases report does not have paragraph numbers or placita. I have, therefore, indicated page numbers where possible.

Companies Act. The questions whether a board of directors of the type indicted in the impugned order could be reconstituted by the court or not and whether the court had power to frame an article inconsistent with the provisions of section 255 of the Act or not **must in the ultimate analysis depend upon the true ambit of the powers of the court under section 397 or 398 read with section 402, for, if these sections confer upon the court jurisdiction and powers of the widest amplitude to pass appropriate orders which the circumstances of the case may require, it would be difficult to accept Mr. Sen's submissions** that the impugned orders and directions are liable to be set aside on the basis that the reconstituted board or modified article 95 was not in consonance with section 255 of the Act. To correctly appreciate the ambit of the court's jurisdiction and the amplitude of the court's powers under section 397 and 398 read with section 402 of the Companies Act, 1956, it will be necessary to consider the entire scheme of the Act pertaining to corporate management of companies. At the outset, it may be stated that all these concerned provisions occur in Part VI of the Act which deals with the management and administration of companies. It may further be pointed out that in this part there are eight chapters. Chapter I

contains general provisions with regard to corporate management and administration of the companies such as registered office, registers of members and debenture-holders, annual returns, meetings and proceedings, accounts, audit, investigation, etc.; Chapter II, which includes section 255, deals with directors, their qualification, dis-qualification and remuneration, meetings of the board, board's powers, procedure where directors are interested, etc.; Chapter III deals with managing agents, their appointment, remuneration, restrictions on their powers, etc.; Chapter IV deals with secretaries and treasurers; Chapter IV-A deals with powers of the Central Government to remove managerial personnel from office on the re-commendation of the Tribunal; Chapter V deals with arbitration, compromises, arrangements and reconstructions; **Chapter VI, which includes sections 397 to 409, deals with prevention of oppression and mismanagement;** Chapter VII deals with constitution and powers of advisory committee and Chapter VIII contains miscellaneous provisions. It will thus be seen that section 255 on which substantially the entire argument of Mr. Sen is based is to be found in Chapter II which deals with directors and the constitution of the board, through which agency the corporate management of the

affairs of a company is usually undertaken, while Chapter VI, which contains material provisions from sections 397 to 409, deals with matters pertaining to prevention of oppression and mismanagement arising out of corporate management. In other words, it is very clear that Chapter II which includes section 255 deals with corporate management of a company through directors in normal circumstances, while **Chapter VI deals with emergent situations or extraordinary circumstances where the normal corporate management has failed and has run into oppression or mismanagement and steps are required to be taken to prevent oppression and/or mismanagement in the conduct of the affairs of a company.** It is in view of this scheme which is very apparent on a fair reading of the arrangement of chapter and the sections contained in each chapter which are all grouped under Part VI of the Act that the question will have to be answered as to **whether the powers of the court under Chapter VI (which includes sections 397, 398 and 402) should be read as subject to the provisions contained in the other chapters which deal with normal corporate management of a company and, in our view, in the context of this scheme having regard to the object that is sought to be achieved by sections 397 and 398 read with section 402, the powers of the court**

thereunder cannot be so read. Further, an analysis of the sections contained in Chapter VI of Part VI of the Act will also indicate that the **powers of the court under section 397 or 398 read with section 402 cannot be read as being subject to the other provisions contained in sections dealing with usual corporate management of a company in normal circumstances. As stated earlier, Chapter VI deals with the prevention of oppression and mismanagement and the provisions therein have been divided under two heads - under head A powers have been conferred upon the court to deal with cases of oppression and mismanagement in a company falling under section 397 and 398 of the Act while under head B similar powers have been given to the Central Government to deal with cases of oppression and mismanagement in a company but it will be clear that some limitation have been placed on the Government's powers while there are no limitations or restrictions on the court's powers to pass orders that may be required for bringing to an end the oppression or mismanagement complained of and to prevent further oppression or mismanagement in future or to see that the affairs of the company are not being conducted in a manner prejudicial to public interest. In other words, whenever the legislature wanted to do so it has made a distinction between**

powers conferred on the Government (vide section 408) and powers conferred on the court (vide section 402) while dealing with similar emergent situations or extraordinary circumstances arising in the management of a company and in the case of the Government it has placed restrictions or limitations on the Government's powers but no restrictions or limitations of anything have been prescribed on the court's powers; if the legislature had desired that the court's powers while acting under section 397 or 398 read with section 402 should be exercised subject to or in consonance with the other provisions of the Act it would have said so. Moreover, the topics or subjects dealt with by sections 397 and 398 are such that it becomes impossible to read any such restriction or limitation on the powers of the court acting under section 402. Under section 397 read with section 402 power has been conferred on the court "to make such orders as it thinks fit" if it comes to the conclusion that the affairs of a company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members and that to wind up the company would unfairly prejudice such member or members but that otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be

wound up "with a view to bringing to an end the matters complained of". Similarly, under section 398 read with section 402 power has been conferred upon the court "to make such orders as it thinks fit" if it comes to the conclusion that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company or that a material change has taken place in the management or control of the company by reason of which it is likely that the affairs of the company will be conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company, "with a view to bringing to an end or preventing the matters complained of or apprehended". Both the wide nature of the power conferred on the court and the object or object sought to be achieved by the exercise of such power are clearly indicated in sections 397 and 398. Without prejudice to the generality of the powers conferred on the court under these sections, section 402 proceeds to indicate what type of orders the court could pass and clauses (a) to (g) are clearly illustrative and not exhaustive of the type of such orders. Clauses (a) and (g) indicate the widest amplitude of the court's power: under clause (a) the court's order may provide for the regulation of the conduct of the

company's affairs in future and under clause (g) the court's order may provide for any other matter for which in the opinion of the court it is just and equitable that provision should be made. An examination of the aforesaid section clearly brings out two aspects, first, the very wide nature of the power conferred on the court, and, secondly, the object that is sought to be achieved by the exercise of such power with the result that the only limitation that could be impliedly read on the exercise of the power would be that nexus must exist between the order that may be passed thereunder the object sought to be achieved by these sections and beyond this limitation which arises by necessary implication it is difficult to read any other restriction or limitation on the exercise of the court's power. We are, therefore, unable to accept Mr. Sen's contention that the court's powers under section 398 read with section 402 should be read as subject to the other provision of the Act dealing with normal corporate management or that the court's orders and directions issued thereunder must be in consonance with the other provisions of the Act.

[*p. 116*] There is another aspect of sections 397, 398 and 402 which also shows that no such limitation as is sought to be suggested by Mr. Sen can be

read on the court's power while acting under the sections. **Section 397 clearly suggests that the court must come to the conclusion that the company's affairs are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members of the company and that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up before any order could be passed by it. In other words, instead of destroying the corporate existence of a company the court has been enabled to continue its corporate existence by passing such orders as it thinks fit in order to achieve the objective of removing the oppression to any member or members of a company or to prevent the company's affairs from being conducted in a manner prejudicial to public interest. Similarly, sub-section (2) of section 398 clearly provides that where the court is of the opinion that the affairs of the company are being conducted in a manner suggested in sub-section (1), then, the court may, with a view to bringing to an end or preventing the matters complained of or apprehended, make such order as it thinks fit. In other words, sections 397 and 398 are intended to avoid winding up of the company if possible and keep it**

going while at the same time relieving the minority shareholders from acts of oppression and mismanagement or preventing its affairs being conducted in a manner prejudicial to public interest and if that be the objective the court must have power to interfere with the normal corporate management of the company. If under section 398 read with section 402 the court is required by its order to provide for the regulation of the conduct of the company's affairs in future because of oppression or mismanagement that has occurred during the course of normal corporate management, the court must have the power to supplant the entire corporate management, or rather corporate mismanagement by resorting to non-corporate management which may take the form of appointing an administrator or a special officer or a committee of advisers, etc., who could be in charge of the affairs of the company. If the court were to have no such power the very object of the section would be defeated. We must observe in fairness to Mr. Sen that it was not disputed by him that the powers of the court under section 398 read with section 402 of the Companies Act were wide enough to enable the court to appoint an administrator or a special officer or a committee of advisers for the future management of the company and thereby supplant completely the corporate

management through the board of directors and it was conceded that it should be so for the simple reason that if as a result of corporate management that has been allowed to run for a certain period oppression or mismanagement has resulted, the court should have power to substitute the entire corporate management by some form of non-corporate management and while doing so the court cannot obviously have any regard or be subject to the other provisions dealing with the corporate form of management. But what was urged by Mr. Sen was that if while acting under section 398 read with section 402 the court thought fit to have recourse to a mode of corporate type of management, for example, if the court felt proper to have a board of directors for future management, then such corporate mode of management to be provide by the court should conform to other provisions of the Act dealing with corporate management. It is not possible to accept this contention of Mr. Sen for two reasons. In the first place, if the court's power under these sections is wide enough to have the corporate management supplanted wholly or completely, it is difficult to understand why the court should not have power to make a partial inroad or encroachment and have a truncated form of corporate management if the exigencies of the case required it, and any truncated form of

corporate management can never conform to all the provisions dealing with corporate management. Secondly, it will all depend upon the facts and circumstances of each case as to how, in what manner and to what extent the court should allow the voice of the shareholders' directors on the board of directors to prevail over that of the other directors and we do not think that the court's powers in that behalf could in any manner be curbed. **In our view, therefore, the position is clear that while acting under section 398 read with section 402 of the Companies Act the court has ample jurisdiction and very wide powers to pass such orders and give such direction as it thinks fit to achieve the object and there would be no limitation or restriction on such power that the same should be exercised subject to the other provisions of the Act dealing with normal corporate management or that such orders and directions should be in consonance with such provisions of the Act.**

[*p. 118*] **Considerable emphasis was laid by Mr. Sen on the fact that there was absence of a non-obstante clause in any of the relevant sections, viz., section 397, 398 and 402. His contention was that whenever the legislature intended that any of the provisions of the Act should be overridden and the legislature has clearly expressed its intention by using**

appropriate language, namely, by user of a non-obstante clause and since there was no non-obstante clause in section 397 or section 398 read with section 402 of the Act, the court's powers thereunder could not override the other provisions of the Act but would be subject to such provisions. In the first place, like a deeming provision which is sometimes made with a view to make explicit what is obvious, a non-obstante clause is also used at times *ex abundanti cautela* to make explicit what is obvious and, therefore, the absence of that clause would not necessarily lead to an inference suggested by Mr. Sen. Secondly, normally, such non-obstante clause becomes necessary when the enacted provisions or enacted clause is necessarily going in conflict with the other provisions of the Act and if there would be no such conflict, then there would be no necessity to use a non-obstante clause and well shall indicate presently that there is no necessary conflict between the provisions of section 397 and section 398 read with section 402 and the provisions of section 255 of the Act and, therefore, the non-obstante clause must not have been used while enacting the relevant sections. By the very nature the provisions contained in sections 397 and 398 read with section 402 have been enacted to meet emergent situations and extraordinary

circumstances while section 255 contains provisions which would operate when the normal corporate management of a company is being run. Normally, the two sets of circumstances in which the two sets of provisions would operate be mutually exclusive. Therefore, there is no question of a conflict necessarily arising between these two provisions and this, in our view, sufficiently explains the absence of a non-obstante clause in sections 397, 398 and 402 of the Act. It is true that while conferring powers on the Central Government to prevent oppression or mismanagement under section 408 a non-obstante clause has been used. But, indisputably, there is substantial difference between the powers conferred upon the court under section 397 or 398 read with section 402 and the powers conferred upon the Central Government under section 408, inasmuch as on the powers of the court no restrictions or limitations of any kind have been put while restrictions and limitations have been placed on the Government's power to grant relief in cases of oppression and mismanagement. Even the manner in which, the extent to which and the period for which relief could be granted by the Government has been indicated and on account of this the provisions of section 408 would necessarily come in conflict with the other provisions of the Act dealing with corporate management

including section 255 and, therefore, a non-obstante clause was used at the commencement of section 408. We are, therefore, inclined to take the view that the absence of a non-obstante clause in sections 397, 398 and 402 does not lead to the inference suggested by Mr. Sen. Moreover, as we have already indicated, there is neither a non-obstante clause contained in any of these sections nor is there language to indicate that the court's powers under these sections are to be exercised subject to any of the other provisions of the Act. In such a situation the ambit of the court's powers must be determined by the scheme of Part VI in which all the concerned sections appear, the language employed in these relevant sections and the object sought to be achieved by them and in this context it would be useful to refer to the rule of construction enunciated in *Maxwell on the Interpretation of Statutes*, 12th edition, page 45, to which our attention was invited by Mr. Phadke. The relevant rule of construction has been stated thus:

> "If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and

> should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result."

The above passage is based on the judgment of Viscount Simon L.C. in the case of *Nokes v. Doncaster Amalgamated Collieries Ltd.* [1940] AC 1014 and, in our view, the rule could be applied to the instant case. Having regard to the admitted position that there is neither a non-obstante clause contained in any of these relevant sections nor is there anything to indicate that the court's powers under these sections are to be exercised subject to any of the other provisions of the Act, there is a choice available to the court and having regard to the manifest purpose of the legislation, **it will be difficult to accept the contention of Mr. Sen that the narrower construction of these sections leading to curtailment of powers conferred upon the court should be adopted simply because the provisions do not contain any non-obstante clause; instead we are inclined to adopt a broader construction, inasmuch as such construction would have the effect of achieving the desired result**.

...

[*p. 121*] Having regard to the above discussion, we are clearly of the view that the court had jurisdiction to reconstitute the board in the manner done in this case and such board is not violative of section 255 of the Companies Act and we are also of the further view that the learned judge had ample powers to alter the original article 95 of respondent No. 1-company in the manner done by him while acting under section 398 read with section 402 of the Act.

...

[*p. 123*] In the context of the above question Mr. Phadke invited out attention to three decisions having a bearing on the court's powers under section 402 of the Act, namely, *Rajahmundry Electric Supply Corporation Ltd. v Nageswara Rao* [1956] 26 Comp Cas 91 (SC), *Shanti Prasad Jain v. Kalinga Tubes Ltd.* AIR 1962 Ori 202 and *Richardson & Cruddas Ltd. v Haridas Mundra* [1959] 29 Comp Cas 549 (Cal). In the first two cases the question had arisen about the nature and scope of the court's power under section 397 read with section 402 (equivalent to section 153C of the old Act) while in the last case a question had arisen about the court's power under section 398 read with section 402. It will suffice if we refer to the last decision of the Calcutta High Court. In that case the question was

whether the court had power to appoint an advisory board to assist the special officer who had been appointed by an earlier order under section 402 in a proceeding instituted under section 398 of the Companies Act and while dealing with the nature and scope of the powers conferred upon the court under section 402, Justice Mukharji, at page 550 of his judgment, has observed as follows:

> "Now the powers of the court under section 402 of the Companies Act are wide. In fact, the court may make any order for the regulation of the conduct of the company's affairs upon such terms and conditions as may, in the opinion of the court, be just and equitable in all the circumstances of the case. Constitution of an advisory board by orders of court in a proper case of company management is, therefore, in my view within the competence of the court under section 402 of the Companies Act, 1956."

Further at page 550, the learned judge has observed as follows:

> **"Since the appointment of the special officer attempts are being made by him to put the**

company's administration on a sound basis. The corporation now makes the application to have a board of advisers to assist the special officer of this court in regulating and managing the company's affairs and its business. The pattern of the court's power of managing under section 402 has to be worked out. The section is an innovation in company administration by the court."

We are in agreement with Justice Mukharji's view that section 402 is an innovation in company administration by the court and the pattern of the court's powers of managing thereunder has to be worked out but there is no doubt having regard to the scheme a Part VI in which all the sections staining to management and administration of the company's affairs occur, the language employed in sections 397, 398 and 402 and the object sought to be achieved by these sections, the court's powers to regulate the conduct of the company's affairs in future, must of necessity be of the widest amplitude and on a rue construction of section 398 read with

> **section 402, we are clearly of the view that no limitation of the type suggested by Mr. Sen on the court's power could be placed and the same are not subject to section 255 or the other provisions of the Act dealing with normal corporate management. The court had ample powers to reconstitute the board in the manner done and to reframe article 95 in the manner done and neither the reconstituted board nor the reframed article 95 are violative of section 255 or section 408 of the Act. The orders passed and directions given by the learned judge cannot be said to be either illegal or without jurisdiction. The contention with regard to illegality of the impugned orders and directions, therefore, must fail.**
>
> (*Emphasis supplied*)

54. *Bennet Coleman* is not, Mr. Chinoy readily accepts, an authority for the proposition that no proceeding under Sections 397-402 of the Companies Act, 1956 can ever be referred to arbitration. He cites it only to show the nature, ambit, extent and source of power invoked under those sections. What *Bennet Coleman* holds is, therefore, that the CLB is not trammelled in what it can and cannot do while exercising its powers under these sections. A private arbitral tribunal on the other hand is no such plenipotentiary; it enjoys no such plenary authority. It certainly cannot exercise any of the powers under section 402 of the Companies Act, 1956. The contrary view, Mr. Chinoy submits, would result in an anomalous

situation. It would amount to saying that merely because there exists an arbitration clause, therefore, the CLB's powers under Sections 397-402 of the Companies Act, 1956 are somehow restricted or fettered, and that the CLB is bound to stay further proceedings before it or even perhaps to divest itself entirely of those proceedings and send the parties to a private dispute resolution forum.

55. This, Mr. Chinoy submits, is inconceivable and has been so held by a learned Single Judge of this Court in *Manavendra Chitnis & Anr. v Leela Chitnis Studios P. Ltd. & Ors.*[10] The decision of the learned Single Judge in *Leela Chitnis Studios* specifically noticed the Division Bench decision in *Bennet Coleman*. The ambit and purpose of sections 397 and 398 read with section 402 was to protect minority share-holders from the acts of oppression and mismanagement, to prevent the affairs of a company being conducted in a manner prejudicial to the interest of the public, while at the same time attempting to avoid winding up of a company to the extent possible. Under Section 402(a), the CLB could even regulate the future conduct of the company's affairs. Section 402(g) empowers the CLB to provide for any other matter which it thinks just and equitable to do. In the achievement of these objects, the CLB can supplant the ordinary corporate management of the company. Thus, these matters that fall within the purview of Sections 397-402 cannot possibly be left to an arbitral panel.

---

10 1985 (58) Comp Cas 113

56. *Leela Chitnis Studios* itself relied upon a decision of a learned Single Judge of the Delhi High Court in *Surendra Kumar Dhawan & Anr. v R. Vir & Ors.*[11] Mr. Chinoy also relies on the decision of *Surendra Kumar Dhawan* for its observation that the jurisdiction of the CLB under sections 397 and 398 is a statutory jurisdiction that cannot be ousted by arbitration clause. Therefore, Mr. Chinoy submits that the fact that a party can also seek reliefs in arbitration or in a civil suit is entirely irrelevant. The question is not, he says, of the ouster of the jurisdiction of a civil court. It is of the ouster of an arbitral power; and to test whether arbitral power does or does not exist, one must look at the source of that power. If an arbitrator cannot pass an order under section 402 of the Companies Act, 1956, then the matter must remain with the CLB. The reliefs sought cannot be carved up or parsed. They cannot be reshaped, reformed, broken down or reassembled into something that was never intended. No amount of sleek drafting can allow a matter squarely within the frame of sections 397, 398 and 402 to migrate to a private arbitral forum.

57. The decision of the learned Single Judge of the Delhi High Court in *O.P. Gupta v Shiv General Finance (P.) Ltd. & Ors.*[12] followed the previous decision in *Surendra Kumar Dhawan*, explicitly citing it. Not only did the learned Single Judge in terms held that the provisions of sections 397 and 398 are entirely beyond the purview of an arbitration, but he also said that where a party seeks protection against oppression and mismanagement by the

---

11 [1977] 47 Comp Cas 276 (Delhi)

12 [1977] 47 Comp Cas 279 (Delhi)

majority, it is useless to direct that the matter be referred to an arbitrator. For, such an arbitrator could not possibly exercise any power or pass any order under sections 402 or 403 of the Companies Act, 1956.

58. In the same vein, Mr. Chinoy also refers to the decision of another learned Single Judge of the Madras High Court in *Das Lagerway Wind Turbines Ltd. v Cynosure Investments P. Ltd.*[13] This decision relied on the Supreme Court decision in *Haryana Telecom* as also another decision of another learned Single Judge of the Madras High Court (referenced below) to hold that that certain reliefs can be granted only by the CLB when provisions of sections 397, 398 and 402 of the Companies Act, 1956, are invoked and that this cannot be referred to arbitration.

59. Then there is a decision of another learned Single Judge of the Madras High court in *Sporting Pastime India Ltd. & Anr. v Kasthuri & Sons Ltd.*[14] The facts in *Sporting Pastime* were that the Respondent-Company was a wholly owned subsidiary of the Petitioner. The Company had a single purpose: to establish, maintain and conduct a golf course and beach resort. It could not achieve this principal objective. The Petitioner entered into an agreement with the 2nd Respondent for a takeover of the company. The 2nd Respondent acquired a 90% stake in the company for a lump sum consideration of Rs. 2.43 crores. It agreed to discharge the debts and liabilities of the company to the Petitioner and others.

---

13 [2009] 147 Comp Cas 149 (Mad)

14 [2008] 141 Comp Cas 111 (Mad)

After the 2nd Respondent acquired these shares, the Petitioner's nominees resigned as directors and other Respondents, all nominees of the 2nd Respondent, were inducted onto the board. The Petitioner complained in his company petition that ever since the takeover, and under the concluded agreement, these individual Respondents had committed acts of oppression and mismanagement in the affairs of the company. The Petitioner, therefore, invoked the jurisdiction of CLB under sections 397 and 398 of the Act. The reliefs sought included for orders superseding the board of directors, declaring as void an increase in share capital, cancelling a share allotment, declaring certain resolutions at a meeting as void, for rectification of the register, and for appointment of a commissioner. One of the contentions raised before the learned Single Judge was that the petition before the CLB was brought on the basis of an agreement that contained an arbitration clause. In support of this contention, reliance was placed on the decision of the Supreme Court in *Hindustan Petroleum Corporation Ltd. v Pinkcity Midway Petroleums*[15] to suggest that an arbitration clause made it obligatory for a court to refer parties to arbitration and that since in the *Sporting Pastime* case there was such an arbitration clause, the CLB was bound to refer the parties to arbitration. This submission was opposed *inter alia* by relying on the decision of the Supreme Court in *Haryana Telecom*. The learned Single Judge held that the reliefs claimed in the company petition were incapable of being granted by an arbitrator and that the statutory jurisdiction of the CLB could not be ousted by consent of the parties. The scope of sections 397 and 398 of the Companies Act, 1956 is distinct and the

15 AIR 2003 SC 2881

CLB's jurisdiction to deal with these disputes cannot be ousted by arbitration clause. The learned Single Judge upheld the CLB's rejection of the company applications seeking a reference of the disputes to arbitration. The appeals under section 10F of the Companies Act, 1956 were dismissed.

60. A contrary decision, also placed by Mr. Chinoy, is that of a learned Single Judge of the Delhi High Court in *Vijay Sekhri & Ors. v Union of India & Ors.*[16] This refers to the decision of the Supreme Court in *Everest Holding Ltd. v Shyam Kumar Shrivastava & Ors.*[17] to suggest that the decision in *Haryana Telecom* notwithstanding, an arbitrator can always find out and adjudicate whether or not the company is functional. In so holding, the learned Single Judge of the Delhi High Court followed the Supreme Court decision in *Everest Holding*. Now *Everest Holding* was not a case under section 8 or section 45 at all. It was decided under section 11. No issue arose under sections 397 or 398 of the Companies Act, 1956. It is difficult to see, Mr. Chinoy submits, how either of these decisions is in any way an answer to his proposition. The decision of the learned Single Judge in *Vijay Sekhri* is at best a casual comment and *Everest Holding* is not a decision under sections 397, 398 or even sections 433 or 434 of the Companies Act, 1956.

61. Mr. Chinoy does not seek to dislodge even in the slightest, as indeed he cannot, the rule in *Foss v Harbottle*[18] and its exceptions: in any action in which a wrong is alleged to have been done to a

16 [2011] 163 Comp Cas 195 (Delhi)

17 (2008) 16 SCC 774

18 (1843) 67 ER 189

company, the proper claimant is the company itself. Because *Foss v Harbottle* leaves the minority in an unprotected position, several important exceptions have been developed, and these are often said to be "exceptions to the rule in *Foss v Harbottle*". Amongst these is the 'derivative action', which allows a minority shareholder to bring a claim on behalf of the company. This applies in situations of 'wrongdoer control'. This is actually the only true exception to the rule in *Foss v Harbottle*, a rule that, on its own, leaves minority shareholders unprotected. Their remedies now have statutory voice, in the provision of special forums with special powers for minority protection. These statutory remedies also allow for reliefs against mismanagement. Sections 397-403 are among those.

62. What Mr. Chinoy does suggest is that the source and nature of the adjudicatory power are such that disputes under these sections of the Companies Act, 1956 are not referable to arbitration. A civil suit is always maintainable as a derivative action following the exceptions to the rule in *Foss vs Harbottle*. This is completely distinct from what CLB can do under sections 397, 398, 402 and other allied sections. A "matter" under Sections 8 or 45 of the Arbitration Act must necessarily be one that can be referred to arbitration in the first place. For example, a "matter" under sections 433 and 434 read with Section 443 of the Companies Act, 1956 cannot be referred to arbitration. Similarly in a petition complaining of oppression and mismanagement, the "matter" is the one under sections 397 and 398. This, he submits, is what *Haryana Telecom* holds albeit in the context of a winding up petition. *Bennett Coleman* is a decision cited only to describe the nature of the power and to show that these sections dealing with oppression and mismanagement are not

circumscribed by other provisions of the Companies Act, 1956. Section 402 must be read with sections 400 and 404 to 407. Section 406 makes applicable sections 539 to 544 which deal with offences antecedent to or in the course of winding up. These are very wide powers, and they are not only or always civil matters. The nature of the power under section 402 thus inherently means that such a "matter" cannot possibly be the subject of an arbitration agreement. It is not a question of what a party might or could have done or whether he could have filed a regular civil suit for some or part of the reliefs being sought in an oppression and mismanagement action under sections 397 and 398. The CLB, when dealing with such a petition, cannot tell a party that it should have filed suit instead, just as a petitioner in a winding up petition cannot be told absent a *bona fide* defence or disputed questions of fact, that he should *simpliciter* have filed a civil suit. Orders under section 402, as that section makes clear, are not therefore purely *in personam*. They can cover third parties. Parts of the reliefs may be *in rem* and there is intrinsic evidence to show this, as for example the requirements of Section 400 that require notice to be given to the Central Government. Therefore, the nature of the reliefs sought and powers invoked necessarily exclude arbitrability.

…continued/-

H. SUBMISSIONS ON BEHALF OF RAKESH REGARDING THE QUESTION OF REFERENCE TO ARBITRATION AND SECTIONS 397-402 OF THE COMPANIES ACT, 1956

63. Mr. Madon's response to this is that there is no apparent reason why there should be any such blanket embargo on reference to arbitration. After all, he submits, it is the nature of the relief sought that is determinative, unlike in the case of special statute (a declaration of tenancy or a probate action). The reliefs sought by RKM are, *ex-facie*, all arbitrable. If disputes are covered by the arbitration agreement, some reason must be shown for its ouster, and there is no complete ban. Once it is found, as the Company Law Board has done, that disputes are covered by the arbitration agreement, a reference must be made. Sections 8 and 45 do not confer discretion in the matter of a reference to arbitration.

64. It is, he submits, well settled that sections 397 and 398 do not oust the jurisdiction of a civil court. Therefore, it follows that once a party can go to a civil court with a dispute, that dispute can always be referred to arbitration; and where there is an arbitration clause it must be referred to arbitration. The only exception is if there is an express bar to the jurisdiction of the civil court and, therefore, of the arbitral panel. It is much too broad, therefore, he submits, to suggest that *no* dispute under sections 397, 398 and 402 can *ever* be referred to arbitration. Under Section 9 of the Code of Civil Procedure, 1908 ("**CPC**"), every court has jurisdiction unless barred. It is not

possible to dress up a petition to get up of the arbitration clause.[19] The court has a duty to hold the parties to the bargain they struck, including the arbitration clause. The CLB's jurisdiction is not in fact conferred by section 402 at all. It is conferred by sections 397 and 398. The fundamental mistake in Mr. Chinoy's approach, Mr. Madon submits, is in referring to the power or to the source of power. That is not relevant; what is of relevance is the *dispute*, for this is what is referred to arbitration. What an arbitrator can do in law with that dispute before him is another matter altogether. He may not in a given case be able to grant the same reliefs as the CLB might or to arrive at a resolution in the same manner or to the same extent as the CLB. This is wholly irrelevant. As long as the dispute is referable to arbitration, that reference must be made. This is the mandate of section 45 of the Arbitration Act. For, Mr. Madon submits, section 45 of the Arbitration Act makes no reference to relief or power but only to the dispute.

65. Mr. Madon submits that the Company Law Board while deciding this issue only considered the decision of the Supreme Court in *M.S.D.C. Radharamanan v M.S.D. Chandrasekarana Raja & Anr.*[20] This decision, Mr. Madon submits, does not address the issue before the CLB at all. All it says is that the CLB is not powerless to pass appropriate orders even if the allegations of oppression are untrue, but where not exercising jurisdiction would result in chaos or mismanagement. This decision, Mr. Madon submits, is no authority for the proposition that Mr. Chinoy canvasses, namely,

---

19 *Chloro Controls*, *supra*.

20 (2008) 6 SCC 750

that no action under Sections 397, 398 of the Companies Act, 1956 read with Section 402 can ever be referred to arbitration.

66. In contrast, Mr. Madon submits, the decision of the Supreme Court in *Hindustan Petroleum Corpn. Ltd. vs. Pinkcity Midway Petroleums*[21] is more appropriate. Considering a question under Section 8 of the Arbitration Act, the Supreme Court in terms held that where an arbitration clause exists, as it does in the present case, the Court has a mandatory duty to refer the disputes between the contracting parties to an arbitrator. This is not optional. In such a case, once an application under Section 8 has been filed, the civil court has no jurisdiction to continue with the suit. The position is no different under Section 45 of the Arbitration Act. Now if the jurisdiction of a civil court to continue with a suit is occluded by the mere existence of an arbitration agreement, and on an application under Section 8 or Section 45 been filed that dispute must be referred to arbitration, then, equally, the same consideration must apply to a proceeding before the CLB under Sections 397 and 398 of the Companies Act, 1956. The reason, according to Mr. Madon, suggests itself: if Sections 397 and 398 do not oust the jurisdiction of a civil court, and an arbitration agreement, following *Pinkcity*, has the effect of eclipsing a jurisdiction of a civil court, the CLB cannot be said to stand on any higher pedestal. This is an unacceptable incongruity. Consequently, only two things are required to be shown: first, that there exists an arbitration agreement, and second, that the disputes are covered by that arbitration agreement. Once this is done, the plain language of Sections 8 and 45 of the

---

21 (2003) 6 SCC 503

Arbitration Act requires that the disputes be referred to arbitration. This is the legislative intent of the Arbitration Act and cannot be allowed to be defeated by clever drafting or even by resort to an abstract theory, that is, for all intents and purposes, an untenable plea for the ouster of jurisdiction of a civil court.

67. A civil court's jurisdictional exclusion is not to be readily inferred unless certain conditions apply. This has been decided by a five judge bench of the Supreme Court in *Dhulabhai & Ors. v The State of Madhya Pradesh & Anr.*[22] The Supreme Court in terms held that a civil court's jurisdiction is excluded where a statute gives finality to the orders of a special tribunal of competing jurisdiction, if there is an adequate remedy to do what civil court would normally do in a suit. This does not exclude that class of cases where the provisions of a given statute are not complied with or where a statutory tribunal has acted otherwise than in accordance with the fundamental principles of judicial procedure. However, where there is an express bar to a court's jurisdiction, an examination of the statutory scheme to determine the remedial statutory sufficiency is relevant but not determinative in sustaining the jurisdiction of a civil court. It is only where there is no express exclusion that such an examination is ever necessary. Now, the issue of the jurisdictional rivalry between Sections 397-402 of the Companies Act, 1956 *vis-à-vis* a civil court's jurisdiction is concluded. Precisely this question — whether Sections 397 and 398 of the Companies Act excluded the jurisdiction of a civil court — was considered and decided by a Division Bench of this Court in *CDS Financial Services (Mauritius)*

---

22 AIR 1969 SC 78

Limited v BPL Communications Ltd. & Ors.[23] In that case, the Division Bench held, after considering various authorities, that Sections 397 and 398 and their allied sections do not confer exclusive jurisdiction on the Company Court (now the CLB) to grant reliefs against oppression and mismanagement. Suits by minority share holders against oppression and mismanagement have been time-honoured exceptions to the rule in *Foss v Harbottle*. Absent words of express or implicit jurisdictional ouster, Sections 397-398 and 402-408 of the Companies Act, 1956, do not exclude the jurisdiction of the civil court. Therefore, there is no legal or logical basis, Mr. Madon submits, for Mr. Chinoy's overbroad proposition.

68. Mr. Madon then turns to the decision of a learned Single Judge of the Kerala High Court in *Marikar (Motors) & Anr. v M.I. Ravikumar & Ors.*[24] in support of the proposition that the Companies Act is not a complete code so as to oust the ordinary jurisdiction of a civil Court. In this decision too, it was held that suits by minority shareholders against oppression and mismanagement are a well-known exception to the *Foss v Harbottle* rule and that Sections 397 and 398 do not exclude the jurisdiction of civil courts. This was also the view of a learned Single Judge of the Calcutta High Court in *Pradip Kumar Sarkar & Ors. v Luxmi Tea Co. Ltd. & Ors.*[25]

---

23 [2004] 121 Comp Cas 374 (Bom)

24 [1982] 52 Comp Cas 362 (Ker)

25 [1990] 67 Comp Cas 491 (Cal.); the appeal was dismissed by the Supreme Court in *Luxmi Tea Co. Ltd. v Pradip Kumar Sarkar*, [1990] 67 Comp Cas 518 (SC)

69. Mr. Madon's argument is that it is not the Companies Act but the Arbitration Act that is a complete code. The grant of relief in an application under Section 8 or 45 of the Arbitration Act is not an order that is appealable under Section 37 or 50 of the Arbitration Act respectively. In support of this proposition, Mr. Madon relies on the decision of the Supreme Court in *Fuerst Day Lawson Ltd. v Jindal Exports Ltd.*[26] The question before the Supreme Court in that case was whether the appellate jurisdiction of the High Court under its Letters Patent was expressly or impliedly excluded in view of the provisions of the Arbitration Act. The Supreme Court held that like its predecessor, the 1940 Act, the 1996 Act, too, is a complete and exhaustive self-contained code. It carries with it "a negative import" that only those acts mentioned in the Act are permissible; acts or things not mentioned therein are impermissible. In other words, a Letters Patent appeal is excluded by the provisions of the 1996 Act.

70. The statutory imperative is, in Mr. Madon's submission, that full effect must necessarily be given to binding arbitration agreements. The Supreme Court's decision in *World Sport Group (Mauritius) Ltd v MSM Satellite (Singapore) Pte. Ltd.*[27] *inter alia* held that all civil courts must follow the legislative mandate of Sections 44 and 45 of the Arbitration Act. It is only if the agreement is null and void, inoperative or incapable of any performance that a court will not refer the parties to arbitration. This is the only situation in

---

26 (2011) 8 SCC 333

27 AIR 2014 SC 968; JT 2014 (2) SC 444. Mr. Madon also cited *Sumitomo Corporation v CDC Financial Services (Mauritius) Ltd. & Ors.*, (2008) 4 SCC 91 in support of the proposition that, unlike appeals, where jurisdiction must be expressly conferred, the jurisdiction of a civil court is not excluded unless there is a specific bar.

which a reference to arbitration can be declined. In the present case, nobody suggests that the arbitration agreement is null and void or is not in effect.

71. Mr. Madon then relies on a very recent decision of the Supreme Court in *Swiss Timing Limited vs. Organising Committee, Commonwealth Games 2010, Delhi.*[28] This was an order on a petition under Section 11(4) read with Section 11(6) of the Arbitration Act. Before the Supreme Court, reliance was placed on a decision of the Supreme Court in *N. Radhakrishnan vs. Maestro Engineers & Ors.*[29] The ratio of *Maestro Engineers* to the effect that where there are serious allegations of fraud etc., the disputes cannot be referred to arbitration was not only doubted but held to be *per incuriam* in *Swiss Timings*. Nijjar, J. held that in *Maestro Engineers*, the Supreme Court's earlier decision in *Pinkcity*, though referred, was neither distinguished nor followed. Another decision in *P. Anand Gajapathi Raju & Ors. v P.V.G. Raju*[30] was not even noticed. The decision in *Maestro Engineers* was thus held not be good law. The Supreme Court held that the legislative mandate and policy is one of least interference in arbitration proceedings. The duty of the court is to facilitate the arbitration process. Indeed, even the question of whether the main contract is void or voidable can be referred to arbitration. To shut out arbitration at the initial stage is to destroy the very purpose for which the parties agreed to an arbitral dispute resolution process. This cannot be permitted, said the Supreme Court.

---

28 (2014) 6 SCC 677

29 (2010) 1 SCC 72

30 (2000) 4 SCC 539

72. If this is so, Mr. Madon submits, and since an order under Section 11 of the Arbitration Act is a judicial pronouncement,[31] then there is no question that the entire weight of precedent is that an arbitration agreement must be honoured and, secondly, that since there is no ouster of a civil court's jurisdiction, even a dispute under Sections 397 and 298 can always be referred to arbitration. To test this, Mr. Madon suggests, we might consider a case where instead of moving under Sections 397 and 398 a party chooses to come to a civil court (following the various decisions cited). Such a civil suit too would be an action seeking remedies against oppression and mismanagement. That civil suit, of necessity, would not only be referable to arbitration but would *have* to be referred to arbitration, *cadit quaestio*; the Supreme Court having said there is no choice in the matter. This issue is no longer *res integra*, having been now concluded, most recently by *Swiss Timing*. It is, Mr. Madon submits, therefore wholly illogical to say that an action seeking an alternate remedy under Sections 397 and 398 by the same party under the same agreement cannot or should not be referred to arbitration, although, had that very party come to a civil court, the reference to arbitration was inevitable.

73. The authorities cited by Mr. Chinoy do not, Mr. Madon submits, establish his proposition at all. The reliance on *Haryana Telecom* is, Mr. Madon submits, wholly misdirected. That was a decision in a winding up proceeding. That is a proceeding *in rem* not a proceeding *in personam*. This means that even if a petitioning creditor in a winding up petition seeks to withdraw, any other

---

31 *SBP & Co. v Patel Engineering Ltd. & Anr.*, (2005) 8 SCC 618

creditor can stepped in and take his place. This is not possible in a proceeding under Sections 397 and 398. *Bennett Coleman* does not actually deal with the question at all. It only sets out what the CLB's powers are under Section 402. It does not address the question of jurisdiction. The decision of the learned Single Judge in *Leela Chitnis Studios* does not contain a reason. It only records a submission, perhaps prescient, of Mr. J.J. Bhatt, appearing in that case. The decisions of the learned Single Judge of the Delhi High Court in *Surendra Kumar Dhawan* and *Shiv General Finance* are, respectively, incorrect and no longer good law. The first states as a proposition that the CLB's jurisdiction under Sections 397 and 298 is statutory and, for that reason, cannot be ousted. Mr. Madon's submission is that the jurisdiction of a Civil Court is equally statutory and, therefore, by this reasoning even a civil suit should not be referable to arbitration. As regards *Shiv General Finance*, his submission is that it is no longer good law since it is a decision pre-dates the 1996 Arbitration Act, the provisions of which, it is now settled, are mandatory. The decision in *Das Lagerway* is confined, Mr. Madon says, to the facts of that case because the petitioner in that case could not satisfy even one of the three standard conditions under Section 8 of the Arbitration Act. Similarly, the decision in *Sporting Pastime* displays an incorrect approach. The Court held that if a tribunal has jurisdiction is necessarily excludes the jurisdiction of other Courts. This is clearly incorrect in view of the decision in *CDS Financial Services* and other judgments. The decisions in *Vijay Sekhri* and *Everest Holdings* both support Mr. Madon's proposition and not that of Mr. Chinoy. The key to this, Mr. Madon submits, is that a reference to arbitration must be of a dispute. How that dispute

is resolved is another matter. There is only a very narrow class of cases in which such reference cannot be made.

…continued/-

I. ARE DISPUTES UNDER SECTIONS 397/398 AND 402 OF THE COMPANIES ACT, 1956 ARBITRABLE?

74. The arguments of both sides are equally compelling. It is hard to find fault with Mr. Madon's formulation that parties must be held to their contractual bargain. Where they have agreed to refer their disputes to arbitration and have an arbitration clause, they must be held to the bargain they made. That is the plain language of the Arbitration Act. It is the legislative intent of that Act. It is, in no uncertain terms, the ratio of various Supreme Court decisions, most recently that of the Nijjar, J in *Swiss Timing*.

75. I do believe however, that Mr. Madon and Mr. Chinoy are somewhat at cross-purposes. I did not understand Mr. Chinoy's submission to mean that Sections 397, 398 and 402 operated to exclude or oust the jurisdiction of a civil court at all. To the contrary: I understood him to say that a regular civil suit by a minority shareholder, one which is, as at least two Courts have said, among the "time-honoured exceptions to the rule in *Foss v Harbottle*", is *always* maintainable. In such a suit too, reliefs can be sought on a cause of action of oppression and mismanagement. *CDS Financial Services* makes it clear that it is no defence at all in such a suit to say that the Plaintiff should have gone to the CLB in a company petition under Sections 397 and 398. Mr. Chinoy's submission is directed rather at the nature and source of the power and the reliefs sought from the CLB in an oppression and mismanagement petition under Sections 397, 398 and their cognate sections of the Companies Act, 1956. Although a civil court can entertain an action in oppression and mismanagement, it cannot

possibly exercise, even under Section 9 of the CPC, the kind of power with the CLB can under Section 402 of the Companies Act. Such a civil suit is almost always an action *in personam*. A Section 397/398 action before the CLB has some flavour of an action *in rem*. On the Central Government being given notice, orders can be passed against parties who are not before the Company Law board; and even in respect of ancillary matters.

76. Sections 8 and 45 of the Arbitration Act use the expression "a judicial authority, when seized of an action ***in a matter in respect of which the parties have made an agreement***" (Section 45), and "a judicial authority before which an action is brought in a ***matter which is the subject of an arbitration agreement***" (Section 8). The operative word here appears to be "matter". The "matter" must be one in respect of which there is an arbitration agreement. This is what can be referred to arbitration. In an oppression and mismanagement "action" before the CLB, the "matter" is the one that lies under Sections 397 and 398 and invokes the CLB's powers under those sections and their statutory brethren, including Section 402. Mr. Madon is of course correct in saying that the jurisdictional section is not Section 402 but Sections 397 and 398. But that only underscores Mr. Chinoy's case. What is being suggested is that disputes in a Section 397/398 action are such that they demand the exercise by the CLB of its powers under Section 402. These are not powers that can be exercised by a civil court. They certainly cannot be exercised by an arbitral forum. This is very different from saying that a civil court, too, can entertain a suit as one of the exceptions to the *Foss v Harbottle* rule, and that the jurisdiction of a civil court is not excluded by Sections 397 and 398 of the Companies Act, 1956.

77. Consider paragraph 14 of the Supreme Court's decision in *Pinkcity*, also cited in *Swiss Timing*:

> 14. This Court in the case of P. Anand Gajapathi Raju v. P.V.G. Raju [(2000) 4 SCC 539] has held that the language of Section 8 is peremptory in nature. Therefore, in cases where there is an arbitration clause in the agreement, it is obligatory for the court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitrator. Therefore, it is clear that if, as contended by a party **in an agreement between the parties *before the civil court***, there is a clause for arbitration, it is mandatory ***for the civil court*** to refer the dispute to an arbitrator. In the instant case the existence of an arbitral clause in the Agreement is accepted by both the parties as also by the courts below but the applicability thereof is disputed by the respondent and the said dispute is accepted by the courts below. Be that as it may, at the cost of repetition, we may again state that the existence of the arbitration clause is admitted. If that be so, in view of the mandatory language of Section 8 of the Act, the courts below ought to have referred the dispute to arbitration.

(*Emphasis supplied*)

78. I would imagine that in itself this leads us to a clear distinction between what a *civil court* can do in a minority shareholder action and what specially-empowered authority like the CLB can do in a petition under Sections 397/398 of the Companies Act, 1956. Barring an express restriction on jurisdictional power, such as a probate action or one relating to a tenancy, an arbitral tribunal can do what a civil court can do. This is not true of the very special powers of the CLB under Sections 397, 398 and 402 of the Companies Act, 1956.

79. In particular if we consider the provisions of Section 402(a) to (g) extracted above, it is clear that no arbitral tribunal can possibly exercise powers of so wide a sweep. But it does not end there. Section 407 provides for the consequences of a termination or modification of certain agreements, including those in Section 402(d) and (e), viz., appointments of the managing director, other directors and the manager, and third party contracts. Section 407(2) provides for penalties in such cases. Section 408 vests in the government the power to prevent oppression and mismanagement. The entire board can be superseded by the Government, too. Section 409 empowers the CLB to prevent any change in the board of directors if this is likely to prejudice the company.

80. I believe Mr. Chinoy is correct when he says that there is a fundamental logical fallacy in Mr. Madon's hypothesis, which may be summarized thus: all civil suits can and must be referred to arbitration where there is an arbitration agreement. The jurisdiction

of the CLB under Sections 397 and 398 of the Companies Act does not exclude the jurisdiction of a civil court for oppression and mismanagement. Therefore, all disputes before the CLB in a Section 397/398 action can and must also be referred to arbitration. In *CDS Financial Services*, in an action for oppression and mismanagement by a minority following the only true exception to the *Foss v Harbottle* rule, it was argued that the plaintiff ought to have moved the CLB in a petition under Sections 397 and 398. The Division Bench rejected this submission. What Mr. Madon suggests is, in effect, the mirror image of this argument: that the CLB can always tell a petitioner before it that he should have filed a suit; and that, had he filed the suit, the dispute might have been referred to arbitration; ergo, the action before the CLB was also so referable. This is the 'fallacy of the undistributed middle':

- all ***x*** is ***z***;
- some (or all) ***y*** is ***z***;
- therefore, all ***y*** is ***x***.

Or, to illustrate this more graphically:

- all policemen wear uniforms;
- some (or all) bus conductors wear uniforms;
- therefore, all bus conductors are policemen.

81. Mr. Madon is correct, generally speaking, in saying that a draughtsperson's acuity cannot permit a party to slither out of a binding arbitration agreement. But just as a petition cannot be 'dressed up' to evade an arbitration agreement, a *bona fide* petition, not one that is vexatious, oppressive or *mala fide*, and genuinely seeks broader reliefs to prevent acts of oppression and mismanagement cannot be, as it were, defrocked, its thesis unseated

and its constituent elements so parsed, dissected and carved up as to drag it into an arbitral dispute only because there happens to be an arbitration agreement. The mistake, I believe, is in seeing every arbitration agreement as some catch-all, encyclopaedic repository for the entirety of the universe of disputes between parties. It is not necessarily so. Conceptually, too, a petition under Sections 397 and 398 of the Companies Act is not necessarily or always relatable to an arbitration agreement. It may speak to a pattern of conduct of clandestine non-contractual actions that result in the mismanagement of the company's affairs or in the oppression of the minority shareholders, or both. In such a petition, even if there is an arbitration agreement, it does not necessarily follow that every single act complained of must, *ipso facto*, relate to that arbitration agreement. Merely because an arbitration agreement exists does not always or necessarily imply that all disputes relate only to it, or that all parties' rights and remedies are circumscribed by that agreement. This appears to me to be the effect of Mr. Madon's submission, one that I find difficult to accept.

82. In *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.*,[32] the Supreme Court considered the question of arbitrability, i.e., the distinction in law between disputes that are capable of arbitral resolution and those that are not. This decision is of immediate significance not least for its acceptance of the principle enunciated in *Haryana Telecom*, one from which Mr. Madon is at some pains to distance himself.

---

32 (2011) 5 SCC 532

34. The term "arbitrability" has different meanings in different contexts. The three facets of arbitrability, relating to the jurisdiction of the Arbitral Tribunal, are as under:

(i) ***Whether the disputes are capable of adjudication and settlement by arbitration?*** **That is, whether the disputes, having regard to their nature, could be resolved by a private forum chosen by the parties (the Arbitral Tribunal) or whether they would exclusively fall within the domain of public fora (courts).**

(ii) *Whether the disputes are covered by the arbitration agreement?* That is, whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the "excepted matters" excluded from the purview of the arbitration agreement.

(iii) *Whether the parties have referred the disputes to arbitration?* That is, whether the disputes fall under the scope of the submission to the Arbitral Tribunal, or whether they do not arise out of the statement of claim and the counterclaim filed before the Arbitral Tribunal. A dispute, even if it is capable of being decided by arbitration and falling within the scope of arbitration agreement, will not be "arbitrable" if it is not enumerated in the joint list of

disputes referred to arbitration, or in the absence of such joint list of disputes, does not form part of the disputes raised in the pleadings before the Arbitral Tribunal.

35. The Arbitral Tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. **Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of the Arbitral Tribunals is excluded either expressly or by necessary implication.** Adjudication of certain categories of proceedings are reserved by the legislature exclusively for public fora as a matter of public policy. **Certain other categories of cases, though not expressly reserved for adjudication by public fora (courts and tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/ dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes.**

36. The well-recognised examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding-up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

37. It may be noticed that the cases referred to above relate to actions *in rem*. **A right *in rem* is a right exercisable against the world at large, as contrasted from a right *in personam* which is an interest protected solely against specific individuals.** Actions *in personam* refer to actions determining the rights and interests of the parties themselves in the subject-matter of the case, **whereas actions *in rem* refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property**. Correspondingly, a judgment *in personam* refers to a judgment against a person as distinguished from a judgment

against a thing, right or status and a judgment *in rem* refers to a judgment that determines the status or condition of property which operates directly on the property itself. (Vide Black's Law Dictionary.)

38. Generally and traditionally all disputes relating to rights *in personam* are considered to be amenable to arbitration; and all disputes relating to rights *in rem* are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to subordinate rights *in personam* arising from rights in rem have always been considered to be arbitrable.

39. The Act does not specifically exclude any category of disputes as being not arbitrable. Sections 34(2)(b) and 48(2) of the Act however make it clear that an arbitral award will be set aside if the court finds that "the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force".

40. *Russell on Arbitration* (22nd Edn.) observed thus (p. 28, Para 2.007):

> "Not all matters are capable of being referred to arbitration. As a matter of English law certain matters are reserved for

> the court alone and if a tribunal purports to deal with them the resulting award will be unenforceable. These include matters where the type of remedy required is not one which an Arbitral Tribunal is empowered to give."

The subsequent edition of Russell (23rd Edn., p. 470, Para 8.043) merely observes that English law does recognise that there are matters which cannot be decided by means of arbitration.

41. Mustill and Boyd in their *Law and Practice of Commercial Arbitration in England* (2nd Edn., 1989), have observed thus:

> "In practice therefore, the question has not been whether a particular dispute is capable of settlement by arbitration, *but whether it ought to be referred to arbitration* or whether it has given rise to an enforceable award. No doubt for this reason, English law has never arrived at a general theory for distinguishing those disputes which may be settled by arbitration from those which may not. …
>
> **Second, the types of remedies which the arbitrator can award are**

limited by considerations of public policy and by the fact that he is appointed by the parties and not by the State. For example, he cannot impose a fine or a term of imprisonment, commit a person for contempt or issue a writ of subpoena; *nor can he make an award which is binding on third parties or affects the public at large, such as a judgment in rem* against a ship, an assessment of the rateable value of land, a divorce decree, a winding-up order…."

(*emphasis supplied*)

Mustill and Boyd in their 2001 Companion Volume to the 2nd Edn. of *Commercial Arbitration*, observe thus (p. 73):

"Many commentaries treat it as axiomatic that 'real' rights, *that is, rights which are valid as against the whole world, cannot be the subject of private arbitration*, although some acknowledge that subordinate rights *in personam* derived from the real rights may be ruled upon by arbitrators. The conventional view is thus that, for example, rights under a patent licence may be arbitrated, but the validity of the underlying patent may not … **An arbitrator whose powers are derived from a private agreement between A and B plainly has no**

> **jurisdiction to bind anyone else by a decision on whether a patent is valid, for no one else has mandated him to make such a decision, and a decision which attempted to do so would be useless.**"
>
> (emphasis supplied)

42. The distinction between disputes which are capable of being decided by arbitration, and those which are not, is brought out in three decisions of this Court. In *Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd.* [(1999) 5 SCC 688] this Court held: (SCC pp. 689-90, paras 4-5)

> "4. Sub-section (1) of Section 8 provides that the judicial authority before whom an action is brought in a matter, will refer the parties to arbitration the said matter in accordance with the arbitration agreement. This, however, postulates, in our opinion, that what can be referred to the arbitrator is only that dispute or matter which the arbitrator is competent or empowered to decide.
>
> 5. The claim in a petition for winding up is not for money. The petition filed under the Companies Act would be to the

> effect, in a matter like this, that the company has become commercially insolvent and, therefore, should be wound up. The power to order winding up of a company is contained under the Companies Act and is conferred on the court. *An arbitrator, notwithstanding any agreement between the parties*, would have no jurisdiction to order winding up of a company. The matter which is pending before the High Court in which the application was filed by the petitioner herein was relating to winding up of the company. *That could obviously not be referred to arbitration* and, therefore, the High Court, in our opinion was right in rejecting the application."
>
> (*emphasis supplied*)[33]

83. *Booz Allen* arose in a suit that was held by the Supreme Court to be one for enforcement of a mortgage by a sale, a matter that would result in a judgment *in rem*, and consequently, one that was not arbitrable. To my mind, this decision alone fully answers Mr. Madon's submissions on *Haryana Telecom* and quite clearly supports Mr. Chinoy's postulate. *Booz Allen* also refers to the Supreme Court

---

[33] In the extract quoted, emphasis in bold and underlined is mine; that only in italics appears in the original report.

decision in *Sukanya Holdings (P) Ltd v Jayesh H. Pandya*[34] to affirm that a bifurcation of a cause of action in a suit is an impermissible procedure beyond the contemplation of the Arbitration Act. It must therefore follow that where a petition under Chapter VI of the Companies Act, 1956 seeks reliefs some of which are in the nature of reliefs *in rem* and others that are *in personam*, then it is not possible or permissible to sever one from the other and disassemble such a petition. Mr. Chinoy is thus correct in his reliance on both *Haryana Telecom* and *Bennett Coleman*. I will leave aside the other decisions of learned Single Judges of the High Court for the present. *Haryana Telecom*, to my mind, though in a petition for winding up, and clearly, therefore, a matter *in rem*, states as a proposition that no agreement between the parties can vest an arbitral panel with the power of winding up. Similarly, no arbitration agreement can vest an arbitral tribunal with the powers to grant the kind of reliefs against oppression and mismanagement that the CLB might. Mr. Madon's submission that it matters not what the arbitral panel does with the dispute so long as the dispute is referred seems to me to strain at the boundaries of the intent of arbitration law. The idea cannot possibly be to shunt parties off the main tracks of a properly brought litigation to some siding with no destination and no way forward. It must be to provide them with an effective, quick and reasonable dispute resolution alternative.

---

[34] (2003) 5 SCC 531. I must note that neither Mr. Madon nor Mr. Chinoy cited *Booz Allen* or *Sukanya Holdings*. I did, however, albeit very late in the day, at the time of prouncement, draw their attention to these and to my reliance on them in this judgment. Neither counsel desired to make further submissions on these decisions.

84. *Bennett Coleman* is a settled authority for the proposition that the powers of the Court under Section 402 are wide enough to permit the CLB to resort to non-corporate management and to supplant corporate management in whole or in part. The CLB may provide for the regulation of the company's future affairs because of previous oppression and mismanagement. In doing so it can appoint an administrator, an observer or a special committee. None of these can possibly lie within the remit of an arbitral tribunal. Neither *Swiss Timing* nor *Chloro Controls* deal with a situation where the very substance of the relief sought was such as was beyond the powers of any arbitrator. What purpose might be served by such a reference? *Swiss Timings* takes as its starting point the indefeasibility of an arbitration agreement in the regular course. The matter before the Court was an application under Section 11 of the Arbitration Act. It is difficult to see this as an authority for the proposition that even when the CLB's plenary and expansive powers are properly invoked, a narrowly tailored arbitral proceeding is sufficient redress for the broad and far-reaching reliefs sought by a petitioner in a Section 397/398 petition.

85. In my view, Mr. Chinoy's submissions demand acceptance. The first question for determination must be answered in his favour. The disputes in a petition properly brought under Sections 397 and 398 read with Section 402 are not capable of being referred to arbitration, having regard to the nature and source of the power invoked.

…continued/-

J. THE "DRESSING UP" ARGUMENT

86. Does this mean that the CLB cannot even entertain an application under Sections 8 or 45 of the Arbitration Act and must dismiss it *in limine*? After all, Mr. Madon's case is that an arbitration agreement is a primary legislative imperative. My acceptance of Mr. Chinoy's submission proceeds on the *a priori* basis that the Section 397/398 petition before the CLB is one that is properly brought, validly invoking the CLB's powers under Section 402 of the Companies Act, 1956. A petition that is merely 'dressed up' and seeks, in the guise of an oppression and mismanagement petition, to oust an arbitration clause, or a petition that is itself vexatious, oppressive, *mala fide* (or, at any rate, not *bona fide*) cannot be permitted to succeed. In assessing an allegation of 'dressing up', the Section 397/398 petition must be read as a whole, including its grounds and the reliefs sought. It cannot be carved up and deconstructed so as to bring some matters within the arbitration clause and leave other matters out. Where there are reliefs that are not arbitrable because they fall within Section 402 of the Companies Act, 1956, there is no question of a dismissal of the petition on the ground that there exists an arbitration clause. In *Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya*[35] the Supreme Court *inter alia* said:

> 13. Secondly, there is no provision in the Act that when the subject-matter of the suit includes subject-matter of the arbitration agreement as well as other disputes, the matter is required to be

[35] (2003) 5 SCC 531

referred to arbitration. There is also no provision for splitting the cause or parties and referring the subject-matter of the suit to the arbitrators.

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

16. The next question which requires consideration is even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible under Section 8 of the Act. In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action, that is to say, the subject-matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a

> totally new procedure not contemplated under the Act. If bifurcation of the subject-matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject-matter of an action brought before a judicial authority is not allowed.
>
> (*Emphasis supplied*)

87. Thus, when the CLB finds in favour of the respondent on his showing that the entirety of the petition, including the reliefs sought, are within the scope of an arbitration agreement, it will dismiss the petition, thus guarding against the mischief of 'dressing up', a dishonest attempt to escape an arbitration clause.

88. I must confess that I had the gravest misgivings about Mr. Chinoy's submission, one that came in response to my query on this aspect, that this must necessarily mean that the CLB cannot even entertain an application under Sections 8 or 45 of the Arbitration Act. I thought that that submission to be overbroad. I so indicated. Mr. Chinoy urged me to reconsider. Once a petition under Chapter VI is dismissed, even on the ground that it is 'dressed up' to avoid an arbitration clause, he submits that there then remains nothing to 'refer to arbitration'. After all, it is the petition, with the disputes it raises, that would be referred to the private tribunal; therefore, if the petition is dismissed, there is nothing to refer to arbitration.

89. I have, at Mr. Chinoy's instance, given this a great deal of thought. His argument is tempting. It is, however, not one that I can bring myself to accept. There is a distinction here, one that may perhaps be very fine indeed, but one that is nontheless real. The assessment by the CLB is not whether or not there is a dispute at all. It is whether that dispute falls within Chapter VI of the Companies Act, 1956. If it does, it cannot be referred to arbitration and the petition proceeds. If it does not, the petition must be dismissed; but this does not *ipso facto* mean that *no* disputes exist; only that the disputes are covered by an arbitration clause. Two consequences must then result: a dismissal of the petition with, if applied for, a reference of the disputes to arbitration in an order made on the Section 8 or Section 45 petition. A common order could cover both the dismissal of the petition and the allowing of the application for reference to arbitration.

90. Mr. Chinoy's submission seems to me to be altogether too technical. It would drive a party who succeeds in dislodging a petition brought under Sections 397/398 to filing a separate application or petition in some other court or before some other authority and be driven to a second go-around on the same material, and thus to give the CLB petitioner another, undeserved, innings. I see no reason why this should be so. It is one thing to say that disputes validly covered by Chapter VI of the Companies Act, 1956 and, specifically, Section 402, cannot be referred to arbitration because they are, by their very nature, and having regard to the source of power, not arbitrable. It is quite another thing to say that when a *mala fide*, vexatious, oppressive or 'dressed up' petition is brought only to evade an arbitration clause, all that the CLB can do

is to dismiss the petition and drive the applicant seeking arbitration to some other forum in which to file an application under Sections 8 or 45 of the Arbitration Act.

91. The true consequence of my finding on Mr. Chinoy's submission regarding the non-arbitrability of disputes validly brought under Sections 397/398 read with with Section 402 of the Companies Act, 1956 is that it is not enough for an applicant seeking a reference to arbitration merely to show that there exists an arbitration agreement. He must, in addition, establish before the CLB that the petition is *mala fide*, vexatious and 'dressed up' and that the reliefs sought are such as can be resolved by a private arbitral tribunal. To hold otherwise would be to say that even a dressed up petition cannot be referred to arbitration. I see no reason why the CLB should be denuded of its powers in that situation. It is, after all, a "judicial authority" within the meaning of the Arbitration Act. The jurisdictional exclusion of Section 402 cannot be extrapolated to a mischievous and 'dressed up' petition. That would be wholly contrary to *Swiss Timing*, *Pinkcity*, *Fuerst Day Lawson* and others. The injustice in such a case is manifest. It must follow, therefore, that the CLB always retains the power to refer the disputes in a petition that is mischievous, vexatious, *mala fide* and 'dressed up' to arbitration.

…continued/-

K. WAS THE CLB BOUND BY THE DECISION OF THE UK COURT? SECTION 13 OF THE CPC;

92. Walker J. considered, in his extremely elaborate and careful decision, whether the disputes in the Company Petitions before the CLB were covered by the arbitration clause of the SSD/SD. Rakesh's case for injunction in the Commercial Court of the Queen's Bench Division proceeded on two fundamental issues:

(a) That there was an 'oral agreement/common understanding' between the parties that formed an integral part of the restructuring under the SSD; and

(b) That the steps Rakesh took were all pursuant to (a) the terms of the SSD "and/or" (b) the oral agreement/ common understanding.[36]

93. On this basis, Rakesh claimed to be entitled to act as he did, and which acts are the subject matter of the CLB petitions. Therefore, according to Rakesh, the matter ought to be referred to LCIA Arbitration under Cl. 43.2 of the SSD, and a corresponding injunction against RKM and Rajiv from proceeding with the CLB petitions. That the question of whether the CLB disputes were covered by the arbitration clause was squarely before Walker, J cannot be disputed: paragraph 10 of his judgment says so in terms. Before him, it was *inter alia* argued that even assuming there was any such oral agreement or common understanding, it stood entirely outside the SSD and hence was not covered by the SSD's arbitration

---

[36] Judgment of Walker J., para 144

clause. Paras 153 and 156 of Walker J.'s decision make it clear that he considered and rejected Rakesh's submission of arbitrability. The injunction earlier granted was vacated on the basis that the CLB proceedings were not covered by the arbitration agreement.[37]

94. Paragraphs 13 to 17 of the CLB's impugned order of 31st January 2013 indicate that the CLB approached the question of Walker J.'s decision as one of '*res-judicata* and estoppel'. The CLB addressed itself to these as arising under Section 11 of the CPC. I believe this entire approach to have been incorrect. The issue was not one of *res-judicata* and Section 11 of the CPC at all, but one, as Mr. Chinoy rightly says, under Section 13 of the CPC, of whether the "foreign judgment" of Walker J. was or was not conclusive.

95. Section 13 of the CPC says this:

> **Section 13—When foreign judgment not conclusive**
>
> A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except—
>
> (a) where it has not been pronounced by a Court of competent jurisdiction;

[37] *Id.* Paragraphs 100, 102, 104, 173, 174, 176 and 183(4)

> (b) where it has not been given on the merits of the case;
>
> (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;
>
> (d) where the proceedings in which the judgment was obtained are opposed to natural justice;
>
> (e) where it has been obtained by fraud;
>
> (f) where it sustains a claim founded on a breach of any law in force in India.

96. For our purposes, the relevant clause is Section 13(c), it being the case that Walker J.'s decision is contrary to that of the Supreme Court in *Chloro Controls*.

97. There is no doubting the first proposition advanced by Mr. Chinoy that Section 13 of the CPC is always available as a defence.[38] Of greater relevance, however, is the decision of a Division Bench of this Court in *Brijlal Ramjidas & Anr. v Govindram Gordhandas Seksaria & Ors.*,[39] affirming the view of Chagla, J. (as he then was), sitting singly. The facts are interesting. Two merchants in Indore referred their disputes to the Prime Minister of the then state of Indore as an arbitrator. The Prime Minister made an award, one that was, on the face of it, of somewhat dubious legality. The plaintiff

---

38 *Chockalingam v Duraiswami & Ors.*, AIR 1928 Madras 327

39 AIR 1943 Bom 201

brought suit in the Bombay High Court to declare that award as invalid. The opposite party moved in Indore to have it made a rule of the Court. The District Judge before whom this application was filed seemed to be delaying the matter. The High Court in Indore withdrew the case to itself. A learned single Judge made the award a rule of the Court. The plaintiff in the Bombay High Court suit appealed. The two judges of the Division Bench in Indore differed. Under the rules then in place in Indore, in such a situation, the view of the learned single Judge was to prevail. The Prime Minister's award thus became a rule of the Court. This immediately raised a question under Section 13 of the CPC; specifically, Clauses (a), (b) and (d) of that Section. Beaumont, CJ held, with Weston, J. concurring:

> "I have no doubt that under Section 13 judgment is not used in the sense of a statement of the Judge's reasons. I have no doubt that a foreign judgment means an adjudication by a foreign Court upon the matter before it. It would be quite impracticable to hold that a foreign judgment means a statement by a foreign Judge of the reasons for his order. If that were the meaning of "judgment," the section would not apply to an order where no reasons were given. Section 13 applies to foreign judgments generally, and we must remember that some systems of foreign procedure may not recognise the distinction between decrees and orders with which we are familiar, and, there may be no requirement on a Judge to give

> **reasons. We have to ascertain what is the actual adjudication of the foreign Court, and for that purpose the first thing to look at is the actual decree or order of the foreign Court.** But in order to understand and interpret the decree or order, we may have to look at the pleadings of the parties and the reasons of the Judge. **Those reasons would not, in my opinion, be binding on any question of fact or law, except so far as they show what the judgment actually decides,** and whether any of the exceptions to Section 13 applies.

98. The decision of our Division Bench was carried to the Privy Council, which dismissed the appeal.[40] Lord du Parcq of the Privy Council said:

> 8. Some difficulty has been occasioned in the interpretation of Section 13 by the definition of "judgment" contained in Section 2. Notwithstanding this definition, their Lordships agree with the learned Chief Justice that **the expression "foreign judgment" in Section 13 must be understood to mean "an adjudication by a foreign Court upon the matter before it.**" The Chief Justice pointed out that "it would be quite impracticable to hold that 'a foreign judgment' means a statement by a foreign Judge of the reasons for his

[40] *Brijlal Ramjidas & Anr. v Govindram Gordhandas Seksaria & Ors.*, AIR 1947 PC 192

order," since "if that were the meaning of 'judgment' the other section (viz. Section 13) would not apply to an order where no reasons were given.

12. ... **The "matter" which was "directly adjudicated upon" by the High Court of Indore was the validity of the award. The order of the Court, which was left standing after the appeal, was to the effect that the award had been properly filed and that the objections to it must be dismissed, and in their Lordships' opinion that order was a "judgment" within Section 13 of the Code of Civil Procedure, which is conclusive between the parties as to the validity of the award. There is nothing in Section 13 to support a contention that every step in the reasoning which led the foreign Court to its conclusion must have been "directly adjudicated upon." Even if it were to be assumed that the arbitration was subject to the law of British India, and that the High Court of Indore was in error in treating it as governed by the law of Indore, the judgment would still be conclusive unless it could be shown that the foreign Court had "refused to recognise the law of British India," and, as has been said, there was no such refusal here.** The fact that the error (if error there were) was induced by the appellants themselves does not improve their position. **It is desirable to add, in order to prevent a possible**

> **misunderstanding, that their Lordships must not be taken to decide that the High Court of Indore did not "directly adjudicate upon" the question whether the law of Indore was applicable. "Directly" does not mean "expressly," and it may well be argued (though it is unnecessary now to decide), that a matter which was not in issue only because all parties were agreed upon it, and was accordingly treated by the foreign Court as an admittedly correct foundation for its decision, can properly be said to have been "directly adjudicated upon."**
>
> (*Emphasis supplied*)

99. The substantive issue in our case is whether Walker J.'s decision is not conclusive under Section 13(c) because it is contrary to the Supreme Court decision in *Chloro Controls India (P) Ltd v Severn Trent Water Purification, Inc. & Ors.*[41] Mr. Madon emphasizes the following from *Chloro Controls*:

> 71. Though the scope of an arbitration agreement is limited to the parties who entered into it and those claiming under or through them, the courts under the English law have, in certain cases, also applied the "group of companies doctrine". This doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within a group of

[41] (2013) 1 SCC 641

companies, can bind its non-signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates. This theory has been applied in a number of arbitrations so as to justify a tribunal taking jurisdiction over a party who is not a signatory to the contract containing the arbitration agreement. [Russell on Arbitration (23rd Edn.)]

72. This evolves the principle that a non-signatory party could be subjected to arbitration provided these transactions were with group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words, "intention of the parties" is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties.

73. A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement between the parties

being a composite transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed.

94. Still, the legislature opted to word Section 45 somewhat dissimilarly. Section 8 of the 1996 Act also uses the expression “parties” simpliciter without any extension. In significant contradistinction, Section 45 uses the expression “one of the parties or any person claiming through or under him” and “refer the parties to arbitration”, whereas the rest of the language of Section 45 is similar to that of Article II(3) of the New York Contention. The court cannot ignore this aspect and has to give due weightage to the legislative intent. It is a settled rule of interpretation that every word used by the legislature in a provision should be given its due meaning. To us, it appears

that the legislature intended to give a liberal meaning to this expression.

95. The language of Section 45 has wider import. It refers to the request of a party and then refers to an Arbitral Tribunal, while under Section 8(3) it is upon the application of one of the parties that the court may refer the parties to arbitration. There is some element of similarity in the language of Section 8 and Section 45 read with Article II(3). The language and expressions used in Section 45, "any person claiming through or under him" including in legal proceedings may seek reference of all parties to arbitration. Once the words used by the legislature are of wider connotation or the very language of the section is structured with liberal protection then such provision should normally be construed liberally.

96. Examined from the point of view of the legislative object and the intent of the framers of the statute i.e. the necessity to encourage arbitration, the court is required to exercise its jurisdiction in a pending action, to hold the parties to the arbitration clause and not to permit them to avoid their bargain of arbitration by bringing civil action involving multifarious causes of action, parties and prayers.

102. Joinder of non-signatory parties to arbitration is not unknown to the arbitration jurisprudence. Even the ICCA's Guide to the Interpretation of the 1958 New York Convention also provides for such situation, stating that when the question arises as to whether binding a non-signatory to an arbitration agreement could be read as being in conflict with the requirement of written agreement under Article I of the Convention, the most compelling answer is “no” and the same is supported by a number of reasons.

103. Various legal bases may be applied to bind a non-signatory to an arbitration agreement:

103.1. The first theory is that of implied consent, third-party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle. They apply to private as well as public legal entities.

103.2. The second theory includes the legal doctrines of agent-principal relations, apparent authority, piercing of veil (also called “the alter ego”), joint venture relations, succession and estoppel. They do not rely on the parties' intention but rather on the force of the applicable law.

104. We may also notice the Canadian case of City of Prince George v. A.L. Sims & Sons Ltd. [(1998) 23 YCA 223] wherein the Court took the view that an arbitration agreement is neither inoperative nor incapable of being performed if a multi-party dispute arises and not all parties are bound by the arbitration agreement: the parties bound by the arbitration agreement are to be referred to arbitration and court proceedings may continue with respect to the other parties, even if this creates a risk of conflicting decisions.

105. We have already discussed that under the group of companies doctrine, an arbitration agreement entered into by a company within a group of companies can bind its non-signatory affiliates, if the circumstances demonstrate that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties.

107. If one analyses the above cases and the authors' views, it becomes abundantly clear that reference of even non-signatory parties to an arbitration agreement can be made. It may be the result of implied or specific consent or judicial determination. Normally, the parties to the arbitration agreement calling for arbitral reference should be the same as those to the action. But this general concept is subject to exceptions which are

> that when a third party i.e. non-signatory party, is claiming or is sued as being directly affected through a party to the arbitration agreement and there are principal and subsidiary agreements, and such third party is signatory to a subsidiary agreement and not to the mother or principal agreement which contains the arbitration clause, then depending upon the facts and circumstances of the given case, it may be possible to say that even such third party can be referred to arbitration.

100. Mr. Madon's submission, as I understand it, is that there was, beyond the SSD/SD, some other controlling agreement that brings this dispute within the frame of *Chloro Controls*. That, the Supreme Court says, is binding; and it is no answer to a claim for reference to arbitration to point out that there is not an exact identity of parties. In *Chloro Controls*, as Mr. Madon says, all that the Supreme Court did was to interpret the law as it stood, not create new law.[42]

101. Correctly read, the basis of Mr. Justice Walker's finding that the CLB disputes are not covered by the arbitration Cl. 43.2 of the SSD is not that the parties to the SSD and to CLB petitions were dissimilar. In paragraph 26, this is mentioned but only as a factual narrative.

> 26. As noted above, Rakesh says that funds paid to the Transauto companies were

---

[42] *Rajeshwar Prasad Misra v State of West Bengal*, AIR 1965 SC 1887; P. *Ramachandra Rao v State*, AIR 2002 SC 1856

> to be at his disposal for working capital of the business. Ms Weaver rightly points out that the Transauto companies are not parties to the SSD, that the SSD does not contain any express obligations or restrictions on them in relation to the payments received, that the SSD does not impose any express obligation on Mr Malhotra senior or Rajiv as to how these payments are to be used once they have reached the Transauto companies, and that no provision in the SSD expressly requires the Transauto companies to provide any loan or other financial support to the Supermax Group.

102. This is in no sense a defence to the arbitrability claim based on dissimilarity of parties. Indeed, paragraphs 175 to 178 and 183(1) to (4) of Mr. Justice Walker's judgment make it clear that the basis of his finding is not the dissimilarity of parties but the dissimilarity of issues; i.e., that the issues before the CLB are not covered by the SSD. Therefore, it was not necessary for Mr. Justice Walker to consider the 'dressing up' argument.

> 175. Ms Weaver submits that Rakesh's authority under clause 41.1 is limited in two ways (a) to taking actions and doing things provided for in or contemplated by the SSD (as extended) and (b) to taking action and doing things to be performed by a Malhotra Party. I do not understand Mr Calver to dispute either of these points. **I agree with Ms Weaver that it is impossible to construe the actions alleged**

in the Indian petitions in relation to the management of the relevant companies as actions "provided for in or contemplated by" the revised transaction.

H6. Matters which do not need to be determined

176. For the reasons given in sections H1 to H5 above **I conclude that the threshold requirement is not met as regards the base question whether the Indian claims have been shown to a high degree of probability to involve the determination of something which, if the Indian claims had all been brought against Rakesh by Mr Malhotra senior or Rajiv, falls within clause 43.2.** It follows that I do not need to determine issues arising in relation to the dressing up argument (including the BNP Paribas case relied on by Rakesh in the written submission of 13 July 2012 and subsequently) and the good reason requirement. Accordingly I deal with them below only briefly.

H 6.1 The dressing up argument

177. In my view Rakesh's dressing up argument, as advanced at the hearing, involved real difficulty. The first point to note is that the argument which succeeded in the *BNP Paribas* case was not the argument advanced at the hearing. In the *BNP Paribas* case both Blair J and the Court of Appeal held, in effect, that the litigation in Russia was vexatious and

oppressive because it was a blatant attempt to circumvent the arbitration clause. By contrast at the hearing in the present case Mr Calver relied on principles applicable in cases where the foreign litigation was a breach (as opposed to a circumvention) of an arbitration clause.

178. It seems to me that as a matter of principle the dressing up argument could only succeed if the test identified in the *BNP Paribas* case were met. **Unless the claims against the other respondents in India were vexatious or oppressive, the Indian petitioners would in my view be fully entitled to say that as between them and the relevant respondent there was no agreement to arbitrate.**

...

183. Also for completeness I record here some comments on matters relied on by Rakesh in order to distinguish *Stonehouse v Jones*. Mr Calver asserted that none of the Californian claims in that case was founded on the relevant agreement: that seems to be equally true of the Indian claims in the present case. Mr Calver added that there was no suggestion that the Californian claims could be defended on the merits. To my mind that had little if any relevance to the decision. As to the matters identified by Mr Calver in his eight specific points of distinction, I

deal with them in the same way as in the preceding section:

(1) "The complaint in India is mismanagement of assets in the Citibank accounts by allowing them to be used to guarantee loans to the new business" – this is one of the complaints (as to which see below); **it and the other complaints are legitimate matters for shareholders to raise in company law proceedings**.

(2) "Those loans are authorised by clause 18.10 of the SSD, and Mr Malhotra senior knew of them" – **the loans are not complained of: the complaint in question concerns the guarantees by the companies**.

(3) "Clauses 18.10 and 41 allow Rakesh alone to procure those loans for the benefit of the new business" – **they do not, however, enable the court to be satisfied to a high degree of probability that disputes between shareholders and directors about the giving of guarantees fall within clause 43.2**.

(4) "The assets of Unique consist of monies paid into its Citibank account as a result of the conclusion of the restructuring agreements made under the SSD; those are its only assets" – **it does not follow that how the directors dealt with those assets falls within the arbitration clause in the SSD**.

(5) "Prior to that payment in to the Citibank account, Unique's directors with

Mr Malhotra senior's knowledge, passed a resolution authorising Rakesh to have complete control over the Citibank account"; (6) "They did this because they all intended the monies paid in to the Citibank accounts to be used for the purposes of SPCPL, in particular to provide security to enable loans to be made to the new business for provision of operating capital. That was why the consortium of banks transferred the loans to SPCPL with Mr Malhotra senior's knowledge" and (7) "The funds were paid into Unique's Citibank account, and the guarantees were given by Unique, with the approval of all parties at the time" — **these allegations do not show to a high degree of probability that the disputed agreement/understanding existed**; see (8) below.

(8) "In this regard Rakesh is not relying merely on disputed oral agreements. The documentary evidence pointed only one way. The whole point of Citibank accounts was to provide monies to be used by Rakesh in support of the new business ... this was confirmed by the acknowledgement in Rajiv's evidence ..." — **For the reasons given earlier in this judgment the evidence relied upon does not point only one way**.

(*Emphasis supplied*)

103. *Chloro Controls* was decided on 28th September 2012. Mr. Justice Walker's decision is of 30th October 2012; the last hearing appears to have been some time earlier, on 15th June 2012. I do not think Mr. Madon is correct in his submission that Mr. Justice Walker's decision is contrary to that of our Supreme Court in *Chloro Controls*, or even that the question of referrability to arbitration was decided on the basis that the parties to the SSD were not the parties before the CLB or *vice-versa*. Mr. Justice Walker's decision on the question of referrability was decided expressly on the basis that the issues raised before the CLB fell outside the scope of the arbitration clause 43.2 in the SSD.

104. What Mr. Madon urges, based on paras 71 to 73 and 94 to 96 of *Chloro Controls*, is that whether or not there was an overarching (in the words of *Chloro Controls*, a "mother") agreement was a finding of fact by the CLB, one that is not assailable in a Section 10F appeal. Further, Mr. Justice Walker himself noted in paragraph 181 that it was for the CLB to decide whether or not the matter before it should be referred to arbitration.

> 181. I do not rule out the possibility that this court might grant an injunction restraining Mr Malhotra senior and Rajiv from raising certain issues only in the Indian petitions. As it seems to me, however, in the ordinary course it would be for the Company Law Board to reach a decision as a matter of case management on what issues it would determine and when. Such a decision would be case-specific and highly fact-sensitive. In the absence of

> particularly strong reason justifying this court in doing so, it seems to me that it would be inappropriate for this court to do so when exercising its own jurisdiction for the purpose of enforcing an English law agreement to arbitrate.

105. But what Mr. Madon overlooks, I think, is the finding in paragraph 179 of Mr. Justice Walker's decision:

> 179. **I do not consider that the claims against the other respondents in India were vexatious or oppressive. The evidence that the directors were acting under the influence of Rakesh was strong.** Particularly alarming in that regard was the refusal of the directors to provide the shareholders with information about what the company was doing, thus preventing the shareholders from even querying whether a transaction proposed by Rakesh was one which they were obliged to acquiesce in. Even taking at face value Rakesh's evidence as to the bitterness of the family dispute, and accepting for present purposes that the Indian petitions formed part of a concerted attack on his ability to keep the business afloat, **it seems to me that it would be wrong to condemn as illegitimate a claim designed to enable the shareholders to regain control of the companies they owned. As Ms Weaver pointed out, the appropriate place to make such a claim was before the Company Law Board**, and in so far as the

> company had entered into transactions which the shareholders were not entitled to complain about the Company Law Board is a judicial body with jurisdiction to determine whether that is the case.
>
> (*Emphasis supplied*)

106. This has nothing to do with the similarity or dissimilarity of parties. This is, quite clearly, a decision on the merits of the issues raised, the rival contentions; on whether the disputes arose out of or related to the arbitration agreement.

107. What Mr. Justice Walker says is, in fact, entirely correct. Consider the array of parties before the CLB. The 1st Respondent is always the Transauto company in question. There is then a batch of individuals joined either as directors or as authorised signatories of the 1st respondent company's bank accounts; and then there is Rakesh. Once we do this clubbing or grouping, it is difficult to see how the directors and bank account authorised signatories could ever be said to be claiming "through" Rakesh. They were certainly acting at his instance. They were not parties to the SSD, and could never have been. The SSD does not concern them, and they are not bound by any arbitration clause. There is no mother agreement in play here. The relief sought is their removal. The directors, and very possibly the authorised signatories too, were in a position where they had two masters but served well only one. They were directors of RKM's companies, but employed, post-restructuring, by Rakesh. RKM and Mrs. Veena Malhotra wholly owned Transauto. Between them, these three along with Rajiv and Mrs. Kunika Malhotra

wholly controlled every one of the other first respondent companies (with Rakesh having a negligible holding in one respondent company). Yet the directors of these companies acted in a way that was contrary to the interests of the only shareholders and owners. As Mr. Justice Walker points out, most egregious of all is the refusal of these directors to disclose information and accounts to the effective owners and only shareholders of the first respondent companies. This group of respondents does not claim "under" Rakesh though it clearly beholden to him, a very different thing. They are, therefore, not claiming under the SSD at all, and are joined as necessary parties to the CLB proceedings. The so-called dissimilarity of parties is, thus, clearly a non-issue.

108. What is material, and what the CLB does not seem at all to have considered, is what it is that was claimed before Mr. Justice Walker and what it is that he decided, i.e., the basis of the right decided. That is in paragraph 10 of Mr. Justice Walker's decision:

> 10. The jurisdictional basis for seeking an injunction here is that the SSD is governed by English Law. The basis on which the without notice injunction was claimed was that the revised transaction includes an arbitration agreement (clause 43.2 of the SSD) providing for arbitration in Geneva under the auspices of the London Court of International Arbitration. It is alleged by Rakesh that the disputes in the Indian proceedings are within the scope of the arbitration agreement as "arising from or connected with" the SSD and SD.

109. Mr. Justice Walker had decided this. This was the very issue before the CLB. Could the CLB now say it was not bound by Mr. Justice Walker's decision, absent any material putting that decision in one of the exceptions to Section 13? The CLB's reasoning on this, if it can be called that, is most unsatisfactory. Paragraph 17, in which the CLB says it is "inclined to accept the contentions of the Learned Senior Counsel representing the Respondent that this Bench is not bound the decision of any Foreign Court" contains no reasoning whatever. There is no reference to Section 13 of the CPC. There is no analysis of what lay before Mr. Justice Walker and what he, over several months, decided. I do not think it is at all possible to brush aside statutory provisions in so blithe a fashion.

110. I also find it difficult to accept Mr. Madon's proposition that the ratio of *Swiss Timing* is, or should be read to mean, that every dispute must be referred to arbitration where there exists an arbitration agreement. There were two grounds of opposition to the Section 11 application in *Swiss Timing*. The second was on the question of the agreement being void or voidable, an issue that does not arise in this case. That formed the central discussion in *Swiss Timing*. The first, though, was whether the disputes arose out of or relating to the agreement in question. This was dispensed with in short order in paragraph 15 (of the SCC report):

> 15. It is evident from the counter-affidavit filed by the respondents that the disputes have arisen between the parties out of or relating to the agreement dated 11-3-2010. On the one hand, the respondent disputes the claims

> made by the petitioner and on the other, it takes the plea that efforts were made to amicably put a "closure to the agreement". I, therefore, do not find any merit in the submission of the respondent that the petition is not maintainable for non-compliance with Clause 38.3 of the dispute resolution clause.

111. Now if it is shown that the disputes in question in this case do not arise from or relate to the arbitration agreement, or that this question has been previously decided in a judgment that is conclusive on the point, then even on a fair reading of *Swiss Timing*, there is no question of reference to disputes to arbitration.

112. Equally dispiriting in the impugned order is the analysis of *Chloro Controls*, the SSD and why precisely it is, despite the categorical and unambiguous findings by Mr. Justice Walker, that the CLB concluded that the disputes before it were covered by the SSD. All that the CLB seems to have done is quoted at some debilitating length from *Chloro Controls* and the SSD (about eight pages of the impugned order are a reproduction of various clauses of the SSD) and then, in paragraph 24, only said:

> 24. I have considered the submissions advanced by the Learned Senior Counsel appearing for both the sides and perused the terms and conditions contained in the SSD/SSSD. After careful scrutiny of the petitions and the SSD/SSSD, I have come to the conclusion that the grievances ventilated by the Petitioners in their

> respective Petitions are covered by the terms and conditions of the SSD/SSSD and the cause of action in each petition flows therefrom only. I, therefore, hold that the clause 43 of the SSD relating to the arbitration is applicable having regard to the facts of the cases in hand.

113. I have very little idea what, if anything, this is supposed to mean. Anyone might arrive at any conclusion. What matters is not only the conclusion, but the *process* and the *reasoning* by which one arrives at it, most especially a court. What precisely might be the effect of this "conclusion"? Does it mean that the so-called oral agreement or common understanding that Rakesh claims stands proved? To arrive at this "conclusion", the CLB would necessarily have had to so find; yet there is no reasoning or analysis of this anywhere. The CLB does not consider Mr. Justice Walker's decision, the questions or issues before him, his analysis or, for the purposes of Section 13 of the CPC, what he decided. It does not consider the effect of Section 13 of the CPC at all.

114. Of particular importance is the fact that the SSD has no provisions controlling the use of funds post-restructuring. That was the only question or grievance in the CLB petitions. The so-called oral agreement or common understanding stands entirely outside the SSD. How then could the disputes in the CLB petitions be covered by the SSD's arbitration clause, even leaving aside for the moment the question of Mr. Justice Walker's decision? The CLB considers none of this. It straightaway holds, on some reasoning left to our speculation, that the disputes in the CLB petitions are within

the frame of the SSD's arbitration clause. Mr. Chinoy is, I believe, entirely justified in describing this as perversity on a question of fact.

115. As the Supreme Court said in *Dale & Carrington Invt. (P) Ltd. v. P.K. Prathapan*:[43]

> 36. Section 10-F refers to an appeal being filed on a question of law. The learned counsel for the appellant argued that the High Court could not disturb the findings of fact arrived at by the Company Law Board. It was further argued that the High Court has recorded its own finding on certain issues which the High Court could not go into and, therefore, the judgment of the High Court is liable to be set aside. **We do not agree with the submission made by the learned counsel for the appellants. It is settled law that if a finding of fact is perverse and is based on no evidence, it can be set aside in appeal even though the appeal is permissible only on the question of law. The perversity of the finding itself becomes a question of law**. In the present case we have demonstrated that the **judgment of the Company Law Board was given in a very cursory and cavalier manner. The Board has not gone into real issues which were germane for the decision of the controversy involved in the case**.

[43] (2005) 1 SCC 212

> The High Court has rightly gone into the depth of the matter. As already stated, the controversy in the case revolved around alleged allotment of additional shares in favour of Ramanujam and whether the allotment of additional shares was an act of oppression on his part. On the issue of oppression the finding of the Company Law Board was in favour of Prathapan i.e. his impugned act was held to be an act of oppression. The said finding has been maintained by the High Court although it has given stronger reasons for the same.
>
> 37. We find no merit in the argument that the High Court exceeded its jurisdiction under Section 10-F of the Companies Act while deciding the appeal.
>
> (*Emphasis supplied*)

116. I have no doubt at all that the decision of Mr. Justice Walker on the question of arbitrability was not covered by any of the exceptions to Section 13. Mr. Justice Walker's decision was not contrary to *Chloro Controls*. It bound the CLB, and the CLB was not, as it held, "free to take its own view". The CLB's assessment is entirely incorrect in law. That being so, there is no question of any reference being made to arbitration.

…continued/-

L. MAINTAINABILITY OF CROSS APPEALS/CROSS OBJECTIONS

117. There remains a subsidiary issue of whether RKM's cross-objections/cross-appeals are maintainable. Mr. Madon argues that an appeal refusing to refer parties to arbitration is not maintainable under Section 50 of the Arbitration Act.[44] If that is so, he says, then a finding that resulted in that decision also cannot be assailed. Mr Chinoy responds, and I believe rightly, by saying that he has a right under Order 41 of the CPC to support any judgment. He refers to a recent decision of a learned single Judge of this Court in *Satpal Malhotra v Puneet Malhotra* in support.[45] I am in respectful agreement with those views. The cross-objections are maintainable.

118. Moreover, the impugned order is self-contradictory. Implicit in its finding is one that RKM's petition were properly brought and were not dressed up. In any event, that issue was concluded by the Mr. Justice Walker's decision, and the CLB could not have re-opened it as it did. In doing so, the CLB in effect took two diametrically opposite views: first, that the disputes were covered by the arbitration clause and, second, that the disputes were not referrable to arbitration, implying that the petition was *not* dressed up to avoid the arbitration clause. These findings cannot possibly co-exist.

---

44 *Fuerst Day Lawson*, *supra*.

45 Arbitration Appeal No. 12 of 2010, decided on 14th June 2013, per R.D. Dhanuka, J.

119. Mr. Madon is correct in saying that an order referring parties to arbitration is not appealable. However, in the view that I have taken, a reference to arbitration can only be made by the CLB where it dismisses the oppression and mismanagement petition before it, i.e., when it finds that the disputes lie outside Section 402 of the Companies Act and are within the ambit of an arbitration clause. Ordinarily, Mr. Madon would have been justified in contending that once it is held that the disputes are within an arbitration clause, a reference to arbitration must follow and that order is not appealable. In this case, though, the CLB has done not one or the other. It has done both: held that the disputes are arbitrable being within the arbitration clause and at the same time that such disputes are not arbitrable being within the frame of Section 402. It could not have arrived at these mutually exclusive findings. A dispute cannot both be arbitrable and not arbitrable. It is one or the other.

120. In any case, I have already held that issue whether the disputes were covered by the arbitration clause was already concluded by Justice Walker's decision. No question therefore arose of the CLB arriving at its finding that the disputes were within the arbitration clause. Only the second finding of non-arbitrability was correct, and on account of that there was no reference to arbitration at all. In consequence, RKM's cross appeal or cross objections are clearly maintainable.

…continued/-

M. THE APPOINTMENT OF AN OBSERVER BY THE CLB

121. There is no doubt, especially following *Bennet Coleman*, that it was well within the CLB's power to appoint an observer and facilitator. However, I have the gravest misgivings whether, on the basis of its findings, that order is correct particularly in regard to what it is that it asks the observer-cum-facilitator to do. The parties were directed to cooperate with observer-cum-facilitator in smooth discharge of his functions "*sorting out the allegations of the Petitioners and the grievances of the Respondents.*" This is not a substitution of non-corporate management for corporate management. This is a wholly impermissible delegation of a judicial function. It is one thing to charge an independent observer and facilitator with the management of the companies or supervision of their businesses. It is quite another to ask him to resolve or "sort out" the disputes between the two warring parties. What would be the nature of his attempted "sorting out"? Would it be an award under the Arbitration Act? A mediation report? What if it was disobeyed? Is this not a matter that is, and must remain, only within the province of the CLB? There is nothing in Chapter VI of the Companies Act, 1956 that permits the CLB to delegate this dispute-resolution judicial function in this manner.

122. Also, once the boards of directors of the first respondent companies were replaced, as the CLB permitted, there was little reason or justification for any such appointment. All that the impugned order says is that the appointment of the observer-cum-facilitator is to ensure "fair, smooth and transparent running" of the

companies, and to "ensure that the restructuring process is not hampered." But the restructuring process was already complete by end-March 2011. What was in dispute was the post-restructuring deployment of the Transauto companies' funds in payment of consultancy fees and the liabilities foisted on those companies for bank facilities and loans granted to SPCPL, the newly-formed Indian company under Rakesh's control. To limit the observer-cum-facilitator to supervising the "fair, smooth and transparent" running of the respondent companies was one thing. To charge him with the doing of that which had, admittedly, already been done was, at the very least, pointless. The CLB does, as Mr. Chinoy says, have very wide and sweeping powers. But those powers, by their very nature, demand that they be used judiciously and carefully.

123. Mr. Chinoy is correct in his submission, therefore, that there was no warrant whatever for the appointment of an observer-cum-facilitator as made.

…continued/-

N. CONCLUSIONS & FINAL ORDER

124. I will return now to the questions for determination I framed earlier.

(a) As to whether the disputes in a petition properly brought under Sections 397 and 398 read with Section 402 of the Companies Act, 1956 can be referred to arbitration, the answer is *no*, subject to the caveat that I have noted regarding a *mala fide*, vexatious or oppressive petition and one that is merely 'dressing up' to avoid an arbitration clause.

(b) The decision of Mr. Justice Walker of the UK Commercial Court of the Queen's Bench Division was not covered by any of the exceptions to Section 13 of the CPC. It was not contrary to *Chloro Controls*. It therefore bound the CLB. As Mr. Justice Walker had already held that the CLB disputes fell outside the arbitration clause, the impugned order is incorrect in its finding that the disputes in the petition were covered by the arbitration clause. Even otherwise, the disputes before the CLB were outside the purview of the arbitration agreement as they related to matters not covered by the SSD.

(c) The appointment of an observer-cum-facilitator was entirely without warrant and served no effective purpose.

125. The impugned order is upheld only to the extent that it holds that disputes in a properly brought petition under Sections 397 and 398 read with Section 402 of the Companies Act, 1956 are not referable to arbitration. The CLB's finding that the disputes were referrable to arbitration is incorrect in law.

126. In consequence, the four appeals filed by Rakesh, viz., Company Appeal (L) No. 10 of 2013, Company Appeal (L) No. 11 of 2013, Company Appeal No. 23 of 2013 (Company Appeal (L) No.12 of 2013), and Company Appeal No. 24 of 2013 (Company Appeal (L) No. 13 of 2013) are all dismissed. The remaining four cross-appeals filed by RKM are allowed to the limited extent of setting aside the impugned order in so far as it appoints an observer-cum-facilitator. The questions raised in the cross-appeals are answered as indicated above.

127. The CLB shall now proceed to forthwith hear the main Company Petitions that are pending before it.

…continued/-

O. STAY OF THIS ORDER & JUDGMENT

128. On 12th August 2014, the matter was for pronouncement of judgment. I indicated my findings. At that stage, both Mr. Madon and Mr. Chinoy requested that I not sign the judgment on that day as they wanted to address me on the question of stay. The matter was posted to 20th August 2014 at their request. I heard both Mr. Madon and Mr. Chinoy at some length on this question also on that day and, in open court, indicated that I was rejecting the application for stay. My reasons follow. I have also summarised the rival submissions.

129. Mr. Madon refers to the various interim orders passed by the CLB. The first in time is a set of four orders (one on each petition) dated 9th February 2012 *inter alia* restraining the four respondent companies from utilizing their funds except for salaries and statutory payments and secondly from disposing of any assets. A later order of 7th November 2012 directed the maintenance of *status quo* "as regards the shareholding, the constitution of the board of directors and the fixed assets" of the companies. In addition, the interim orders of 9th February 2012 were continued. As I have noted in Section C of this judgment, this was followed by an order of 19th November 2012 that clarified that there was no injunction as regards Transauto's board of directors, but that it would continue for the other three companies. Mr. Madon then points out the order of this Court on admission of these petitions, passed on 7th February 2013, by which the CLB's orders of 9th February 2012 and 7th November 2012 were continued. This, he says, was clarificatory.

130. Now in the impugned order of 31st January 2013, the CLB has only permitted the reconstitution of the boards of the respondent companies. The remaining *status quo* orders in relation to the shareholding and fixed assets continue. These have not been challenged by RKM and his fellow petitioners and therefore, Mr. Madon says, at least to that extent they must continue.

131. Seeking a stay of the operation of this judgment and order, Mr. Madon says that the interim *status quo* orders have held the field for at least 18 months and there is no reason why they should be abruptly discontinued now without giving the main appellant (Rakesh) a fair opportunity to carry the matter higher, especially since it involves a question of law. Dissolving the interim orders that have the effect of an injunction, and, specifically, permitting an immediate change in the constitution of the boards of directors of the four respondent companies is, Mr. Madon submits, bound to result in an irreversible situation, one with possibly catastrophic consequences to Rakesh's companies in the SuperMax group. The four RKM/Indian Transauto companies have contractual obligations with or to the SuperMax companies, and should these contracts be terminated, the consequences to the SuperMax group would be crippling.

132. Mr. Chinoy opposes this application; enough, he says, is enough. Rakesh has effectively wrested control of the finances of even the Transauto / Indian RKM companies for three long years. The boards of these companies are beholden to him and act at his bidding. The 99.9% shareholders of the companies have been denied even the most basic rights, to information and accounts. Indeed, the

very fact that this state of affairs has been allowed to continue for so long is itself reason enough to not grant any stay. Rakesh attempted to stymie his father's petition for relief not once, but twice: in the courts in England and then again before the CLB. He has lost in both actions, including at the venue of his choosing in an action he initiated. There can be, Mr. Chinoy submits, no justification for any continued stay. He points out that there is no challenge in Rakesh's appeals to that part of the impugned order that permits a reconstitution of the boards of the four respondent companies. In seeking a stay now of a judgment that dismisses his appeals, Rakesh cannot be in a position better than he was when he filed these appeals. The impugned order in para 37 modifies the previous interim orders at least as regards the reconstitution of the boards.

133. Mr. Madon's response is two-fold. First, that the earlier interim orders were modified by the impugned order only to the extent of the question of reconstitution of the boards; the remaining portion, regarding the shareholding and fixed assets is unchanged and unchallenged. Also, he says, his challenge in these appeals is against the rejection of Rakesh's application for reference to arbitration. Implicit in that is, necessarily, a challenge to the order permitting a reconstitution of the four respondent companies' boards.

134. Between these rival submissions, where lies the greater equity? That, I believe, is the only question I must ask myself. Mr. Madon is not wrong in saying that a given state of affairs having continued for considerable period of time, and without objection or application for modification by the other side, a brief continuance is

unexceptionable. But that argument, compelling though it is at first glance, only scratches the surface. Even given that the fabric of such separations or restructurings is seldom smooth and unwrinkled, there are tears and gashes in this one that are beyond the ordinary. Rakesh, then a young man his family trusted implicitly, appears *prima facie* to have betrayed that confidence, and to have done so in a most egregious manner. He is primarily responsible for the fractures in the family relationships and business. RKM and Rajiv acted in good faith; Rakesh was, as agreed, given full control of the SuperMax companies. The funds that were, in exchange, to come to the RKM-controlled Indian companies (the Transauto companies) were wrested — perhaps hijacked might be a more apposite term — and deployed to further the interests of the entities Rakesh controls. In effect, Rakesh engineered a *coup d'état* and assumed control of the entire group. Keeping the directors of the Transauto companies under his thumb, he not only created significant liabilities in the Indian companies but did so without notice or intimation to their owners, RKM, Transauto and the other family members. When these owners sought information, it was denied. Rakesh went so far as to threaten the directors should they make any disclosure. With orders from the CLB, these directors, all beholden to Rakesh, continued on the RKM Indian companies. This is the very "*status quo*" of which Mr. Madon now seeks a continuance.

135. There is also evidence that even after these appeals were filed, those directors continued to be obdurate and obfuscatory. By an order dated 21st October 2013, clarified on 29th October 2013,

this Court[46] appointed Mr. Justice H. Suresh, a retired Judge of this Court, as an Observer in respect of the four respondent companies, viz., Transauto & Mechaids Pvt. Ltd., Unique Properties and Securities Pvt. Ltd., Vidyut Metallics Pvt. Ltd. and Supermax International Pvt. Ltd. Mr. Justice Suresh (retd) held meetings with the parties. I have seen some of his minutes. He directed inspection and disclosure. Rakesh and the directors of the companies again played truant. On 9th December 2013, N.M. Jamdar, J. passed another order noting the lack of cooperation from the directors. Two directors named in that order were made personally responsible for ensuring compliance with the directions of the Observer. Although I am not continuing this order, it is nonetheless a telling indicator of the attitude, approach and conduct of Rakesh and the director-respondents of the four Transauto companies.

136. In Mr. Madon's formulation I fear there is much that is lost in translation. Mr. Madon speaks of the crippling effect a reconstitution of the four respondent companies' boards will have on Rakesh's SuperMax group companies should the contracts between the two be terminated by the former. What does this mean except that Rakesh continues to believe (presumably on the basis of his assertion of an oral agreement or common understanding) that he has unfettered control and use of, and access to, the funds of the Transauto companies. To allow them a situation where they might compromise on contracts with companies in his own group is inequitable; but it matters not a whit that those very contracts expose the four respondent companies to very considerable financial

---

[46] N.M. Jamdar, J.

risk, and even possibly ruin. Rakesh's Supermax companies must be protected and ring-fenced, even if this comes at the cost of the RKM-controlled four Indian Transauto companies. That they might as a result be placed in severe financial distress is apparently irrelevant. In a word: Rakesh must have the SuperMax group. He must also have the safety provided by the funds of the RKM Transauto group. RKM's and Rajiv's interests are of no moment. Their 99.9% shareholding is inconsequential. That the directors of their own companies have acted as Rakesh's puppets is immaterial. This is, in substance, the effect of the stay now requested.

137. I believe it would be wholly inequitable to allow this state of affairs to continue. There cannot possibly be any equity in Rakesh's favour in a situation like this. The irreversible prejudice that Mr. Madon apprehends is, I think, far outweighed by the considerably more profound prejudice and harm likely to result to RKM, his fellow-petitioners and the Transauto companies if the *status quo* or interim arrangement is continued. Such orders, once passed, tend to continue and are difficult to dislodge. I believe that equity now demands that Rakesh must assume the burden of satisfying a court in appeal from this judgment why the previous *status quo* or interim arrangement that has worked so unfairly to RKM and the Transauto companies should be allowed to continue. For myself, I find no justification for it.

138. As to the question of a freeze on the shareholding and the fixed assets, I believe this to be something of a red herring and perhaps a complete misconception. There is no question of a change in shareholding at all, and therefore no question of a 'stay'

continuing in that respect. There is also no warrant for any 'stay' on the fixed assets of the four respondent companies continuing.

139. The application for stay is rejected. Mr. Chinoy's request that the pending interim orders of 9th February 2012 and 7th November 2012 passed by the CLB be allowed to continue is one that I must accept. It is clarified that, except for those two orders, there will now be no interim order in place as regards any of the four respondent companies. Parties are at liberty to make such applications as they think fit for further suitable interim orders. The Company Law Board will consider every such application on its merits.

140. The eight appeals disposed of in these terms. In the facts of the case, there will be no order as to costs.

141. It only remains for me to thank Mr. Chinoy and Mr. Madon for their very considerable assistance and their untiring efforts throughout, especially on questions of law.

(G.S. PATEL, J.)

List of Authorities & Decisions Referred/Cited

1. *Haryana Telecom Ltd v Sterlite Industries (India) Ltd*, (1999) 5 SCC 688.
2. *Bennett Coleman & Co. v Union of India & Ors.*, 1977 (47) Comp Cas 92
3. *Manavendra Chitnis & Anr. v Leela Chitnis Studios P. Ltd. & Ors.*, 1985 (58) Comp Cas 113
4. *Surendra Kumar Dhawan & Anr. v R. Vir & Ors.*, [1977] 47 Comp Cas 276 (Delhi)
5. *O.P. Gupta v Shiv General Finance (P.) Ltd. & Ors.*, [1977] 47 Comp Cas 279 (Delhi)
6. *Das Lagerway Wind Turbines Ltd. v Cynosure Investments P. Ltd.*, [2009] 147 Comp Cas 149 (Mad)
7. *Sporting Pastime India Ltd. & Anr. v Kasthuri & Sons Ltd.*, [2008] 141 Comp Cas 111 (Mad)
8. *Hindustan Petroleum Corporation Ltd. v Pinkcity Midway Petroleums*, AIR 2003 SC 2881
9. *Vijay Sekhri & ors. v Union of India & Ors.*, [2011] 163 Comp Cas 195 (Delhi)
10. *Everest Holding Ltd. v Shyam Kumar Shrivastava & Ors.*, (2008) 16 SCC 774
11. *Foss v Harbottle*, (1843) 67 ER 189
12. *M.S.D.C. Radharamanan v M.S.D. Chandrasekarana Raja & Anr.*, (2008) 6 SCC 750
13. *Dhulabhai & Ors. v The State of Madhya Pradesh & Anr.*, AIR 1969 SC 78
14. *CDS Financial Services (Mauritius) Limited v BPL Communications Ltd. & Ors.*, [2004] 121 Comp Cas 374 (Bom)
15. *Marikar (Motors) & Anr. v M.I. Ravikumar & Ors.* [1982] 52 Comp Cas 362 (Ker)
16. *Pradip Kumar Sarkar & Ors. v Luxmi Tea Co. Ltd. & Ors.*, [1990] 67 Comp Cas 491 (Cal.)
17. *Luxmi Tea Co. Ltd. v Pradip Kumar Sarkar*, [1990] 67 Comp Cas 518 (SC)
18. *Fuerst Day Lawson Ltd. v Jindal Exports Ltd.*, (2011) 8 SC*C 333*

19. *Chloro Controls India (P) Ltd v Severn Trent Water Purification, Inc. & Ors.*,
(2013) 1 SCC 641

20. *World Sport Group (Mauritius) Ltd v MSM Satellite (Singapore) Pte. Ltd.*,
AIR 2014 SC 968; JT 2014 (2) SC 444.

21. *Sumitomo Corporation v CDC Financial Services (Mauritius) Ltd. & Ors.*,
(2008) 4 SCC 91

22. *Swiss Timing Limited vs. Organising Committee, Commonwealth Games 2010, Delhi.*,
(2014) 6 SCC 677

23. *N. Radhakrishnan vs. Maestro Engineers & Ors.*,
(2010) 1 SCC 72

24. *P. Anand Gajapathi Raju & Ors. v P.V.G. Raju*,
(2000) 4 SCC 539

25. *Brijlal Ramjidas & Anr. v Govindram Gordhandas Seksaria & Ors.*,
AIR 1943 Bom 201

26. *Brijlal Ramjidas & Anr. v Govindram Gordhandas Seksaria & Ors.*,
AIR 1947 PC 192

27. *Rajeshwar Prasad Misra v State of West Bengal*,
AIR 1965 SC 1887;

28. *P. Ramachandra Rao v State*,
AIR 2002 SC 1856

29. *Chockalingam v Duraiswami & Ors.*,
AIR 1928 Madras 327

30. *SBP & Co. v Patel Engineering Ltd. & Anr.*,
(2005) 8 SCC 618

31. *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.*,
(2011) 5 SCC 532 at page 546

32. *Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya*,
(2003) 5 SCC 531

33. *Dale & Carrington Invt. (P) Ltd. v. P.K. Prathapan*,
(2005) 1 SCC 212

34. *Satpal Malhotra v Puneet Malhotra*,
Arbitration Appeal No. 12 of 2010, decided on 14th June 2013, per R.D. Dhanuka, J.