SWAROOP SHARAD PHADKE Digitally signed by SWAROOP SHARAD PHADKE Date: 2022.12.24 17:28:43 +0530

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

ARBITRATION APPLICATION NO.238 OF 2019

Edufocus International Education LLP ...Applicant
vs.
Yashovardhan Birla and Others ...Respondents

WITH
ARBITRATION APPLICATION NO.227 OF 2019

Eduserve International Education LLP ...Applicant
vs.
Yashovardhan Birla and Others ...Respondents

Mr. Rohan Kelkar a/w. Mr. Chirag Bhatia, Mr. Rashi Shah i/b. Kartikeya & Associates, for the Applicants.

Mr. Vishal Kanade a/w. Mr. Sumit Chakrabarti, Mr. Shantam Mandhyan i/b. Vidhi Partners, for the Respondents.

CORAM : N. J. JAMADAR, J.
RESERVED ON : 8th DECEMBER, 2022
PRONOUNCED ON : 23rd DECEMBER, 2022

ORDER:

1. These applications are preferred under section 11 of the Arbitration and Conciliation Act, 1996 (the Act, 1996) to appoint an Arbitral Tribunal to arbitrate upon and decide the disputes/issues and/or differences between the parties arising out of and in accordance with an Agreement to Lease dated 8th September, 2014, School Management Services Agreement dated 13th August, 2014 read with Memorandum of Understanding (MOU) dated 14th August, 2014 and the Leave

and License Agreement dated 22nd September, 2014.

2. Background facts leading to these applications can be stated in brief as under:

Eduserve International Education LLP (Eduserve) the applicant in Application No. 227 of 2021 is a limited liability partnership firm registered under the Limited Liability Partnership Act, 2008 with Chandraprakash Goenka, Sandeep Goenka, who represent "Goenka Group", and Nirvaan Birla and Vedant Birla, who represent "Birla Group", as its partners. Mr. Nirvaan Birla and Vedant Birla are the sons of respondent No. 1 Yashovardhan Birla and No. 2 Avanti Birla. Respondent Nos. 1 and 2 along with 3 and 4 are the trustees of Birla Industries Group Charity Trust (the BIG Trust), the respondent No. 5, which is a public trust registered under Maharashtra Public Trust Act, 1950.

3. Respondent No. 5 BIG Trust runs educational institutions, including Gopi Birla Memorial School (the School) at plot No. 68, Walkeshwar Road, Mumbai 6 (the School property). Pursuant to the request of respondent Nos. 1 and 2, Sandeep Goenka had negotiations with respondent Nos. 1 and 2, who desired the Goenka to enter into a Joint Venture to administer and manage schools utilizing their expertise. Post negotiations on 8th September, 2014 two family groups, "Goenka" and "Birla", entered into a Deed of Limited Liability Partnership and formed the applicant Eduserve

4. Edufocus International Education LLP (Edufocus), the applicant in

Application NO. 238 of 2019 is another limited liability partnership under the Limited Partnership Act, 2008 with the same composition of partners representing the Goenkas and Birlas as in the case of Eduserve.

5. Edufocus and respondents executed a School Management Services Agreement whereby the respondents appointed the applicant as its educational and academic adviser. Under the said agreement Edufocus was to conceive, develop and implement educational goals for the trust, respondent No. 5, using the proprietary and confidential information of Goenkas. The said agreement was to be effective from 18th August, 2014 to 17th August, 2045. Clause 13 of the said agreement provided for resolution of the disputes arising out of or in connection with the said agreement through arbitration.

6. In furtherance to the SMSA, a Memorandum of Understanding (MOU) was executed between the parties to grant the applicant license to use the School Property for an aggregate period of 360 months (30 years) to be granted in six tranches of license period. First tranche was to commence from 14th August, 2014 and expire on 14th August, 2019. The applicant was to pay to the BIG Trust, respondent No. 5, an aggregate sum of Rs.73,53,900/- as the license fee. In addition, a sum of Rs. 2 Crores was to be deposited by way of interest free and refundable security deposit.

7. On 22nd September, 2014, in conformity with the aforesaid arrangement, the applicant and respondent No. 5 executed a Leave and License Agreement

wherein the BIG Trust, the respondent No. 5, agreed to give the School Property on Leave and License for the term of 60 months commencing from 14th August, 2014.

8. On 8th September, 2014, the BIG Trust, respondent No. 5 and Eduserve executed an Agreement to Lease in respect of the School Property for a period of 10 years. By way of consideration, in addition to lease rent, the lessee was to deposit with the lessor an amount of Rs. 2,48,40,000/- as an interest free security deposit. It was, inter alia, agreed that the BIG Trust, the lessor, shall approach the Charity Commissioner and obtain permission to execute the Lease Deed under section 36 of the Maharashtra Public Trusts Act, 1950. Clause 11 of the Lease Agreement provided for dispute resolution including arbitration upon failure of mediation.

9. The applicant asserts all these agreements i.e. SMSA, MOU and Leave & License Agreement and Agreement to Lease collectively constitute a contract between the parties. In terms thereof, the applicant and respondents took measures to implement the contract and perform their respective obligations. The applicant began overseeing the entire affairs of the school. The applicant shared its expertise and confidential information.

10. The respondents were initially non-cooperative. Later on, the respondents took an unjustifiable and incorrect stand vide letter dated 16th October, 2015 that the Agreement to Lease was in contravention of section 36(1) (b) of the

Maharashtra Public Trusts Act, 1950. Respondent No. 5 thus proposed to terminate the said arrangement and requested the applicant to execute the Deed of Cancellation. The applicant took umbrage.

11. Further correspondence was exchanged and proposals and counter proposals were made with a view to amicably resolve the dispute. In the meanwhile, despite the obtrusive stand of the respondents, the applicants continued to handle the operations of the school and provide management services. Yet the stalemate could not be resolved. The applicant has made substantial investment.

12. The applicants assert that on account of the refusal on the part of the respondents to perform their part of the contract and wilfull breach of the terms and conditions of the agreements between the parties and failure to obtain the requisite permission from the Charity Commissioner coupled with animus on the part of the respondent No. 5 to terminate the said agreement, arbitrable disputes have arisen between the parties.

13. Hence the applicants invoked arbitration by notice dated 20th August, 2018 whereby the applicants appointed Mr. Kirti G. Munshi, advocate, as their nominee and called upon the respondents to appoint their nominee arbitrator or agree to the appointment of Kirti G. Munshi as the sole Arbitrator. The respondents gave a reply to the said notice of invocation and refused to either nominate an Arbitrator or give consent to the appointment of advocate Kirti G.

Munshi as the sole Arbitrator. Hence, the applicants were constrained to institute these applications for appointment of an Arbitral Tribunal under section 11 of the Arbitration Act, 1996.

14. The respondents have appeared in both the applications. Affidavits in reply are filed on behalf of the BIG Trust. The respondent No. 5 has taken a slew of exceptions to the applications seeking appointment of Arbitral Tribunals.

15. Firstly, the notice invoking the arbitration is stated to be bad in law as the invocation thereunder is through Mr. Chandra Prakash Goenka and Mr. Sandeep Goenka, the partners of the applicant, in their personal capacity and not by the applicants. Secondly, the tenability of the applications is assailed on the ground that they are instituted without a valid authorization by the applicant firms. In substance, it is the contention of the respondent No. 5 that all the partners of the applicants have not resolved to institute these proceedings in the manner ordained by the terms of Limited Liability Partnership Deeds. Thirdly, the application is bad for mis-joinder of parties as the respondent Nos. 1 to 4, the trustees of the BIG Trust, respondent No. 5, have been unnecessarily roped in. Fourthly, the applications are also stated to be premature as they have been instituted without adhering to the mandate of pre-arbitral steps in the nature of mutual consultation or mediation provided thereunder.

16. As regards Edufocus (Application No. 238 of 2019) the respondent No. 5 contends that, at best, there is an arbitration clause in the School Management

Services Agreement dated 14th August, 2014. Thus the applicant cannot seek consolidation of all the agreements and reference of the disputes which have allegedly arisen thereunder to arbitration. Each of the said agreements, according to respondent No. 5, was executed by and between the applicants and respondent No. 5 for a separate purpose. In the absence of arbitration clause in the MOU and Leave and License Agreement and specific incorporation of the terms of SMSA into the MOU or the Leave and License Agreement, the arbitration clause under SMSA can not be invoked to resolve the disputes under MOU and/or Leave and License Agreement. In any event, the disputes between the licenser and licensee are not arbitrable as such disputes are amenable to the exclusive jurisdiction of the Court of Small Causes under section 41 of the Presidency Small Cause Courts Act, 1882.

17. With reference to application of Eduserve (Application No. 227 of 2021), it is contended that the Agreement to Lease itself is void as it was executed on behalf of a non-existing entity as the applicant came to be incorporated only on 30th September, 2014, and the Agreement to Lease is shown to have been executed on 8th September, 2014. The respondents further contend that the dispute between the lessor and lessee, which relationship the applicant attempts to establish, is non-arbitrable.

18. By filing affidavits in rejoinder, the applicants have made an endeavor to meet the objections raised on behalf of the respondents.

19. In the wake of the aforesaid pleadings, I have heard Mr. Rohan Kelkar, learned counsel for the applicants and Mr. Vishal Kanade, learned counsel for respondents.

20. The learned counsel have taken me through the pleadings and material on record, especially, the instruments executed by and between the parties namely the Limited Liability Partnership Deeds dated 8th September, 2014 (Eduserve) and 11th August, 2014 (Edufocus), School Management Services Agreement dated 13th August, 2014, MOU dated 14th August, 2014 and Leave and License Agreement dated 22nd September, 2014 (Edufocus) and the Agreement to Lease dated 8th September, 2014 (Eduserve).

21. Mr. Kelkar, the learned counsel for the applicants submitted that in the face of these documents and incontrovertible position that disputes arose between the applicants and respondents, the resistance to appointment of arbitrator to resolve the disputes, in accordance with the terms of the agreements which incorporate specific arbitration clause, is inconceivable. Mr. Kelkar submitted that SMSA dated 13th August, 2014 and Agreement to Lease dated 8th September, 2014 contain clear and explicit arbitration agreements, is incontestable. All the defences now sought to be raised to the reference of the dispute to arbitration are technical defences which are beyond the scope of inquiry under section 11 of the Arbitration and Conciliation Act, 1996. Amplifying the submission, Mr. Kelkar would urge that the alleged improper invocation of the arbitration, and invocation

sans a valid authorization on behalf of the applicant LLP are the matters clearly beyond the scope of inquiry under section 11 of the Act, 1996. The defence of misjoinder of respondent Nos. 1 to 4, according to Mr. Kelkar, is wholly untenable. Nor the contention that the invocation is premature for want of mediation is worthy of consideration.

22. Mr. Kelkar would urge that the substantive challenge based on the bar contained in section 41(2) of the Act, 1882 to the arbitrability of the dispute is also misconceived. It was submitted that by a catena of decisions it is now well neigh settled that every transfer of property dispute is not incapable of resolution by arbitration.

23. To bolster up this submission, Mr. Kelkar placed a strong reliance on the judgments of the Supreme Court in the cases of :-

1) **Booz Allen vs. SBI Home Finance Ltd. And Ors.**[1]

2) **Emaar MGF vs. Aftab Singh**[2]

3) **Vidya Drolia vs. Durga Trading**[3]

4) **Suresh Shah vs. Hipad Technology India Pvt. Ltd.**[4]

24. In opposition to this, Mr. Vishal Kanade, the learned counsel for the respondents would urge that the instant applications for reference of the dispute to arbitration are fraught with insuperable procedural and substantive

1 (2011) 5 SCC 532.
2 (2018) SCC OnLIne SC 2771
3 (2019) SCC OnLine SC 538
4 (2021) 1 SCC 529

impediments.

25. First and foremost, according to Mr. Kanade, the very invocation of the arbitration is wrongful. Inviting the attention of the Court to the notice invoking the arbitration, which shows that the same was addressed on behalf of Mr. Chandraprakash Goenka and Mr. Sandeep Goenka, in contradistinction to the applicant LLPs, Mr. Kanade would urge that such invocation can by not stretch of imagination be said to be on behalf of applicant LLPs. Support was sought to be drawn from the clauses in the LLP Deeds regulating decision making process by the LLPs. In any event, the invocation is not backed by any authorization or ratification by the respective LLPs.

26. Secondly, Mr. Kanade, would urge that the execution of the Agreement for Lease is itself in the arena of controversy as it was executed even before the incorporation of Eduserve.

27. Thirdly, Mr. Kanade submitted that a composite prayer in the application seeking reference to arbitration of disputes under all the agreements is impermissible in law. In this context, a two pronged challenge was mounted by Mr. Kanade.

28. First, the MOU dated 14th August, 2014 and the Leave and License Agreement dated 22nd September, 2014 do not contain any arbitration clause. They are separate and standalone agreements which are not covered by any arbitration clause. In the absence of a specific reference manifesting a clear

intention to incorporate the arbitration clause contained in another document, the prayer to refer the dispute to arbitration arising out of the MOU and Leave and Licence Agreement is legally unsustainable, urged Mr. Kanade. A strong reliance was placed by Mr. Kanade on the judgment of the Supreme Court in the case of **M.R. Engineers and Contractors (P) Ltd. vs. Som Datt Builders Ltd.**[5] and a judgment of this Court in the case of **MSTC Ltd. vs. Omega Petro Products Pvt. Ltd.**[6]

29. Second, the disputes under the Agreement to Lease dated 8th September, 2014 and MOU dated 14th August, 2014, Leave and License Agreement dated 22nd September, 2014 are not susceptible to arbitration in view of express bar contained in Presidency Small Cause Courts Act, 1882 (Act 1882). In substance, the applicants are seeking to enforce the rights in relation to the possession of the immovable property, under Agreement to Lease and Leave and Licence Agreement, which is governed by the Act, 1882 a special enactment. To bolster up this submission, reliance was placed on the judgments of this Court in the cases of **Central Warehousing Corporation, Mumbai vs. Fortpoint Automotive Pvt. Ltd., Mumbai**[7] and **ING Vysya Bank Limited vs. Modern India Limited**[8] and of the Supreme Court in the case of **Suresh Shah** (supra).

30. Mr. Kelkar, the learned counsel for the applicant joined the issue by canvassing a submission that the fact that there is no independent arbitration

5 (2009) 7 SCC 696
6 2018 SCC OnLine Bom 487
7 2010(1) Mh.L.J., 658
8 2008 (2) Mh.L.J. 653

clause in the MOU and the Leave and License Agreement does not detract materially from the applicants claim to refer the entire spectrum of the dispute to arbitration. It was urged, with a degree of vehemence, that firstly, the said objection is beyond the scope of inquiry under section 11 of the Act, 1996 and, secondly, and more importantly, MOU and Leave and License Agreement along with SMSA constitute a composite transaction between the parties. Banking upon the pronouncement of the Supreme Court in the case of **Chloro Controls India Pvt. Ltd. vs. Severn Trent Water Purification, Inc. and Ors.**[9], it was submitted that arbitration clause contained in SMSA is comprehensive enough to include the disputes which have arisen between the parties under the MOU and the Leave and License Agreement.

31. I have given anxious consideration to the rival submissions canvassed across the bar.

32. To start with, it may be apposite to note the timeline and the nature of the instruments executed by and between the parties.

(i) Edufocus was formed under the Deed dated 11th August, 2014.

(ii) SMSA came to be executed between Edufocus and respondents on 13th August, 2014. Indisputably, SMSA provides for arbitration as a dispute resolution mechanism under clause 13.11.

(iii) The MOU came to be executed between the respondents and Edufocus on 14th August, 2014 whereby and whereunder the respondents

9 (2013) 1 SCC 641

agreed to grant a license to use the School Property comprising of ground + 4 floors + Terrace (wing A) and ground + 6 floors + Terrace, (wing B) for aggregate 360 months.

(iv) The aforesaid MOU was followed by a registered Leave and License Agreement dated 22nd September, 2014 whereunder the respondents granted the aforesaid premises on Leave and License to Edufocus for a period of 60 months commencing from 14th August, 2014.

(v) Eduserve was formed on 8th September, 2014.

(vi) An Agreement to Lease came to be executed between Eduserve and the respondents on 8th September, 2014 wherein the respondent No. 5/ trust, lessor agreed to grant a lease of a portion of School Property having constructed area admeasuring 23000 sq.ft. consisting of stilt + Ground + 4 floors + Terrace. It is not in contest that clause 11.3 of the Agreement to Lease contains dispute resolution through arbitration by an Arbitral Tribunal consisting of 3 Arbitrators in accordance with the provisions of the Act, 1996.

33. In the light of the aforesaid facts and instruments, it would be necessary to immediately notice the prayers in the respective applications. In Application No. 238 of 2019, Edufocus prays for appointment of an Arbitral Tribunal to arbitratrate upon and decide disputes and differences which have arisen between the parties out of the SMSA dated 13th August, 2014 read with MOU dated 14th

August, 2014 and the Leave and License Agreement dated 22nd September, 2014.

34. In Application No. 227 of 2019, Eduserve seeks the appointment of an Arbitral Tribunal to arbitrate upon and decide the dispute and differences which have arisen between the parties out of the Agreement to Lease dated 8th September, 2014 and *SMSA dated 13th August, 2014, MOU dated 14th August, 2014 and the Leave and License Agreement dated 22nd September, 2014, the later 3 instruments having been executed by and between the respondents and Edufocus.*

35. Confronted with the aforesaid situation, Mr. Kelkar, learned counsel for the applicant submitted that Eduserve (Application No. 227 of 2019) restricts its application to the reference of the disputes which has arisen out of the Agreement to Lease dated 8th September, 2014 only, to arbitration.

36. In the light of the above, the controversy between the parties essentially revolves around two issues :

(i) Whether the reference of all the disputes and differences which have allegedly arisen out of SMSA dated 13th August, 2014, MOU dated 14th August, 2014 and Leave and Lincence Agreement dated 22nd September, 2014 executed by and between Eduserve and Respondents is warranted.

(ii) Is there any impediment in appointing an Arbitral Tribunal for adjudication of the disputes arising out of the Agreement to Lease dated 8th September, 2014, executed by Eduserve.

37. To start with it may be expedient to keep in view the scope of inquiry under section 11 of the Act, 1996. In view of the significant legislative change brought about by the 2015 Amendment Act, the scope of inquiry at the stage of section 11(6) application is confined to the examination of the existence of an Arbitration Agreement. Mr. Kelkar was justified in placing reliance on a three Judge Bench judgment of the Supreme Court in the case of **Mayavati Trading Pvt. Ltd. V/s. Pradyuat Deb Burman**[10] wherein the effect of the legislative change was expounded.

38. The scope of inquiry under section 11 of the Act, 1996 was considered in greater detail in the case of **Vidya Drolia vs. Durga Trading (supra)** A three Judge Bench of the Supreme Court considered the core issues as to, "non arbitrability", when the subject matter of the dispute is not capable of being resolved through arbitration, and the conundrum, "who decides the arbitrability". It would, therefore, be advantageous to consider the exposition of law in the case of **Vidya Drolia** (supra).

39. In para No.2 of the judgment, the Supreme Court framed the issues which warranted consideration :

> "2. A deeper consideration of the order of reference[11] reveals that the issues required to be answered relate to two aspects that are distinct and yet interconnected, namely :
>
> 2.1. (i) Meaning of non-arbitrability and when the subject matter of the dispute is not capable of being resolved through

10 2019 SCC Online SC 1164

11 (2019) 20 SCC 406

> arbitration.
>
> 2.2 (ii) The conundrum - "who decides" - whether the Court at the reference stage or the Arbitral Tribunal in the arbitration proceedings would decide the question of non-arbitrability.
>
> 2.3The second aspect also relates to the scope and ambit of jurisdiction of the Court at the referral stage when an objection of non-arbitrability is raised to an application under Section 8 or 11 of the Arbitration and Conciliation Act, 1996 (for short "the Arbitration Act").

40. After an elaborate analysis of historical context, legal provisions and the precedents, the first question was answered in para 76 as under :

> 76. In view of the above discussion, we would like to propound a fourfold test for determining when the subject matter of a dispute in an arbitration agreement is not arbitrable :
>
> 76.1 (1) When cause of action and subject matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem.
>
> 76.2 (2) When cause of action and subject matter of the dispute affects third party rights; have *erga omnes* effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable.
>
> 76.3 (3) When cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable.
>
> 76.4 (4) When the subject matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).
>
> 76.5 These tests are not waterlight compartments; they dovetail and overlap, albeit when applied holistically and pragmatically

will help and assist in determining and ascertaining with great degree of certainty when as per law in India, a dispute or subject matter is non-arbitrable. Only when the answer is affirmative that the subject matter of the dispute would be non-arbitrable.

76.6 However, the aforesaid principles have to be applied with care and caution as observed in **Olympus Superstructures (P) Ltd. V/s. Meena Vijay Khetan**[12] : (SCC p. 669 para 35)

"35. ……. Reference is made there to certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, which cannot be referred to arbitration. It has, however, been held that if in respect of facts relating to a criminal matter, say, physical injury, if there is a right to damages for personal injury, then such a dispute can be referred to arbitration (Keir v. Leeman[13]). Similarly, it has been held that a husband and a wife may refer to arbitration the terms on which they shall separate, because they can make a valid agreement between themselves on that matter (Solleux V. Herbst[14], Wilson V Wilson[15], and Cahill V Cahill[16])"

41. The discussion on the second issue as to "who decides arbitrability" was concluded as under :

"154. Discussion under the heading "who Decides Arbitrability?" can be crystalised as under :

154.1 Ration of the decision in Patel Engg. Ltd.[17] on the scope of judicial review by the court while deciding an application under Sections 8 or 11 of the Arbitration Act, post the amendments by Act 3 of 2016 (with retrospective effect from 23-10-2015) and even post the amendments vide Act 33 of 2019

12 (1999) 5 SCC 651
13 (1846) 9 QB 371
14 (1801) 2 Bos. & P 444
15 (1848) 1 HL Cas 538
16 (1853) LR 7 AC 420 (HL)
17 SBP & Co. V. Patel Engg. Ltd. (2005) 8 SCC 618

(with effect from 9-8-2019, is no longer applicable.

154.2 Scope of judicial review and jurisdiction of the court under Sections 8 and 11 of the Arbitration Act, is identical but extremely limited and restricted.

154.3 The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of "second look" on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub clause (i) of Section 34(2)(b) of the Arbitration Act.

154.4 Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably "non-arbitrable" and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct or arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.

155. Reference is, accordingly, answered."

42. The observations in paragraph Nos.233, 234 and 238 are also instructive and hence extracted below :

> 233. From the aforesaid discussion, we can conclude that the respondent-defendant has to establish a prima facie case of non-existence of valid arbitration agreement, wherein it is to be summarily portayed that a party is entitled to such a finding. If a party cannot satisfy the court of the same on the basis of documents produced, and rather requires extensive examination of oral and documentary production, then the matter has to be necessarily referred to the tribunal for full trial. Such limited jurisdiction vested with the court, is necessary at the pre-reference stage to appropriately balance the power of the tribunal with judicial interference.
>
> 234. The amendment to the aforesaid provision was meant to cut the deadwood in extremely limited circumstances, wherein the respondent is able to ex facie portray non-existence of valid arbitration agreement, on the documents and the pleadings produced by the parties. The prima facie view, which started its existence under Section 45 through *Shin Etsu case*[18] has been explicitly accommodated even under domestic arbitration by the 2015 Amendment with appropriate modifications.
>
> 238. At the cost of repetition, we note that Section 8 of the Act mandates that a matter should not *(sic)* be referred to an arbitration by a court of law unless it finds that prima facie there is no valid arbitration agreement. The negative language used in the section is required to be taken into consideration, while analysing the section. The Court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above. Therefore, the rule for the court is "when in doubt, do refer".

18 Shin-Etsu Chemical Co. Ltd. V Aksh Optifibre Ltd. (2005) 7 SCC 234

43. In view of the aforesaid exposition of law, the inquiry under section 11 of the Act, 1996 would be, in a sense, a very limited review to ascertain as to whether there is indeed 'no Arbitration Agreement' and to ensure that the parties are not forced to arbitrate when the matter is demonstrably "non arbitrable", and to cut off the dead wood. Where the resistance to arbitration on the count that the disputes are non arbitrable appears contentious, the Court would refer the parties to arbitration as the rule for the Court is, "when any doubt, do refer". The overarching consideration at the stage of section 11 application is to uphold the integrity and efficacy of arbitration as a preferred mode of dispute resolution chosen by the parties and not to embark upon an inquiry at the expense of the Arbitral Tribunal.

44. On the aforesaid touchstone, it may be apposite to first consider the common grounds of objection to the reference of the disputes to arbitration. Invocation of arbitration was sought to be assailed on the ground that the respective LLP firms had neither authorized the invocation of the arbitration nor the notices invoking the arbitration were issued for and on behalf of the applicant LLPs. This submission is required to be appreciated in the backdrop of the peculiar composition of the LLPs. Indisputably, the LLPs were formed by partners representing the Goenkas and Birlas. Undoubtedly, the notices invoking the arbitration, start with the description of Chandraprakash Goenka and

Sandeep Goenka as the persons on whose behalf the notices were issued. However, I am not persuaded to throw the invocation overboard on the said count alone. In my view, the substance of the matter is required to be considered. The notices of invocation refer to the transactions between the parties, the execution of the instruments in furtherance of the agreements between the parties, the purported cause for the dispute and resolution thereof through arbitration. In the totality of the circumstances, especially having regard to the composition of the LLPs, the invocation cannot be faulted at.

45. Mr. Kanade would urge that the absence of the resolution by the LLPs is fatal to invocation of arbitration. The aforesaid factors constitute an answer to this challenge, as well. In any event, the invocation of arbitration does not seem to be one of the 'Reserved Matters' under the respective Deeds of LLPs, which could not have been dealt with by the designated partner. In my view, having regard to the composition of he LLPs, the submission based on absence of resolution does not merit acceptance as, if stretched too far, the applicant LLPs may be deprived of the right to invoke the remedies.

46. The Agreement to Lease provides for a three tiered dispute resolution mechanism. First; mutual consultation, second; mediation, and, third, arbitration. Clauses 11.2 and 11.3.1 read as under:-

> "11.2 Mediation
> If the Dispute is not resolved by mutual consultation within 30 (thirty) days, the parties agree to attempt to settle it by mediation by one Party

> serving a written notice to the other party requesting a mediation ("Mediation Notice") to be conducted by Senior Executives/Promoters of either Party"
>
> "11.3.1 If the Dispute is not resolved within 30 (thirty) days of giving the Mediation Notice, or if one of the Parties refuses to participate in mediation, either party may require that the dispute be referred to and finally resolved by arbitration in accordance with the (Indian) Arbitration and Conciliation Act, 1996 for the time being in force."

47. Banking upon the aforesaid clauses, Mr. Kanade, submitted that the invocation is premature as it was not preceded by mediation. Mr. Kelkar, countered the submission by inviting the attention of the Court to the body of correspondence exchanged between the parties and a definite intention expressed by the respondents to terminate the Agreement to Lease. It was further submitted that even this Court made an effort to persuade the parties to resolve the dispute amicably as recorded in the order dated 9th January, 2019. Pursuant thereto, the parties participated in formal mediation for over two months but to no avail, submitted Mr. Kelkar. Indeed, the order dated 9th January, 2019 records the view of the Court that in the larger interest of the parties, it was appropriate that the parties made an attempt to resolve the issues.

48. The material on record indicates that prior to invocation of arbitration, lengthy correspondence was exchanged between the parties. Things came to such a pass that the respondent No. 5 proposed termination of the Agreement to Lease. In any event, post institution of these applications, efforts were made to

amicably resolve the disputes. In the circumstances, the challenge to the instant applications on the count of premature invocation of arbitration does not merit countenance.

49. The challenge that the agreement to lease is void as the same was executed with a non-existent entity on the premise that the certificate of incorporation of Eduserve under Section 12(1)(b) of LLP Act, 2008 was issued on 30 September 2014 and the agreement to lease was executed on 8 September 2014 is also unworthy of countenance. Indisputably, the limited liability partnership deed came to be executed between Mr. Chandraprakash Goenka, Mr. Sandeep Goenka and Mr. Nirvaan Birla on 8 September 2014. The fact that the certificate of incorporation came to be issued on 30 September 2014, may not be of decisive significance as the specific performance of contract can be sought by a juristic entity even where a contract was executed before its incorporation. It is not the case that either the Respondents questioned the validity of the agreement to lease on the said count or Eduserve resiled from the said agreement to lease after its incorporation. In any event, this aspect would not affect the arbitrability of the dispute and can be properly adjudicated by the arbitral tribunal.

50. This takes me to the core issue of the resistance on behalf of the respondents. Mr. Kanade, strenuously submitted that since the applicants seek enforcement of their rights under the Agreement to Lease (Eduserve), and the MOU and Leave and License Agreement (Edufocus), the non arbitrability of the

disputes is writ large. Mr. Kanade submitted that, in the instant case, the Court is not required to embark upon an inquiry into the arbitrability or otherwise of the disputes since the non arbitrability arises on account of the statutory prescription. In substance, according to Mr. Kanade, the disputes fall within the exclusive jurisdiction of the Court of Small Causes.

51. In the case of **Central Warehousing** (supra) a Full Bench of this Court considered the following question:-

1) "Whether in view of the provision of Section 5 of the Arbitration and Conciliation Act, 1996, if any Agreement between Licensor and Licensee contains a clause for arbitration, the jurisdiction of the Small Causes Court under the Presidency Small Cause Courts Act, 1882 would be ousted. ?"

52. After analyzing the provisions of the Act, 1996 and the Act, 1882 and the governing precedents, the Bench answered the aforesaid question as under:-

> "40. In summation, we would hold that section 41(1) of the Act of 1882 is a special law which in turn has constituted special Courts for adjudication of disputes specified therein between the licensor and licensee or a landlord and tenant. The effect of section 41(2) of the Act of 1882 is only the suits or proceedings for recovery of possession of immovable property or of licence fee thereof, to which, the provisions of specified Acts or any other law for the time being in force apply, have been excepted from the application of non-obstante clause contained in section 41(1) of the Act. The expression "or any other law for the time being in force" appearing in Section 41(2) will have to be construed to mean that such law should provide for resolution of disputes between licensor and licensee or a landlord and tenant in relation to immovable

> property or licence fee thereof, to which immovable property, the provisions of that Act are applicable. The Act of 1996 is not covered within the ambit of Section 41(2) in particular the expression "or any other law for the time being in force" contained therein. The question whether the exclusive jurisdiction of the Small Causes Court vested in terms of Section 41 of the Act of 1882 is ousted, if an agreement between the licensor and licensee contains a clause for arbitration, the same will have to be answered in the negative. For, Section 5 of the Act of 1996 in that sense is not an absolute non-obstante clause. Section 5 of the Act of 1996 cannot affect the laws for the time being in force by virtue of which certain disputes may not be submitted to arbitration, as stipulated in Section 2(3) of the Act of 1996. We hold that Section 41 of the Act of 1882 falls within the ambit of section 2(3) of the Act of 1996. As a result of which, even if the Licence Agreement contains Arbitration Agreement, the exclusive jurisdiction of the Courts of Small Causes under Section 41 of the Act of 1882 is not affected in any manner. Whereas, Arbitration Agreement in such cases would be invalid and inoperative on the principle that it would be against public policy to allow the parties to contract out of the exclusive jurisdiction of the Small Causes Courts by virtue of Section 41 of the Act of 1882."

53. Mr. Kanade invited attention of the Court to the judgment in the case of **<u>ING Vaisya</u>** (supra) wherein the Court was confronted with the question as to whether the provisions of Section 41 of the Presidency Small Causes would bar the jurisdiction of an Arbitral Tribunal to entertain a claim for specific performance of an agreement of renewal contained in an agreement of license executed between a licensor and licensee. This Court held that since there was a pre-existence relationship of licensor and licencee between the parties, the relief of renewal of the license cannot be said to be a bare relief of specific performance

susceptible to arbitration.

54. Mr. Kelkar made an earnest endevour to draw home the point that the aforesaid propositions do not apply with equal force to the facts of the case at hand. It was urged with tenacity that the MOU and the Leave and License Agreement (Edifucos) were entered into by and between the parties with intent to give effect to SMSA. MOU and Leave and License Agreement, therefore, according to Mr. Kelkar, cannot be considered *de hors* the SMSA. As regards the Agreement to Lease (Eduserve), Mr. Kelkar would urge that an Agreement to Lease stands on a different footing and need not necessarily involve a dispute which falls within the exclusive province of the Court of Small Causes.

55. Though Mr. Kelkar made reference to a large number of judgments, in my view, the controversy is set at rest by a three Judge Bench judgment of the Supreme Court in the **Suresh Shah** (supra) wherein the issue of non arbitrability was considered from the stand point of a dispute relatable to the provisions of Transfer of Property Act, 1981 and a dispute which is amenable to exclusive jurisdiction under the Rent Acts. The following observations make the position abundantly clear:-

> "17. Such equitable protection does not mean that the disputes relating to those aspects between the landlord and the tenant is not arbitrable and that only a Court is empowered to waive the forfeiture or not in the circumstance stated in the provision. In our view, when the disputes arise between the landlord and tenant with regard to determination of lease under the TP Act, the landlord to secure possession of the leased property

in a normal circumstance is required to institute a suit in the Court which has jurisdiction. However, if the parties in the contract of lease or in such other manner have agreed upon the alternate mode of dispute resolution through arbitration the landlord would be entitled to invoke the arbitration clause and make a claim before the learned Arbitrator. Even in such proceedings, if the circumstances as contained in Section 114 and 114A of TP Act arise, it could be brought up before the learned Arbitrator who would take note of the same and act in accordance with the law qua passing the award. In other words, if in the arbitration proceedings the landlord has sought for an award of ejectment on the ground that the lease has been forfeited since the tenant has failed to pay the rent and breached the express condition for payment of rent or such other breach and in such proceedings the tenant pays or tenders the rent to the lessor or remedies such other breach, it would be open for the Arbitrator to take note of Section 114, 114A of TP Act and pass appropriate award in the nature as a Court would have considered that aspect while exercising the discretion.

18. On the other hand, the disputes arising under the Rent Acts will have to be looked at from a different view point and therefore not arbitrable in those cases. This is for the reason that notwithstanding the terms and conditions entered into between the landlord and tenant to regulate the tenancy, if the eviction or tenancy is governed by a special statute, namely, the Rent Act the premises being amenable to the provisions of the Act would also provide statutory protection against eviction and the courts specified in the Act alone will be conferred jurisdiction to order eviction or to resolve such other disputes. In such proceedings under special statutes the issue to be considered by the jurisdictional court is not merely the terms and conditions entered into between the landlord and tenant but also other aspects such as the bonafide requirement, comparative hardship etc. even if the case for eviction is made out. In such circumstance, the Court having jurisdiction alone can advert into all these aspects as a statutory requirement and, therefore, such cases are not arbitrable. As indicated above, the same is not the position in matters relating to the lease/tenancy which are not governed under the special statutes but under the TP Act.

> 18. In the backdrop of the above discussion, we are of the considered view that insofar as eviction or tenancy relating to matters governed by special statutes where the tenant enjoys statutory protection against eviction whereunder the Court/Forum is specified and conferred jurisdiction under the statute alone can adjudicate such matters. Hence in such cases the dispute is non arbitrable. If the special statutes do not apply to the premises/property and the lease/tenancy created thereunder as on the date when the cause of action arises to seek for eviction or such other relief and in such transaction if the parties are governed by an Arbitration Clause; the dispute between the parties is arbitrable and there shall be no impediment whatsoever to invoke the Arbitration Clause. This view is fortified by the opinion expressed by the Coordinate Bench while answering the reference made in the case of Vidya Drolia wherein the view taken in Himangni Enterprises is overruled." (Emphasis Supplied)

56. The Supreme Court has, thus, drawn a distinction between a dispute which is governed by the provisions of Transfer of Property Act, 1981 and a dispute arising under the Rent Act. The former is held to be amenable to resolution through arbitration. The latter is susceptible to adjudication by the Courts having jurisdiction under the special enactment.

57. In view of the aforesaid position in law, in my view, the bar under Section 41(2) of the Act, 1882 may not apply to the resolution of the dispute arising out of the Agreement to Lease as the disputes stem from an agreement to create the lease in future, the specific performance of which can be sought even before an Arbitrator. Conversely, the proceeding to enforce the specific performance of an Agreement to Lease cannot be said to be a suit relating to recovery of possession

of property or relating to recovery of any license fee or charges or rent therefor.

58. In the context of the MOU and the registered Leave and License Agreement (Edifucous), however, objection to arbitrability cannot be discarded lightly. MOU incorporated an agreement to create the license. Eventually, MOU culminated in execution of registered Leave and License Agreement. The said Leave and License Agreement establishes jural relationship of licensor and licencee between the parties. The disputes which arise out of the said Leave and License Agreement would, therefore, emanate from the said relationship of licensor and licencee. In my view, the interdict contained in section 41(2) of the Act, 1882 would operate with full force and vigor rendering the dispute not amenable to arbitration.

59. Mr. Kelkar attempted to salvage the position by forcefully canvassing a submission that MOU and Leave and License Agreement are but a part of composite transaction between the parties evidenced by the SMSA, which is in the nature of a mother contract. In order to give effect to the transaction evidenced by SMSA, the execution of Leave and License Agreement was inevitable. From this stand point, neither the absence of independent arbitration clause in the MOU or the Leave and License Agreement nor the bar under section 41(2) of the Act, 1882 would preclude the resolution of the dispute through arbitration. Mr. Kelkar heavily relied upon the judgment of the Supreme Court in the case of **Chloro Controls India Pvt. Ltd.** (supra) to bolster up this

submission.

60. In the case of **Chloro Controls India Pvt. Ltd.** (supra), in paragraphs 144 and 145 the Supreme Court observed, inter alia, as under:-

> 144. When we refer to all the six relevant agreements in relation to the arbitration clause, the Shareholders Agreement, the Financial and Technical Know-How License Agreement and the Export Sales Agreement contained the arbitration clause while the other three agreements, i.e., International Distributor Agreement, the Managing Director's Agreement and the Trademark Registered User License Agreement did not contain any such arbitration clause. The arbitration clause contained in the Principal Agreement in clause 30 has been reproduced above. It requires that any dispute or difference arising under or in connection with that agreement which could not be settled by friendly negotiation and agreement between the parties, would be finally settled by arbitration conducted in accordance with the Rules of ICC. This clause is widely worded. It is comprehensive enough to include the disputes arising 'under and in connection with' the agreement. The word 'connection' has been added by the parties to expand the scope of the disputes under the agreements. The intention to make it more comprehensive is writ large from the language of the agreement and particularly clause 30 of the Mother Agreement. It is useful to notice that the agreement has to be construed and interpreted in accordance with laws of the Union of India, as consented by the parties.
>
> 145. The expression 'connection' means a link or relationship between people or things or the people with whom one has contact (Concise Oxford Dictionary (Indian Edition). 'Connection' means act of uniting; state of being united; a relative; relation between things one of which is bound up with (Law Lexicon 2nd Edn. 1997). Thus, even the dictionary meaning of this expression is liberally worded. It implies expansion in its operation and effect both. Connection can be direct or remote but it should not be fanciful or marginal. In other words, there should be relevant connection between the dispute and the agreement by specific words or by

> necessary implication like reference to all other agreements in one (principal) agreement. The expression appearing in clause 30 has to be given a meaningful interpretation particularly when the Principal Agreement itself, by specific words or by necessary implication, refers to all other agreements. This would imply that the other agreements originate from the Principal Agreement and hence, its terms and conditions would be applicable to those agreements."

61. The aforesaid pronouncement, in my considered view, does not advance the cause of the submission on behalf of the applicant (Edufocus). I deem it superfluous to delve into the question as to whether there is a specific incorporation of the arbitration clause contained in SMSA, in the MOU and Leave and License Agreement. In the case at hand, the real question is not as to whether the agreements in question collectively evidence a composite contract but the question is of existence of a statutory bar. Therefore, I am unable to accede to the submission on behalf of the applicant (Edufocus) that the dispute arising out of MOU and Leave and License Agreement are also required to be referred to arbitration.

62. The conspectus of the aforesaid discussion is that the applications deserve to be partly allowed.

Hence, the following order:-

ORDER

Arbitration Application No.238 of 2019

1] The Application stands partly allowed.

2] Arbitral Tribunal is ordered to be constituted to arbitrate upon and decide the disputes and differences between the parties arising out of the School Management Services Agreement dated 13th August, 2014 only.

Arbitration Application No. 227 of 2019 :-

3] The Application stands partly allowed.

4] Arbitral Tribunal is ordered to be constituted to arbitrate upon and decide the disputes and differences between the parties arising out of the Agreement to Lease dated 8th September, 2014 only.

5] At this stage the learned counsel for the parties submit that, it would be appropriate if a Sole Arbitrator is appointed to arbitrate the disputes between the parties.

6] Shri S.C. Gupte, a former Judge of this Court, is appointed as Sole Arbitrator to decide all the disputes and differences between the applicants and respondents arising out of School Management Services Agreement dated 13th August, 2014 and the Agreement to Lease dated 8th September, 2014 in Arbitration Application No. 238 of 2019 and 227 of 2019, respectively.

7] The learned Arbitrator is requested to file his disclosure statement under section 11(8) read with Section 12(1) of the Act, 1996 within two weeks with the Prothonotary and Senior Master and provide copies to the parties.

8] Parties to appear before the Sole Arbitrator on a date to be fixed by him at his convenience.

9] Fees payable to the Sole Arbitrator will be in accordance with the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018.

10] In the circumstances of the case, there shall no order as to costs.

(N.J.JAMADAR, J.)