

Mr. Akshay Kapur and ors. Vs. Mr. Rishav Kapur and ors.

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SooperKanoon Citation : sooperkanoon.com/695097

Court : Delhi

Decided On : May-30-2003

Reported in : 2003(2)ARBLR508(Delhi); 105(2003)DLT467; 2003(69)DRJ332; 2003(3)RAJ189

Judge : Vikramajit Sen, J.

Acts : [Arbitration and Conciliation Act 1996](#) - Sections 5, 7, 7(3), 8, 8(1), 8(3), 16, 36 and 37; [Arbitration Act, 1940](#) - Sections 8, 12, 20, 34, and 41; Indian Contract Act - Sections 28

Appeal No. : IA No. 1441/2003 in Suit No. 77/2003

Appellant : Mr. Akshay Kapur and ors.

Respondent : Mr. Rishav Kapur and ors.

Advocate for Def. : A.M. Singhvi, Sr. Adv. and ; Sudhir Makkar, Adv. for Defendant Nos. 4 to 6, 8 and 9, ;

Advocate for Pet/Ap. : C.A. Sundaram, Sr. Adv.,; Anuradha Dutt and; Ekta Kapil

Disposition : Application dismissed

Judgement :

Vikramajit Sen, J.

1. These Orders shall decide an application filed on behalf of Defendants No. 8 and 9 under Section 8 read with Section 5 of the Arbitration & Conciliation Act 1996 (hereinafter referred to as the 'Act') praying that the parties and the disputes be referred to arbitration and the pending suit be dismissed. The suit is for Declaration and permanent injunction in which the reliefs prayed for are --

'a . pass a decree of declaration declaring the impugned report to be invalid and/or void.

b. pass a decree of permanent injunction restraining the defendants from pursuing or taking any steps pursuant to the impugned report.'

2. In is No. 338/2003 which accompanied the plaint praying for an ex-parte ad interim injunction, the Defendants had been restrained from taking any steps or acting in pursuance of the Final Valuation Report prepared by Messrs Ernst & Young Private Ltd., Defendant No. 11, through Defendant No. 10. Arguments have been addressed at length on the application under Section 8 only. It needs to be clarified that since the applicants, as well as the other Defendants, have not pressed for the recall of the ex- parte ad interim injunction passed on 14.1.2003, pending disposal of the Section 8 application, those Orders would continue until it is found that the suit is not maintainable, or is No. 388/2003 is devoid of merit.

3. Dr. A.M. Singhvi has drawn attention to the Clause 4 of the Memorandum of Understanding (MoU) dated 8.1.1999 which clarifies that it 'incorporates only the broad guidelines to be followed for arriving at a final settlement between the parties. The essence of the mutual understanding is that all the assets and the Companies referred to above shall be divided in the three equal baskets after the same has been properly evaluated at the present market price. The valuation of all the assets, Companies, Trusts and Firms shall be done by Shri K.N. Memani of Messrs Ernest & Young, Chartered Accountants who shall value the Companies, Private Limited Companies, Partnership Firms, Charitable Trusts and other assets at market price as per the accepted principles of accountancy. Shri K.N. Memani will confer jointly with the three groups regarding the valuation of all the

Companies/Firms/Trusts etc. and thereafter declare the value. Shri K.N. Memani's valuation will be final and un-challengeable by the parties or even the Arbitrator.' It is contended that the process of valuation was started in August 2000 and all concerned parties, including the Plaintiff fully participated therein. He has also submitted that the valuers, namely, Messrs Ernst & Young, had been represented before the learned Arbitrator, who has already held about fifty hearings. It is Dr. Singhvi's further contention that the principles of waiver, acquiescence and estoppel are clearly attracted since the Plaintiff has participated in the arbitral proceedings with full knowledge and without any demur whatsoever. He has submitted that the present objections have been raised only when alleged siphoning of funds has come to light and that if suits of the present genre are entertained, the Act would be totally defeated and emasculated. The Arbitration & Conciliation Act, 1996 in terms bars the interference of Civil Courts in arbitral proceedings and instead envisages or permits a challenge to the Award only after it is passed. He has referred to Clause IV(v) of the Objects of the Act and has relied on Sections 5, 8, 16 and 37 thereof. In respect of the factual matrix, Dr. Singhvi has submitted that there has been a suppression of relevant events in the litigation, in particular to the dismissal of SLP No. 13239/2002 on 29.7.2002 which was preferred against the Order dated 10.5.2002 of Hon'ble Mr. Justice M.A. Khan in which the prayer to declare the mandate of the arbitrator to have de facto and de jure ended, was dismissed in limini. The defalcation of funds by the Plaintiff is stated to have been for approximately Rs. 9,00,00,000/- from the Malanpur unit to various companies owned by the Arun Kapur family, i.e. the Plaintiffs. He has strenuously submitted that if the Valuation Report is not given effect to, the whole purpose of the arbitration proceedings will come to a grinding halt.

4. Mr. Sundaram, learned counsel for the Plaintiff has, on the contrary, submitted that Section 8 of the Act is akin to Sections 12 and 34 of the Arbitration Act 1940, the only difference being that no discretion is reposed in the Court. It is his contention that the only issue to be kept in mind is whether the Evaluation Report and the connected proceedings are covered by and fall within the Arbitration Clause. It is his contention that the Arbitration Agreement is concerned only with the preparation of three baskets and their allocation and distribution to the three sub-families. The learned Arbitrator was not, and because of lack of expertise,

could not have been invested with the task of preparation of the valuation of all the assets which would be distributed and segregated into the three baskets. So far as the valuation is concerned, it is his submission that since all the amounts were kept in the same bank, no mala fides should be imputed to the Plaintiffs. Instead, the Plaintiff had been discriminated against inasmuch as an Audit was ordered by the learned Arbitrator only in the Plaintiff's case, but their similar prayer was declined in respect of other units. He has vehemently contended that any agreement for arbitration must be in writing and that Section 7(3) of the Act leaves no room for acquiescence. He has argued that the very orders that the Plaintiff is aggrieved by are being projected by the Defendants as indicative of the Plaintiff's acquiescence. He has also drawn attention to the fact that Messrs Ernst & Young are not parties to the Arbitration Clause and that all the Defendants have not joined in the prayer under Section 7 read with Section 5 of the Act inasmuch as 50.2% of the shares of Atlas Industries is with the public. It is impermissible to equate the Joint Managing Committee, which comprise the parties hereto with the Board of Directors of Atlas Industries. Mr. Sundaram has further submitted that although the Joint Managing Committee was formed in the arbitration proceedings, it did not empower the learned Arbitrator to hold sway over all matters concerning the family dispute. He has further sustained his argument on the non-maintainability of the application on the stands of Defendants No. 10 and 11 that they are not privy to the arbitration proceedings even though they have attended most of them. Mr. Sundaram has also emphasised that the request of Mr. Arun Kapur for the examination of the books of Atlas Cycles Industries Limited, Milton Cycles Industries Limited and Roamer Engineering Works Limited was turned down by the learned Arbitrator for the reason that in his opinion such directions did not fall within the scope of arbitration. He has also relied on the observations of the learned Arbitrator in similar vein viz.

'how to treat the amount that Arun Kapur may be found to have defalcated, if at all, I am of the view that this is a matter of maintenance of company's accounts -- depending on how such shortfalls have been adjusted in the past -- which will have to be considered by Mr. Memani as it falls within his scope to evaluate the assets, etc. for preparing the three baskets. The MoU clearly bars the Arbitrator from entering his arena and I have no desire to do so. A company undergoes

losses for a variety of reasons, defalcation may be one of them, and how such amounts are adjusted is a matter which falls within the purview of the accountancy practice of the company and it will be the sole responsibility of Mr. Memani who has to evaluate the assets, to assessing its impact on valuation before preparing three equal baskets. I thereforee hold that this is a matter which falls outside the scope of Arbitration'.

He has assailed the Report of Messrs Ernst & Young, of January, 2003, on the ground that Mr. Arun Kapur was not given any hearing by the Valuer ostensibly because Mr. Arun Kapur was not on the Board of Directors, having been removed there from on March, 2001. My attention has been drawn to the Orders of the learned Arbitrator dated 4.4.2001 in which it has been observed that the learned Arbitrator was ' aware that the reference under the MoU is limited and it may not be possible for me to issue any directive to the Board'. Mr. Sundaram has also highlighted the observations of the learned Arbitrator in the 36th hearing on 13.10.2001 in which the Plaintiff's objection to the exercise of jurisdiction was noted and rejected. It was observed by the learned Arbitrator that 'it must be remembered that no question of jurisdiction was raised when the demand to refund Rs. 5,95,60,400/- was made. In fact, he acquiesced in the jurisdiction, gave an undertaking dated 9.4.2001 and wrote the typed letter delivered on 10.4.2001. This will be clear from the Minutes of the Meeting held on 9.4.2001 and on subsequent dates. I am, thereforee, of the opinion that it is too late in the day to contend that this issue does not fall within my purview'. He has also emphasised the fact that the audit of the company's accounts was turned down by the learned Arbitrator on the ground that whilst he had control over Messrs Ernst & Young, he had no control over Messrs. S.R. Batliboi & Company. The Valuation Report is also being challenged on the ground that there was no basis for returning the following findings:-

'In a normal case, if the amounts had been due from any third party, the above extra-ordinary items would be netted off the valuation. However, in the current case, the amount is due from one of the signatories of the MoU. thereforee, given the context of the valuation exercise, we have considered it appropriate to assume that the above would be recoverable from the said signatory of the MoU i.e. Mr.

Arun Kapur. thereforee, we have assumed Rs. 1,045.3 lakh (Rs. 545.0 lakh of extra-ordinary revenue loss and Rs. 500.3 lakh of provision) to be recoverable from him. Atlas Cycles has already claimed a tax deduction on the extra-ordinary revenue loss so booked earlier. The tax deduction amounts to Rs. 194.6 lakh at the marginal tax rate. thereforee, a net amount of Rs. 850.7 lakh is added to the valuation. We have not assumed any interest income that may arise on account of delayed recovery of this amount'.

5. The following extract from the Report has also been attacked by Mr. Sundaram on the ground that persons inimical towards the Plaintiff have been consulted and the Report is based on such confabulation:--

'In the course of the valuation, E&Y; were provided with both written and verbal information, including market, technical, financial and operating data. We have also conferred jointly with the three Family Groups. We have evaluated the information provided to us by the Group through broad inquiry, analysis and review (but have, however, not carried out a due diligence or audit of the Group for the purpose of this engagement, nor have we independently investigated or otherwise verified the data provided). Through the above evaluation, nothing has come to our attention to indicate that the information provided was materially mis-stated/incorrect or would not afford reasonable grounds upon which to base the report. We do not imply and it should not be construed that we have verified any of the information provided to us, or that our inquiries could have verified any matter, which a more extensive examination might disclose. The terms of our engagement were such that we were entitled to rely upon the information provided by the Group without detailed inquiry. Also, we have been given to understand by the Family Members and the officials of the Group that it has not omitted any relevant and material factors and that it has checked out relevance or materiality of any specific information to the present exercise with us in case of any doubt. Accordingly, we do not express any opinion or offer any form of assurance regarding its accuracy and completeness. Our conclusions are based on these assumptions, forecasts and other information given by/on behalf of the Group. The Family Members and officials of the Group have indicated to us that they have understood that any omissions, inaccuracies or misstatements may materially affect our valuation

analysis/results. Accordingly, we assume no responsibility for any errors in the above information furnished by the Group and their impact on the present exercise. Also, we assume no responsibility for technical information furnished by the Group and believed to be reliable'.

6. Other instances of this alleged discrimination have also been referred to. Mr. Sundaram has referred to the following paragraph in General Manager, Northern Railway and Another vs . Sarvesh Chopra, : [2002]2SCR156 :-

' To sum up, our conclusions are: (i) while deciding a petition under Section 20 of the [Arbitration Act, 1940](#), the court is obliged to examine whether a difference which is sought to be referred to arbitration is one to which the arbitration agreement applies. If it is a matter excepted from the arbitration agreement, the court shall be justified in withholding the reference, (ii) to be an excepted matter it is not necessary that departmental or an ' in-house' remedy for settlement of claim must be provided by the contract. Merely for the absence of provision for in-house settlement of the claim, the claim does not cease to be an excepted matter, and (iii) an issue as to arbitrability of claim is available at all the three stages -- while making reference to arbitration in the course of arbitral proceedings and while making the award a rule of the court'.

However, It must be borne in mind that these observations have been made in the context of the Arbitration Act 1940, which regime has been materially varied by the 1996 Act. There was no provision in the erstwhile statute which envisaged the learned Arbitrator to decide on its own jurisdiction. For the same reason the pronouncements in Gaya Electric Supply Co. Ltd., vs . State of Bihar, : [1953]4SCR572 and Asiatic Shipping Co. (Private) Ltd. vs . P.N. Djakarta Lloyd and Another, : AIR1969 Cal374 are not altogether apposite although they definitely demarcate the distinction between arbitrability of disputes specifically so indicated and those outside such a compact.

7. Dr. Singhvi's reference to Hindustan Lever Employees' Union vs. Hindustan Lever Ltd. and Others, (1995) 83 Comp Cas. 30 and Miheer H. Mafatlal vs . Mafatlal Industries Ltd., : AIR 1997 SC506 is similarly not of any assistance in deciding the present application. The Apex Court had expressed the dangers of

jural interference with the report or opinion of an expert albeit in respect to a Scheme of Amalgamation. These observations would be relevant only when the application under Order XXXIX CPC for the passing of an injunction pendente lite is taken up for final consideration.

8. The Arbitration & Conciliation Act 1996 was enacted with the avowed objectives, inter alia, to ensure that the arbitral tribunal remains within the limits of its jurisdiction and to minimise the intervention and delimit the supervisory role of courts in the arbitral process. Section 5 states in very wide words that notwithstanding anything contained in any other law for the time being in force, no judicial authority shall intervene [presumably in the course and continuance of the arbitral proceedings] except where specifically provided. Section 8 is expected to fulfill functions similar to Section 20 and Section 34 of the 1940 Act. As I see it, the present Section is a hybrid of the two earlier ones, albeit with some differences. A perusal of Section 8 and of Section 34 will yield that some of the distinctions between them, inter alia, are firstly that under Section 34 discretion to refer the parties to arbitration was saved to the Court; now it is mandatory. Although Courts have sometimes interpreted the auxiliary verbs 'may' to be mandatory and 'shall' only to be directional in the syntax of a particular provision, where there has been a deliberate departure by the legislature from 'may' to 'shall', I would consider it to be mandatory. Secondly, the earlier enactment merely called for a stay of proceedings, whereas the later provisions prescribes that the parties should be referred at once to arbitration, rendering the suit not maintainable, atleast thereby bringing the proceedings before the judicial authority to its culmination. Thirdly, the 1940 Act contemplated an invocation by as well as against a party to an arbitration agreement or any person claiming under him. The 1996 Act by referring to the legal action in a matter which is the subject of any arbitration agreement, the focus is shifted from the parties to the 'matter' itself. The ambit of Section 8 is clearly much wider than that of Section 34. This appears to me to be a natural jurisprudential progression from the period when arbitration as a mode of the disposal of disputes was at its nascent stages, to the present time, when arbitration is well established as an effective alternate system of dispute resolution, conceptually quicker and cheaper than the jural establishment. There is a conscious shift from the Courts to the Arbitral Tribunals. In this respect,

mediation has become the substitute to arbitration. These are not the only differences between the two Acts. I do not feel the necessity to adumbrate others since they may not be relevant to the facts and issues of the present case. The Hon'ble Supreme Court had occasion to compare these very provisions in Smt. Kalpana Kothari vs . Smt. Sudha Yadav and Others, : AIR 2002 SC404 , and observed thus:-

'8. Section 34 of the 1940 Act provided for filing an application to stay legal proceedings instituted by any party to an arbitration agreement against any other party to such agreement, in derogation of the arbitration clause and attempts for settlement of disputes otherwise than in accordance with the arbitration clause by substantiating the existence of an arbitration clause and the judicial authority concerned may stay such proceedings on being satisfied that there is no sufficient reason as to why the matter should not be referred to for decision in accordance with the arbitration agreement, and that the applicant seeking for stay was at the time when the proceedings were commenced and still remained ready and willing to do all things necessary to the proper conduct of the arbitration. This provision under the 1940 Act had nothing to do with actual reference to the arbitration of the disputes and that was left to be taken care of under Sections 8 and 20 of the 1940 Act. In striking contrast to the said scheme underlying the provisions of the 1940 Act, in the new 1996 Act, there is no provision corresponding to Section 34 of the old Act and Section 8 of the 1996 Act mandates that the Judicial authority before which an action has been brought in respect of a matter, which is the subject-matter of an arbitration agreement, shall refer the parties to arbitration if a party to such an agreement applies not later than when submitting his first statement. The provisions of the 1996 Act do not envisage the specific obtaining of any stay as under the 1940 Act, for the reason that not only the direction to make reference is mandatory but notwithstanding the pendency of the proceedings before the Judicial Authority or the making of an application under Section 8(1) of the 1996 Act, the arbitration proceedings are enabled, under Section 8(3) of the 1996 Act to be commenced or continued and an arbitral award also made unhampered by such pendency. We have to test the order under appeal on this basis.'

The comparison between the provisions of the two statutes would be meaningful on a reflection also upon Section 16 of the 1996 Act, which attempts to complete the intention generally expressed in Section 5. It vests power with the arbitral Tribunal to rule on its own jurisdiction including ruling on any objection with respect to the existence or validity of the arbitration agreement. The decision of arbitral Tribunal on this point as well as on a plea that it is exceeding the scope of its authority can be assailed by the aggrieved party only upon the conclusion of its proceedings.

9. The comparison between the aforementioned Sections is so frequently undertaken because of the critical consequences of staying the arbitral proceedings. Section 8 is a hybrid of Sections 20 and 34 of the 1940 Act, because it also deals with the Courts power to refer the parties to arbitration. In the repealed Act the party desirous of commencing arbitration, in a situation where its adversary dilating or obstructing such reference, could move the Court for ordering the arbitration agreement to be filed in Court and the reference to arbitration being made, subject to the Court holding that sufficient cause had not been shown against doing so. Most importantly this became imperative in order to qualify for the grant of interim relief. Now it is only an administrative function that the Court fulfills under Section 11. The present Section 8 mandates the filing of the arbitration agreement or a certified copy thereof, and also expects every judicial authority before which an action is pending, to refer the parties to arbitration, if such action is the subject matter of an arbitration agreement. The difference between the two Acts is that earlier the Court's intervention was necessary where one party to an arbitration agreement was recalcitrant in starting the process. Since sundry sections of the 1996 Act suggest an abjuration of interference in the arbitral process, a party may now find it advisable to not risk the passing of an ex-parte award. This is a practical compulsion which has rendered otiose the need for a Court reference, as under Section 20 of the 1940 Act. Reference to the decision of the Apex Court in *M/s. Sundaram Finance Ltd. vs . M/s. NEPC India Ltd.*, : [1999]1SCR89 would be of advantage to elucidate the differences in the erstwhile and present statutes, and the manner in which the 1996 Act should be interpreted and implemented. The following passages call to be reproduced :-

'9. The 1996 Act is very different from the [Arbitration Act, 1940](#). The provisions of this Act have, therefore, to be interpreted and construed independently and in fact reference to 1940 Act may actually lead to misconstruction. In other words the provisions of 1996 Act have to be interpreted being uninfluenced by the principles underlying the 1940 Act. In order to get help in construing these provisions it is more relevant to refer to the UNCITRAL Model Law rather than the 1940 Act.

..... 13. The position under the [Arbitration Act, 1940](#) was that a party could commence proceedings in Court by moving an application under Section 20 for appointment of an arbitrator and simultaneously it could move an application for interim relief under the Second Schedule read with Section 41(b) of the 1940 Act. The 1996 Act does not contain a provision similar to Section 20 of the 1940 Act. Nor is Section 9 or Section 17 similar to Section 41(c) and the Second Schedule to the 1940 Act. Section 8 of the new Act is not in pari materia with Section 20 of the 1940 Act. It is only if in an action which is pending before the Court that a party applies that the matter is the subject of an arbitration agreement does the Court get jurisdiction to refer the parties to arbitration. The said provision does not contemplate, unlike Section 20 of the 1940 Act, a party applying to a Court for appointing an arbitrator when no matter is pending before the Court. Under the 1996 Act appointment of arbitrator/s is made as per the provision of Section 11 which does not require the Court to pass a judicial order appointing arbitrator/s. The High Court was, therefore, wrong in referring to these provisions of the 1940 Act while interpreting Section 9 of the new Act.

14. Under the 1996 Act the Court can pass interim orders under Section 9 Arbitral proceedings, as we have seen, commence only when the request to refer the dispute is received by the respondent as per Section 21 of the Act. The material words occurring in Section 9 are 'before or during the arbitral proceedings'. This clearly contemplates two stages when the Court can pass interim orders, i.e., during the arbitral proceedings or before the arbitral proceedings. There is no reason as to why Section 9 of the 1996 Act should not be literally construed. Meaning has to be given to the word 'before' occurring in the said Section. The only interpretation that can be given is that the Court can pass interim orders before the commencement of arbitral proceedings. Any other interpretation, like

the one given by the High Court, will have the effect of rendering the word 'before' in Section 9 as redundant. This is clearly not permissible. Not only does the language warrants such an interpretation but it was necessary to have such a provision in the interest of justice. But for such a provision no party would have a right to apply for interim measure before notice under Section 21 is received by the respondent. It is not unknown when it becomes difficult to serve the respondents. It was, therefore, necessary that provision was made in the Act which could enable a party to get interim relief urgently in order to protect its interest. Reading the section as a whole it appears to us that the Court has jurisdiction to entertain an application under Section 9 either before arbitral proceedings or during arbitral proceedings or after the making of the arbitral award but before it is enforced in accordance with Section 36 of the Act.'

10. Significantly, before referring the parties to arbitration under Section 8 of the present Act, the Court must be satisfied that the action pending before it is 'the subject of an arbitration agreement'. If the Court or judicial authority comes to the contrary conclusion, it must continue and conclude the proceeding before it. To my mind, therefore, a little change has been brought about by the amending Act. It also seems to me that while it is no longer possible for a party to have the arbitrability of a dispute decided by a Court, the same position can be brought about through the device of a legal action such as the present suit. In the regime of the 1940 Act it was felt that such questions could not be left to the Arbitrator to decide and rule upon; he could not be a judge in his own cause, so to speak. Since the intention of the legislature to ensure the continuance of arbitral proceedings is palpably present, giving the Arbitrator the untrammelled power to decide all questions touching upon his jurisdiction, I would have readily read down the opening words of Section 8 to achieve this objective. But such an interpretation would do violence to and would be irreconcilable with the plain meaning of the words used therein, and therefore I shall refrain from undertaking such an exercise. The essence of the erstwhile Section 34, as extracted in the Kothari case (supra) makes the judgment's ratio relevant even in respect of the new Act.

11. I am unable to accept the carefully conceived and articulated arguments of Dr. Singhvi that the suit must necessarily be dismissed in order that the arbitral

proceedings may be allowed to run their normal course, and only on their conclusion should the Plaintiff's grievances be heard. If the Court is of the opinion that the action, in the present case the suit for declaration and injunction, is not the subject matter of the arbitration agreement, it would be improper not to hear it. Notwithstanding the non obstinate words employed in Section 5, if the dispute raised in the suit is not covered by the Arbitration Clause it must be considered on its merits, regardless of whether the arbitration proceedings are impeded in this process. It cannot be said that Section 16 of the 1996 Act changes every aspect of common law and that excepted or exempted or excluded matters cannot be adjudicated upon even in the absence of a decision by the arbitrator as to their arbitrability, or where the ambivalence of the arbitrator is apparent.

12. The phrase 'which is the subject matter of an agreement' is not a mere surplage and has been carefully cogitated upon in numerous precedents including *P. Anand Gajapathi Raju and Others vs . P.V.G. Raju (died) and others*, : [2000]2SCR684 where it was observed that (i) if the agreement was entered into during the pendency of an appeal it should be given effect to; (ii) in the absence of such agreement there is no provision enabling Court to refer the parties to arbitration; (iii) that if a reference is made the civil action comes to an end; and (iv) that the language of Section 8 is peremptory, enjoining that a reference be made by the judicial authority. It has also been held that it is impermissible to draw an inference about the existence of an agreement to arbitrate upon disputes, or it come to such a conclusion because of acquiescence of parties, especially since it must be reduced to writing as spelt out in Section 7(3) of the Act. The situation would appreciably be different if this question had been heard and disposed of in unequivocal and clear terms by the learned Arbitrator. In such an event the Plaintiff would have to challenge the finding after the Award is published.

13. I shall now consider whether the question raised in the suit namely, the impugned Valuation Report 'is the subject of an arbitration agreement' . Clause 4 of the MoU has already been reproduced, and the consensus regarding arbitration is recorded in Clauses 6 and 10 thereof which read thus :-

'6. In case of difference of opinion on any matter and a settlement is not arrived at, the matter will be referred to the arbitration of Shri A.M. Ahmedi, retired Chief Justice of the Supreme Court of India, who has been unanimously selected by the three groups as the Sole Arbitrator. The three parties mutually on their own will prepare three baskets based on valuation made by Shri K.N. Memani and the same be distributed amongst the three groups by the draw of lots in the presence of the sole arbitrator referred to above. Similar exercise be done to deal with Charitable Trusts. In case, within a reasonable time the parties are unable to arrive at a mutual settlement amongst themselves then the matter will be referred to the sole arbitrator for arbitration. The arbitrator shall take into account the understanding between the parties as mentioned in the MOU above and the valuation made by Shri K.N. Memani and accordingly prepare the three baskets to be distributed amongst the three groups by way of a draw. While making the award the arbitrator shall keep in mind to conform to the spirit of understanding mentioned above, thus not in derogation to the MOU. The management and control be handed over the same instance after the lots are drawn; the formal ownership to change hands legally as early as possible. Before the draw of lots, a system be devised for the interim period with the assistance of Shri K.N. Memani to ensure smooth transition and to avoid misappropriation. A continued audit to detect any misappropriation be undertaken under his guidance till the split is legally complete and his report in writing be sent to the three groups every month.

10. The award of the arbitrator will be given without assigning reasons thereof and shall be final and binding on all the parties. It would not be challenged in any Court of Law. The venue of the arbitration shall be New Delhi. The costs of arbitration shall be borne equally by the three parties and the parties shall bear their own expenses.'

The valuation is the precursor to the Arbitration. The Arbitrator cannot exercise any superintending or advisory or appellate jurisdiction on the Valuers, whose decision is stated to be binding on all concerned. The two roles are decidedly distinct.

14. It appears that an application had been filed by Mr. Arun Kapur before the learned Arbitrator under Section 17 of the Act which was resisted by the applicants/defendants on the grounds that it was not maintainable. Although the tenor of the Replies are common, the following passage from the Reply on behalf of Jaidev Kapur and Jagdish Kapur deserves to be reproduced to highlight their shifting stands:

'5. It is submitted that the relief prayed for in the application can not be granted by this Hon'ble Forum in as much as the same is clearly beyond the scope of arbitration proceedings and clearly in contravention of the Terms of the Memorandum of Understanding. It is submitted that under the Memorandum of Undertaking it was agreed in unequivocal terms that the valuation of the assets, companies, trusts and firms shall be done by M/s Ernst and Young who shall do the valuation as per the accepted principles of accountancy. The Memorandum of Understanding further stipulated that Sh. K.N. Memani will confer jointly with the three groups regarding the valuation of all the companies, firms, trusts etc. and thereafter declare the value. The Memorandum of Understanding mandates that Sh. K.N. Memani's valuation will be final and unchallengeable by the parties or even the Arbitrator. In view of this position the present application is absolutely misconceived and the relief prayed for in the application cannot be granted by the Hon'ble Arbitrator'.

15. Mr. Ganju, learned counsel for Defendants No. 10 and 11 contended that his clients have no role to play in the litigation in the Kapur family. These Defendants had agreed to prepare the Valuation Report because all the members had specifically agreed that their Report would not be challenged. He further submitted that though his clients did appear before the learned Arbitrator they were not bound to do so and were not privy or subject to or concerned with the arbitration agreement. This clearly indicates that all the aspects of the Valuation Report were independent and unconnected with the Arbitration. It seems to me that as per the Arbitration agreement, the arbitration was to commence after the said Valuation Report was prepared and presented, and further only in the event that the three Kapur families failed to prepare 'three baskets based on the valuation made by Mr. K.N. Memani'.

16. The learned Arbitrator has also expressed the view that the valuation exercise is not related to the arbitral proceedings. Some of such observations have already been mentioned above. In the 33rd hearing it has been highlighted that the valuation 'will be final and unchallengeable by the parties or even the arbitrator'.

17. I have deliberately not dealt with all the arguments addressed before me for the reason that they impinge on the application for the ad interim injunction filed in the suit. For this very reason I think it unnecessary to dilate upon the argument that Section 28 of the Indian Contract Act would nullify any agreement which would have the effect of rendering the Valuation Report impervious to legal challenge. These arguments would be considered by me while deciding IAs No. 389/2003 and 2377/2003.

18. In these circumstances it is my considered opinion that the reliefs claimed for in this suit would not fall within the subject matter of the arbitration agreement subsisting between the parties. The application is, therefore, dismissed. However, there shall be no order as to costs.

IAs No. 389/2003, 2377/2003 in Suit No. 77/2003

19. Renotify the matter for final disposal on 8.7.2003.