IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL REVISION APPLICATION NO.7 OF 2015

1. Tulip Hotels Pvt. Ltd.
Company incorporated under
The Companies Act, 1956
and having its registered office
at 10th floor, Mehta Mahal, 15,
Mathew Road, Mumbai-400004.
(through authorized signatory
Paully D'Souza).

2. Dr. Ajit B. Kerkar,
son of late Baburao Kerkar,
81 years old, married,
Indian National,
resident of Flat No.31,11,
Navroji Mansion,
Nathalal Parekh Marg,
Mumbai. (through his
Power of Attorney Paully D'Souza) …. Petitioners

V/s

1. Trade Wings Ltd.
A public limited company
registered under the
Companies Act, 1 of 1956
and having its registered office at 6,
Mascarenhas Building,
M.G. Road, Panaji,
Goa – 403 001 and
Corporate office at 18/20 K,
Dubhash Marg Fort, Mumbai – 400 023.

2. Dr. Shailendra P. Mittal of Mumbai,
Indian National, residing at
Mittal Bhavan, 62-A,
Peddar Road, Mumbai 400 026.

3. Trade Wings Hotel Ltd.,
a company incorporated under

The Companies Act 1 of 1956
and having its registered office at 6,
Mascarenhas Building,
M.G. Road, Panaji, Goa – 403 001. …. Respondents

Shri S.G. Desai, Senior Advocate with Shri Parag Rao, Advocate for the Petitioners.

Shri H. Jagtiani, Senior Advocate with Shri E.O. Mendes and Shri S. Jain, Advocates for the Respondents.

CORAM : C.V. BHADANG, J.

Reserved on : 1st JULY, 2015

Pronounced on : 1st OCTOBER, 2015

JUDGMENT :

By this revision application under Section 115 of the Code of Civil Procedure, the petitioners/original claimants are challenging the judgment and order dated 13/01/2015 passed by the learned Principal District and Sessions Judge, South Goa, Margao in Arbitration Application No.10/2013. By the impugned judgment the learned District Judge has dismissed the application thereby confirming an order dated 6/07/2013 passed by the learned Arbitrator upholding an objection raised under Section 16(2) of he Arbitration and Conciliation Act, 1996 ('The Act', for short) and thereby rejecting the claim filed by the petitioners.

2. The facts necessary for the disposal of the petition may be stated thus:

That the petitioner no.1 is a company incorporated under the

Companies Act, 1956 with its registered office at Mumbai. It is engaged in the business of running hotels and other activities in the hospitality industry since about 1997. The petitioner no.2 is the Chairman of the petitioner no.1. The petitioner no.2 was erstwhile a Chairman and Managing Director of Taj Group of Hotels and is having a name and experience in the hospitality industry.

3. The first respondent Trade Wings Ltd. (TWL) is a public limited Company incorporated under the Companies Act, 1956 and is said to be engaged in the business of travel agency, etc. The second respondent Dr. Shailendra P. Mittal (SM) is a Director and a majority shareholder of the first respondent. The third respondent Trade Wings Hotel Ltd. (TWHL) is yet another public limited Company having its registered office at Goa. The majority share capital of the third respondent is held by the first respondent TWL.

4. There is a holiday resort which is a five star hotel known as Bogmalo Beach Resort (BBR) owned by the first respondent. The BBR is situated at Bogmalo, Goa and was being managed by Sarovar Park Plaza Group (SPP) erstwhile under a hotel management contract dated 1/07/1994. Although BBR was managed by a professional hotel

operator, it was said to be loosing business and money.

5. In the year 1995, the first respondent had obtained a loan of Rs.9.37 crores from Tourism Finance Corporation of India (TFCI) for repairs and renovation of BBR, for which the first respondent had stood as a Guarantor and all the movable and immovable assets and the equity shares of the third respondent were pledged in favour of TFCI.

6. It appears that the parties had decided to utilise the expertise of the petitioner no.2 in order to revive the business of BBR. As a consequence there of a Memorandum of Understanding (MOU) was executed between the petitioners and the second respondent on 26/04/2000. The MOU, inter alia, envisaged formation of a Joint Venture Company (JVCO) for the purpose of operating hotels and resorts including BBR for a period of 10 years. This was subject to certain other conditions which included the termination of the hotel management contract by the second respondent with SPP. Under the material term of the MOU the petitioner no.1 was to purchase 50% of the equity share capital of the third respondent in its favour or its nominees within a period of 90 days of the management of BBR being taken over by the JVCO. It was agreed that if the petitioner no.1 was unable to buy

the same then it will cause Tulip Star Hotel Limited (TSHL) its associate to purchase 50% of the equity share capital of TWHL within 45 days of the expiry of the aforesaid 90 days for a minimum price based on the valuation of 27 crores. There was also a term about sharing of the income and the gross operating profits in a staggered manner comprised for the first 5 years period and the period from 6th year onwards.

7. The execution of the MOU was followed by an execution of a Share Holders Agreement (SHA) between the parties on 9/06/2000, setting out the terms of purchase of the shares of TWHL by the petitioners. It would be necessary to set out some material terms of the SHA (which are reproduced by the learned Arbitrator) as under:

> (i) The MOU was incorporated into the SHA and the same was annexed as Annexure A.
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> (ii) In pursuance of Clause 2 under Covenants and Understanding of the MOU, the Claimants under the SHA would be required to pay 50% of the valuation of Rs.27,00,00,000/- (Rupees Twenty Seven Crores only) as share purchase amount for the 50% equity shares of Trade Wings Hotels, i.e. Rs.13,50,00,000/- (Rupees Thirteen Crores Fifty Lakhs only). The SHA contains an arbitration clause between the parties for settlement of any disputes arising out of the SHA.
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> (iii) That Trade Wings will sell to Tulip Hotels and/or its nominees 50% of the issued, subscribed and paid up share capital of Trade Wings Hotels for a total consideration as was set out in the MOU. The valuation settled between parties was Rs.27,00,00,000/-

(Rupees Twenty Seven Crores only) for 100% of the Share Capital of Trade Wings Hotel.

(iv) Trade Wings Limited and Tulip Hotels agreed that the holding of the parties shall remain in equal proportion. Trade Wings Limited shall hold 50% and Tulip Hotels or its nominees/associates shall hold the other 50% of the entire equity share capital as mentioned. The shareholding of Trade Wings Limited and Tulip Hotel shall not be diluted under any circumstances whether by way of fresh issue or reduction of share capital or otherwise during continuance of this Agreement the share holding ratio shall always be equal unless otherwise agreed in writing.

(v) The completion date was as set out in the SHA was 7th September, 2000 (subsequently amended and/or waived by the Parties) and the completion of the sale and purchase of the shares of Trade Wings Hotels was to take place on spot delivery basis was subject to:

(a) Dr. Mittal (Respondent No.2) terminating the Hotel Management Agreement with SPP.

(b) Parties executed the Hotel Management Agreement with respect to Bogmallo Resort in favour of Joint Venture Company as mentioned in the MOU.

(c) Tulip Hotels (Claimant No.1) assigning a hotel operating agreements entered into by them to the Joint Venture Company for a consideration.

(d) Execution of the Shareholders Agreement between Respondent No.2 and/or his nominees and Claimant No.1 and/or its nominee in the Joint Venture Company.

(e) Any disputes under the SHA would be resolved through arbitration.

8. The petitioners had paid a total amount of Rs.1,30,50,000/- till 31/03/2001 to TWHL (respondent no.3) at the behest of TWL (respondent no.1).

9. It is undisputed that in pursuance of the SHA, the respondents terminated the hotel management agreement with SPP, sometime in June, 2000 and the petitioners were placed in possession and control of BBR on 15/06/2000. It is further undisputed that although some steps were taken towards incorporation of the JVCO, eventually the JVCO never materialized.

According to the petitioners, it was suggested by the second respondent that in view of the fact that the petitioner no.2 was proposed to be entrusted with the control of BBR, there was no need to form the JVCO. Further, according to the petitioners this suggestion was accepted and it is only thereafter the petitioners were placed in possession, control and management of BBR on 15/06/2000. It is the material case of the petitioners that on account of this new arrangement, the concept of formation of JVCO was given up and the SHA accordingly stood amended/modified by the acts and conduct of the parties, although the rest of the terms of the SHA were adhered to. Although, it was also the case set up before the Arbitrator that by

conduct of parties, the term about setting up of JVCO was waived by the petitioners, the said case and submission is given up at this stage. Be that as it may, according to the petitioners they were in possession, management and control of BBR from 15/06/2000 till 27/01/2007 when the petitioners were dispossessed from the BBR.

10. In the meantime, TFCI had instituted proceedings for recovery of the outstanding loan against the third respondent before Debt Recovery Tribunal, Delhi sometime in the year 2003. According to the petitioners, the petitioner no.2 using his good Officers had managed to obtain a one time settlement (OTP) from TFCI which led to execution of a tripartite agreement between the third respondent, the petitioner no.1 and TFCI on 4/01/2005. According to the petitioners, by the said one time settlement the outstanding loan amount, which by then, had swelled to Rs.27.00 lakhs was finally settled for Rs.12.00 lakhs. Eventually, the petitioner no.1 paid certain amounts to TFCI in instalments which ultimately led the TFCI to issue a No Due Certificate in favour of the third respondent on 28/07/2006. According to the petitioners, the petitioner no.1 had paid to the respondents or on their behalf a total sum of Rs.16.25 crores which according to the claimants was towards the purchase price of 50% of the shares of the third respondent which were

agreed to be purchased for consideration of Rs.13.50 crores. The petitioners also claimed that in addition to the aforesaid amount they had spent an amount of Rs.1.91 crores for renovation of BBR. In short, according to the petitioners inspite of all efforts from their side to abide by the SHA, the respondents avoided to perform their obligation. It was further contended that the respondents insisted for payment of interest. The petitioners agreed to pay additional amount of interest 'under duress', on the categorical assistance of one Om Navani and the second respondent. The petitioners had accordingly handed over a cheque for Rs.9,79,70,000/- which was rejected by the respondents and they also failed to adhere to the terms agreed between the parties including the balance sheet of the respondent no.3 being cleared of all intra group loans as agreed. It appears that the petitioners had issued two notices to the respondents on 11/06/2008 and 31/07/2008 raising certain disputes and seeking specific performance of the SHA. It would now be necessary to set out certain developments in the interregnum.

11. On 7/02/2007, the petitioners filed an application for grant of interim measures under Section 9 of the Act before the learned District Judge which was in consequence of an attempt to dispossess the petitioners from BBR on 27/01/2007. In that application an undertaking

was given on behalf of the petitioners that they shall not part with 50% of share holding in TWHL and shall not create any third party rights in respect of BBR. Eventually, on 26/11/2007, the respondents were restrained from parting with 50% shares in TWHL and from creating any third party rights in respect of BBR.

12. On 8/02/2007, the respondents filed Special Civil Suit No.7/2007 before the learned Civil Judge, Senior Division, Vasco da Gama, Goa, against (1) Dr. Ajit B. Kerkar, petitioner no.2 herein, (2) Tulip Hotels Pvt. Ltd., petitioner no.1 herein, (3) Tulip Star Leisure and Health Resort, Ltd., (4) Mr. Bopanna Dwarkanath (earlier General Manager of BBR) (5) Mr. Vasant R. Agnihotri (6) Mr. Sudhanshu P. Purohit, both Directors nominated by the petitioners on the Board of the third respondent both of whom subsequently resigned. In the suit the following reliefs were claimed:

> (a) for a declaration that the Memorandum of Understanding dated 26.4.2000 stood terminated and rendered inoperative with effect from 1.11.2006;
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> (b) for a direction to the defendants to surrender the MOU dated 26.4.2000, Shareholders Agreement dated 9.6.2000 and all documents/agreements entered in relation to time share scheme;
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> (c) for a direction to defendants to render full and complete Accounts of all amounts received by them from the time share agreements entered in respect of

BBR; and

(d) for a permanent injunction restraining defendants from entering into any further time share agreements in regard to the BBR or entering upon the premises of BBR or representing themselves to be the owners or persons having any proprietary interest in BBR.

According to the petitioners this (the filing of the suit) was an attempt in the nature of a counterblast by the respondents.

13. On 14/02/2007, an application under Section 8 of the Act came to be filed by the petitioners in the Civil Suit seeking a reference of the dispute to arbitration in view of clause 19 of the SHA. It is undisputed that the said application was rejected by the Trial Court and the same has attained finality as the petitioners unsuccessfully challenged the same initially before this Court and, thereafter, before the Hon'ble Supreme Court.

14. It may be mentioned that clause 19 which is an arbitration clause in the SHA envisages the disputes and differences between the parties being referred to a panel of three Arbitrators, one each being appointed by the petitioners and the respondents and these two Arbitrators appointing an umpire. As the respondents failed to nominate

their Arbitrator, the petitioners filed Arbitration Application no.4/2007 under Section 11 of the Act for appointment of an Arbitrator which was rejected by this Court on 19/03/2008 being premature, inasmuch as the SHA contemplated the parties going for conciliation before arbitration.

15. The petitioners again approached this Court under Section 11 of the Act being Arbitration Application No.10/2008 which was rejected on 14/08/2009. This was challenged by the petitioners before the Hon'ble Supreme Court in Civil Appeal No.9105/2010. The Hon'ble Apex Court allowed the appeal on 23/09/2010. The Hon'ble Apex Court in para 9 of the order has set out the disputes which led to the filing of the petition, as mentioned in notices dated 11/06/2008 and 31/07/2008 as under:

> a) Disputes concerning the rights, liabilities and obligations arising under Memorandum of Understanding dated 26.4.2000.
>
> b) Disputes concerning the rights, liabilities and obligations arising under Shareholders Agreement dated 9.6.2000.
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> c) Disputes concerning the rights of appellants to the management, possession and control of Bogmalo Beach Resort and the right to conduct business therefrom for a period of 10 years with effect from 9.6.2000.

d) Disputes concerning the transfer of 50% of shares of Trade Wings Hotels Ltd. to Tulip Hotels Pvt. Ltd., the price/consideration payable thereof, including the calculation of the interest thereof.

e) Disputes concerning clearing of balance sheet of Trade Wings Hotels Ltd. before the transfer of 50% shares of Trade Wings Hotels to Tulip Hotels Pvt.Ltd.

f) Disputes concerning the interference by respondents with the conduct of business by appellants of Bogmalo Beach Resort as well as with the possession, management and control of Bogmalo Beach Resort of appellants.

The Hon'ble Apex Court has found that the notice dated 31/07/2008 did not refer to any specific itemized dispute but the allegations were in the nature of "facets of the disputes raised in the notice dated 11/06/2008".

It would be necessary to reproduce paras 12,13 & 14 of the order as under :

12. In view of it, the learned counsel for the appellants clarified and categorically submitted on instructions, that the appointment of arbitrator was sought only with reference to the disputes arising from or referable to Shareholders Agreement dated 9.6.2000. He stated that the appellants will not seek arbitration in regard to the disputes relating to management of BBR arising in regard to the MOU dated 26.4.2000. In a proceedings under Section 11 of the Act, the Chief Justice or his Designate will be considering the question whether there is an arbitration agreement, and not the question whether the disputes are arbitrable. But if the petition

under Section 11 of the Act refers to disputes relating to other agreements which did not have an arbitration agreement, it is open to the learned Chief Justice or his Designate, while appointing the arbitrator in pursuance of the petition under Section 11 of the Act, to make it clear that the appointment was only in pursuance of the Agreement containing the arbitration agreement and was not in regard to the disputes relating to agreement or MOU which did not contain an arbitration. Be that as it may.

13. As the appellants have now clarified that the petition under Section 11 of the Act was intended to be only in regard to the disputes arising in regard to the Shareholders Agreement dated 9.6.2000 and not beyond it, it becomes clear that the disputes (a), (c) and (f) extracted in para 9 above, will not be amenable to arbitration as they relate to the MOU and the pending Special Civil Suit. It also becomes clear that disputes (b),(d) and (e) extracted in para 9 above would survive for consideration with reference to the petition under Section 11 of the Act along with any other matter relating to the Shareholders Agreement dated 9.6.2000. In so far as the disputes referred to in notice dated 31.7.2008, it follows that only such of those disputes which will fall under the Agreement dated 9.6.2000 will be amenable for arbitration and not the disputes which are outside the said agreement dated 9.6.2000. The question of arbitrability of the disputes could be raised by the respondents before the arbitrator. The Arbitrator will decide which disputes are arbitrable and then proceed accordingly.

14. In view of the above, we allow this appeal, set aside the order dated 14.8.2009 of the learned Designate and allow the petition filed by the appellants under Section 11 of the Act for appointment of an arbitrator subject to the above clarifications. All issues relating to merits, limitation and arbitrability are left open to be urged in arbitration.

16. Eventually, the disputes were referred to the sole Arbitrator, as

appointed by the Hon'ble Apex Court.

17. The petitioners filed a statement of claim before the learned Arbitrator with the following reliefs:

1. Specific Performance:

A. that the Respondents, their directors, servants and agent be directed to specifically perform their obligations under the SHA:

(i) To transfer 50% shares in Trade Wings Hotel to the Claimants or its nominees;

(ii) To order the Respondents to clean up the Balance Sheets of the Trade Wings Hotels of any intra group and any other liabilities;

(iii) To order the Respondents to conduct the business of the running of the hotel along with the Claimants in terms of the SHA and in particular in terms of Clauses 6,7 and 8 of the SHA;

(iv) To determine if any amounts are payable to the Respondents as interest.

(v) To order the Respondents to accept payment of the balance principle share purchase price and transfer 50% shares of Trade Wings Hotel in pursuance of the Agreement;

(vi) To order the reinstatement of the Claimants representative on the Board of Directors of Trade Wings Hotels equivalent in number to the representatives of the Respondents.

The Claimants pray that the Respondents be directed to

extinguish all inter-corporate loans and all other loans and liabilities in the books of Trade Wings Hotels which were not present at the commencement of the arbitration.

Without prejudice to the above and in the alternative:
B. to order Repayment of Rs.16.25 (Sixteen Crore Twnety Five Lakh) crores and Rs. 1.91 Crores (One Crore Ninety one Lakh) which was spent by the Claimants on renovation of Bogmallo Resort with 18% interest from the date of receipt to the date of payment.

2. To order the Respondents to pay losses of Management fees of 2.5% of Total Sales and 5% of the Gross Operating Profit for the first five full years of management and subsequently 3% of Total Sales and 7.75% of the Gross Operating Profit from the sixth year onwards as is provided under the Memorandum of Understanding Clause 4 for the Management Contract and Clause 7.4 of the SHA as well as costs and interests for wrongful termination of the Management Agreement for 3 years, 4 months and 13 days.

3. To order the Respondents pay to the Claimants damages for Loss of Reputation by way of wrongful actions, allegations, publication based on fabricated information by the Respondents causing irreparable tarnish to the name and reputation of the Claimants.

4. To order that Respondents be ordered to pay an amount of as loss of profit amounting to Rs.13.55 crores (Rupees Thirteen Crores Fifty Five Lakhs only).

5. Costs and interests of 18% on Claim Amount.

18. On 23/05/2011, the respondents filed an application purportedly under Section 16(2) of the Act, inter alia, claiming rejection of the claim on following grounds:

(i) The claim being barred by limitation,

(ii) The absence of jurisdiction to entertain the claim because of allegations of fraud and coercion,

(iii) The absence of jurisdiction as the claim falls outside the arbitration clause,

(iv) The claim being barred by the provisions of the Benami Transaction (Prohibition) Act, 1988, and

(iv) There being duplication of prayers in the context of pendency of Special Civil Suit No.7/2007.

19. The petitioners filed a reply to the application opposing the same.

20. On 8/09/2011, the petitioners filed an application for amendment of the claim, inter alia, seeking introduction of paras 14(A), 14(B) and 15(A). That application was allowed by the Arbitrator on 9/07/2012 by which the following paras came be introduced in the statement of claim.

14.A The Parties were aware of the fact that Respondent No.3 had taken substantial loans from TFCI and that the same remained unpaid at the time of the signing of the SHA. The Claimants were aware of the fact that Respondent Nos.1 and 2 had guaranteed to the loan and pledged 100% of the shares of Respondent No.3 as a security to the Guarantee and the loan. The Parties submit that it was all along understood that the SHA could not be performed till such time as the

shares or at least 50% of the shares had been returned to the Respondent Nos.1 and 2 and the pledge in respect of the same were cancelled. The Claimants submit that it was an implied term that the SHA could only be completed on the happening of this event. It was further implied that in the event the pledge was not cancelled prior to the completion date being 7th September, 2000 set out in the SHA, the completion date would stand extended to 135 days after the said pledge had been released. The Parties have in other parts of the Statement of Claim demonstrated that both parties acted on this implied terms in terms of implementation of the SHA and this contention is without prejudice to the Claimants other contentions that the completion date for the SHA stood extended for 135 days beyond the release of the pledge by virtue of the conduct of parties.

14.B The Claimants humbly submit that in view of the acts, omissions, conduct, circumstances, correspondences and understanding between the parties the SHA stood amended and/or waived on the following aspects;

i. The Completion Date and the subsequent transfer of shares.

ii. The formation of the JVCO for the management of the Bogmallo Resort.

Iii. Payments made to third parties on behalf of the Respondents and which were to be treated as consideration under the SHA.

15A. Due to the above mentioned acts and deeds, the Claimants and Respondents agreed that the Completion date as envisaged by the SHA stood extended until the settlement of the TFCI loan amount and the release of the Shares pledged under the TFCI loan. Thus, the completion date of 7 September 2000 was amended and/or (and without prejudice to the contention of amendment) waived by the parties."

21. The learned Arbitrator on hearing the parties by the impugned order dated 6/07/2013 allowed the application holding that none of the claims raised by the petitioners in their statement of claim can be entertained or granted by the Tribunal. Thus while upholding the objection under Section 16(2) of the Act, claims were dismissed for "lack of jurisdiction of the Tribunal and/or lack of arbitrability". It may be worthwhile to reproduce the brief findings of the learned Arbitrator on each of the heads of objection as under:

(i) Limitation:

The learned Arbitrator held that the claim for specific performance was barred by time by virtue of Article 54 of the Limitation Act, 1963, as not being preferred within a period of 3 years from the date of the automatic termination of the agreement i.e. the SHA on 7/09/2000.

(ii) Absence of jurisdiction to entertain, on account of allegations of fraud and coercion.

The learned Arbitrator refused to accept the said ground holding that mere use of the words “duped” and “duress” in the statement of claim would not partake of the nature of material averments which would indicate a commission of criminal offence. Thus, the contention in this regard was rejected.

(iii) Absence of jurisdiction, on account of the claim falling outside the arbitration clause:

The learned Arbitrator noticed that the Hon'ble Supreme Court in the order dated 23/09/2010 vide paragraph 13 had held that the disputes as mentioned in paragraphs (a),(c) and (f) as indicated therein would not be amenable to arbitration as they did not arise out of the SHA, which contains an arbitration clause. The Arbitrator also noticed that the Hon'ble Supreme Court has held that arbitrability of the dispute mentioned in paragraphs (b), (d) and (e) would have to be decided by the Tribunal. The learned Arbitrator found that some of the claims raised were not arising out of the SHA which alone had the arbitration clause. The learned Arbitrator ultimately held thus:

> 41. The order and judgment of the Supreme Court dated 23rd September 2010 (vide paragraph 13), holds that disputes mentioned in paragraphs (a),(c) and (f) as indicated therein would not be amenable to arbitration, as they did not arise out the SHA which contains an arbitration clause. It also holds that the arbitrability of the disputes mentioned in paragraph (b),(d) & (e) would also have to be decided by the Tribunal. The claims raised in the Statement of Claim are partly arising out of the SHA which admittedly has an arbitration clause. Some of the claims, however, are in respect of matters which are not covered by the SHA, Prayer clause A(ii) seeks a direction to direct the Respondents to clean up the balance sheets of Trade Wings Hotels of any intra group or any other liabilities. Similarly, prayer clause A(iii) to order the Respondents to conduct the hotel along with the Claimants is not a dispute arising out of or touching the SHA. However,

the Claimants have tried to bring it within the ambit of SHA by praying that the direction must be to run the hotel along with the Claimants in terms of clauses 6,7 and 8 of the SHA. Prayer clause A(iv) can conceivably be a consequential relief, if it is found that the Respondents are entitled to any amounts under the SHA. Prayer clause A(v) is a dispute arising with reference to payment of the share purchase price and transfer of 50% shares of Trade Wings Hotel in pursuance of the SHA. Prayer clause A(vi) seeks direction to reinstatement of the Claimants representative on the Trade Wings Hotel and therefore is not referable to any terms of the SHA. With regard to prayer clauses B(2) to B(4) they are said to arise from the new arrangement between the parties, which arrangement according to the Claimant resulted as a consequence of the understanding to be found in the Minutes of 19th October 2005 held between Respondent No.2, Claimant No.2 and Om Navani. There is no arbitration clause in the said new arrangement and the disputes arising out of the implementation of the said new arrangement cannot be the subject matter of the present arbitral proceedings. That the Claimant has pitched for claims based on new arrangement is clear from paragraph 27 of the Statement of Claim in which the Claimant expressly avers "the parties have arrived at a further arrangement. ….." and also indicates how the fresh understanding arrived at in the tripartite meeting of Claimant No.2. Respondent No.2 and Om Navani is recorded in the Minutes of 19th November 2005. It would appear that insofar as the Claimant's attempt are seeking implementation of what is alleged to have been agree as per the Minutes dated 19th October 2005 are concerned, they cannot be the subject matter of the SHA which alone contains the Arbitration clause. Since, the alleged Agreement of 19th October 2005 does not contain an arbitration clause, any dispute touching the contents of the minutes dated 19th October 2005 would not be arbitrable.

Prayer clauses (A)(ii) seeking direction to clean up the balance

sheets of Trade Wings Hotels of any intra group or any other liabilities and;

Prayer clause (A)(iii) to order the respondents to conduct the hotel along with the petitioners was found to be a dispute not touching or arising out of the SHA.

Prayer clause (A)(iv) was found to be in the nature of consequential relief if it is found that the respondents are entitled to any amounts under the SHA.

Prayer clause (A)(v) was found to be a dispute arising with reference to the payment of the share purchase price and transfer of 50% shares of TWH in pursuance of the SHA.

Prayer clause (A)(vi) seeking direction for reinstatement of the petitioners' representative on the TWH and was found to be not referable to any term of the SHA.

In so far as the prayer clauses (B)(2) to (B)(4) are concerned they were found to be arising out of the new arrangement between the parties which arrangement was in consequence of understanding recorded in the minutes of 19/10/2005 between the petitioner no.2, the second respondent and Mr. Om Namani. It was found that there was no arbitration clause in the said new arrangement and thus the disputes

arising out of the said arrangement, cannot be subject matter of the arbitral proceedings.

(iv) Benami :

The learned Arbitrator refused to accept the said ground for the reason that the respondent nos.1 & 3 are closely related companies and were acting in the interest of each other and the respondent no.1 except for a few shares was the holder of the majority share capital of the third respondent.

(v) Duplication of the prayers in the context of pendency of Special Civil Suit No.7/2007 :

After noticing the pendency of Special Civil Suit No.7/2007, it was found that the prayer clause 1(A)(iii) and (2) cover the relief which is also the relief claimed in the Special Civil Suit No.7/2007. Thus the contention that the prayer clause 1(A)(iii) and (2) could not be arbitrated was upheld.

22. At this stage, it needs to be mentioned that the learned Arbitrator has mentioned in para 46 of the impugned order that it was the petitioners (the claimants before the Arbitrator) who had filed the Special Civil Suit in which the respondents had filed an application

under Section 8 for reference of the matter to the Arbitrator. The learned Senior Counsel for the petitioners had stressed on this aspect saying that this is factually incorrect. It is submitted that the learned Arbitrator has not properly considered and appreciated the rival circumstances and the submissions made. I propose to revert back to this aspect while dealing with the submissions.

23. Feeling aggrieved, the petitioners challenged the same before the learned Principal District Judge under Section 37 of the Act in Arbitration Application No.10/2013. Apart from the grounds raised before the learned Arbitrator it was also urged before the learned Principal District Judge (which was not a ground taken before the learned Arbitrator) that the Arbitrator cannot examine the question of limitation while ruling on his own jurisdiction under Section 16 of the Act. In other words, it was contended that an objection as to the claim being barred by limitation cannot form part of the exercise which an Arbitrator can undertake under Section 16 of the Act which section is based on the principle of competenz, competenz.

24. The learned Principal District Judge framed the following points for determination:

1. Whether the Learned Sole Arbitrator had the jurisdiction to decide the issue of limitation while dealing with the Application under Section 16 of the Act?

2. Whether the MOU could be read into the SHA and as to infer the existence of an Arbitral agreement?

3. Whether the impugned order justified interference in appeal being illegal, arbitrary and/or perverse?

The learned Principal District Judge answered point no.1 in the affirmative and the second and third point in the negative and proceeded to dismiss the appeal. That is how the petitioners are before this Court in a revision under Section 115 of the Civil Procedure Code.

25. I have heard Shri S.G. Dessai, the learned Senior Counsel for the petitioners and Shri H. Jagtiani, the learned Senior Counsel for the respondents. With the assistance of the learned Counsel for the parties, I have perused the relevant records as also the impugned orders.

26. The parties have also filed written submissions on record along with list of reliance.

27. It is submitted by Shri Dessai, the learned Senior Counsel for the petitioners placing reliance on the decision of the Hon'ble Supreme Court in the case of ***ITI Ltd. V/s. Siemens Public Communications Network Ltd.*** reported in ***2002 (5) SCC 510*** that revision application against the judgment of the learned District Judge under Section 37 of the Act would be maintainable.

28. It is submitted that under the revisional jurisdiction this Court can correct jurisdictional error committed by the Courts below. It is submitted that there is a jurisdictional error committed by the learned Arbitrator in assuming jurisdiction under Section 16 of the Act when none existed. The learned Principal District Judge also failed to correct the jurisdictional error committed by the learned Arbitrator and went upon giving a finding that the issue of limitation can be decided in exercise of jurisdiction under Section 16 of the Act. The basic contention on behalf of the petitioners is that the question of limitation cannot be gone into in an application under Section 16 of the Act as a question of limitation would not partake of the nature of jurisdictional issue which alone can be looked into and examined under Section 16 of the Act.

29. It is next submitted that the JVCO never came into existence and, therefore, the period of 90 days and 45 days (total 135 days) as contemplated under clause 2 of the MOU never commenced. It is submitted that the completion date shown as 7/09/2000 was based on the expiry of the period of 135 days as contemplated under clause 2 of the MOU which is yet to arrive or has not come into being.

30. It is submitted that the completion date cannot be equated to 7/09/2000 and it would be equivalent to the expiry of a period of 135 days as referred to in clause 2 of the MOU. Thus the completion date is a question of fact or a mixed question of law and fact which can only be decided after evidence is led by the parties. It is submitted that in the SHA, the petitioners have not agreed to clear the outstanding amount of TFCI and had only agreed to pay consideration price of 50% share capital of TWHL on a spot delivery contract basis i.e. as against delivery of share certificates to them. The learned Senior Counsel has referred to the definitions of "completion", "the completion date" and "effective date" as also "completion" as contemplated in clause 4 of the SHA. It is submitted that except the first condition none of the conditions as mentioned in clause 4 have been complied with and thus the completion being conditional on compliance with these clauses, the completion date

cannot be equated to 7/09/2000.

31. In so far as the termination clause as contained in clause 12 of the SHA is concerned it is submitted that clause 12.5(i) is not a termination clause but is an indemnity clause or force majeure clause. For this reason the SHA may be deemed to be terminated on 7/09/2000 although factually it may still be operational. It is submitted that without prejudice to the aforesaid, it is a conditional termination (assuming that it is a termination clause) subject to nonavailability or other approvals of a third party or on account of circumstances beyond the control of a party. It is submitted that there is no pleading by the respondents that there was any approval from a third party required and not available or statement regarding circumstances beyond the control of a party. It is submitted that clause 12.5(i) does not contemplate automatic termination or self termination. It implies conditional termination or deemed termination for the purpose of indemnifying a defaulting party from paying damages to the other party, if the agreement is terminated on grounds not attributable to the party or due to circumstances beyond the control of the defaulting party. It is submitted that clauses 12.1 to 12.5 have to be read harmoniously as a whole and clause 12.5 which has alone been relied upon by the learned Arbitrator cannot be read in isolation, as it

does not open, with a non-obstante clause with regard to other modes as contemplated in clauses 12.1 to 12.4. It is submitted that the third respondent was for the first time in a position to sale 50% of the share holding on 28/07/2006 (when TFCI issued a no dues certificate) and thus the finding of the SHA having been self terminated on 7/09/2000 would be a finding dehors of the record and would be perverse. It is submitted that both the learned Arbitrator and the learned Principal District Judge failed to appreciate that clause 12.5(i) was only applicable, if the approval of a third party was required for completion of the transaction and it was not available and secondly it was never the case of the respondents that on account of circumstances beyond their control the transaction could not be completed. It is contended that the later part of clause 12.5(i) was in the nature of a force majeure clause if and when the defaulting party was unable to complete the transaction on account of circumstances beyond the control of such defaulting party.

32. It is submitted that alternatively and assuming that the SHA self terminated on 7/09/2000 the conduct of the parties and particularly under the arrangement and the possession and control of the BBR continued with the petitioners till the year 2006-07, the SHA would stand extended. In short, it is submitted that all these issues required oral

evidence to be led and the petitioners could not have been non-suited at the threshold. It is submitted that the question whether the SHA self terminates or automatically terminates on 7/09/2000 is a mixed question of law and fact and thus the doctrine of estopel would not apply as it may not be available as against law. It is submitted that in paragraphs 5 & 6 of the reply dated 2/09/2011, it was specifically contended that the issues would require evidence being recorded.

33. It is submitted that the finding by the learned Principal District Judge that the issue of limitation can be decided in an application under Section 16 of the Act, is against the ratio in the decision of the Hon'ble Apex Court in the case of ***SBP and Company V/s. Patel Engineering Ltd. & Anr.*** reported in ***(2005) 8 SCC 618***. It is submitted that the submission based on Section 16 of the Act being a pure question of law, can be raised at any stage of the proceedings. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in the case of ***Tarinikamal Pandit & Ors. V/s. Perfulla Kumar Chatterjee (dead) by LR's.*** reported in ***AIR 1979 SC 1165***.

34. It is contended that in any case the issue of limitation could not have been decided at the threshold as it is always a mixed question of

law and fact. It is submitted that the learned Arbitrator has observed in para 2 of the order that the question has to be examined on principles analogues to Order 7 Rule 11 of the Civil Procedure Code. Thus the Arbitrator ought to have found that confining to the statement of claim, the petitioners could not have been non-suited at the threshold.

35. It is submitted that the learned Arbitrator has failed to appreciate that in the statement of claim the cause of action was shown to have arisen on or about July, 2006 and on or about November, 2006 and therefore the claim filed by invoking arbitration on 16/04/2007 and 11/07/2008 (considering, commencement of the arbitration proceedings within the meaning of Section 21 of the Act) was within limitation. The learned Senior Counsel has placed reliance on the decision of the Hon'ble Apex Court in the case of ***Ramesh B. Desai & Ors. V/s. Bipin Vadilal Mehta & Ors.*** reported in ***(2006) 5 SCC 638***, ***Shree Ram Mills Ltd. V/s. Utility Premises (P) Ltd.*** reported in ***(2007) 4 SCC 599***, and ***Chloro Controls India Private Ltd. V/s. Severn Trent Water Purification Inc. & Ors.*** reported in ***(2013) 1 SCC 641*** and the judgment of this Court in the case of ***Merit Magnum Constructions V/s. Nand Kumar Anant Vaity & Ors.*** reported in ***2014(2) Bom.C.R. 182*** in support of the submission that an issue of limitation being a mixed

question of law and fact could not have been decided at the threshold in the absence of oral evidence. It is submitted that the Arbitrator could not have gone beyond the decision of the Hon'ble the Chief Justice or his designate and rule on his own jurisdiction and the jurisdiction under Section 16(1) can be exercised only in case the Arbitral Tribunal is directly constituted without the intervention of the learned Chief Justice or his designate. It is submitted that once the Arbitrator is appointed with the intervention of the Hon'ble the Chief Justice or his designate, after ascertaining the existence and validity of the arbitration agreement including the existence or otherwise of a live claim, the Arbitral Tribunal could not have gone into this aspect.

36. It is submitted that the learned Arbitrator and for the matter of that the learned Principal District Judge has failed to consider these aspects which has resulted into the impugned orders being a result of exercise of jurisdiction with material irregularity, requiring interference.

37. It is next submitted that the impugned order also shows non-application of mind in that the relief of possession was in addition or in substitution for the relief of specific performance and was not a consequential relief as observed by the learned Arbitrator. It is

submitted that assuming that relief of specific performance was barred by limitation, the claim for refund of the amount of Rs.16.25 crores would certainly survive for adjudication. It is submitted that a situation where the applicants had already parted with Rs.16.25 crores and were also being denied specific performance was highly unjust and against the well established principles of restitution.

38. The learned Senior Counsel has then referred to the observations in para 46 of the impugned judgment in order to submit that the learned Arbitrator has erroneously recorded that it was the petitioners who had filed Special Civil Suit No.7/2007 when in fact it was filed by the respondents. It is submitted that this cannot be by way of a typographical error or an error arising out of accidental slip or omission. The learned Arbitrator has reached a categorical finding on the basis of these observations. It is submitted that in para 43 of the impugned order, the learned Arbitrator has found that the issue of arbitrability of the claim cannot be decided since the pleadings are not yet complete and the evidence is yet to be recorded. Thus, the learned Arbitrator could not have non-suited the petitioners at the threshold on the ground of limitation. It is submitted that all the claims could not have been rejected as has been done. In so far as the further

arrangement/understanding and the wide scope of the arbitration clause 19 of the SHA is concerned, it is submitted that the conduct of the respondents in seeking approval from the TFCI on 20/07/2001 for transferring 50% of the equity shares of BBR i.e. after 7/09/2000 and seeing that the petitioners clear the loan of TFCI by way of one time settlement in order to release the lien/pledge on the equity share capital clearly shows that none of the parties intended the SHA to self terminate on 7/09/2000. It is submitted that in fact the conduct of the parties past 7/09/2000 would establish that for about 7 years after 7/09/2000, the SHA was operational. It is submitted that clause 19 of the SHA is wide enough to cover all disputes and differences between the parties in respect of any matter, including disputes arising between the parties on the basis of alleged oral understanding. Hence, the said oral understanding cannot be said to be dehors the arbitration clause.

39. In so far as the order dated 23/09/2010 of the Hon'ble Supreme Court is concerned it is submitted that it is on concession. It is by way of clarification, that the petitioners had submitted that they shall not raise disputes regarding MOU before the learned Arbitrator. It is submitted that the Hon'ble Supreme Court clearly spelt out that the disputes at (b), (d) and (e) (para 9 of the order) and in so far as issues arising under

notice dated 31/07/2008 the arbitrability was kept open.

40. On the contrary, it is submitted by Shri Jagtiani, the learned Senior Counsel for the respondents that the reliance placed on the decision in the case of ***SBP & Co V/s. Patel Engineering Ltd. & Anr.*** (supra) is misplaced as the issue would be academic for the present purpose in view of the judgment and order dated 23/09/2010 of the Hon'ble Supreme Court wherein it was left open to the Arbitrator to decide the issue of limitation. It is submitted that the Hon'ble Supreme Court in a later decision in the case of ***National Insurance Co. Ltd. V/s. Boghara Polyfab Pvt. Ltd.*** in Civil Appeal No.5733/2008 has interpreted the earlier decision in the case of ***SBP & Co V/s. Patel Engineering Ltd. & Anr.*** (supra) and has identified the issues that may arise for consideration in an application under Section 11 of the Act, into three categories. It is submitted that under the second category the Hon'ble Chief Justice may choose to decide the same or leave the same to the Arbitrator which would include the issue of limitation. It is submitted that there is nothing in Section 16 of the Act to show that the issue of limitation could not be gone into under the said section. It is submitted that the basic issue is about whether the claim lodged by the petitioners was within limitation as provided under Article 54 of the Limitation Act,

inasmuch as it was a claim for specific performance for transfer of 50% shares of TWHL in favour of the petitioner no.1. It is submitted that in terms of the 'completion date' and 'completion' as contemplated in the SHA, the necessary requisites in clause 4 of the SHA of not having been complied with which was a condition precedent, the SHA self terminated on 7/09/2000 as has been rightly concluded by the learned Arbitrator. It is submitted that the life and terms of the SHA could only be extended, varied, amended or modified by a document in writing executed and signed by the parties to the SHA as provided under clause 17 thereof. It is submitted that the finding by the learned Arbitrator on the various issues as raised in the impugned order is on appreciation and interpretation of the terms of the agreement and in the absence of the finding being perverse, the same does not call for interference. The learned Senior Counsel has placed reliance on the following decisions:

(i) National Thermal Power Corpn. Ltd. V/s. Siemens Atkeingesellschaft reported in ***(2007) 4 SCC 451***,

(ii) Vimal G. Jain V/s. Vertex Financial Services Pvt. Ltd. reported in ***(2007) 0 Supreme (Mah) 183***,

(iii) Dirk India Private Ltd. & Anr. V/s. Maharashtra State Electricity Generation Company Ltd. & Anr. reported in ***2013 DGSL (AHC) 4364***,

(iv) Bharat M.N (Sic) v/s. Mr. Satish Ashok Sabni (Sic) reported in ***2003(4) MhLj 259,***

(v) Pandurang Dhoni Chougule V/s. Maruti Jadhav reported in ***1966 AIR SC 153,***

(vi) Jain Studios Limited V/s. Maitry Exports Pvt. Ltd. reported in ***I (2008) BC 640,***

(vii) National Insurance Co. Ltd. V/s. Boghara Polyfab Pvt. Ltd. reported in ***(2009) 1 SCC 267,***

(viii) Foreshore Co-operative Housing Society Lomited V/s. Shri Praveen D. Desai reported in ***2008 (6) ALL MR 600,***

(ix) Indeen Bio Power Limited V/s. Dalkia India Pvt. Ltd. unreported judgment dated 21/01/2013**,**

(x) Shaikh Jaber Abdulah J Al Sabah V/s. Ravindra Mukund Chafe & Anr. unreported judgment dated 19/12/2013**,**

(xi) M/s. Shree Balaji Enterprises V/s. M/s. Bhagyashri Enterprises unreported judgment dated 3/07/2014**,**

(xii) Bharat M.N. (Sic) V/s. Mr. Satish Ashok Sabni (Sic) & Ors. reported in ***2003 (4) MhLJ 259.***

41. He submitted that the scope of interference available under Section 115 of the Civil Procedure Code is limited and in the absence of any jurisdictional error this Court may not interfere with the concurrent findings recorded by the Arbitrator and the learned District Judge.

42. On hearing the learned Counsel for the parties, the following points fall for determination in this case:

(i) Whether a revision application under Section 115 of the Civil Procedure Code would be maintainable against the judgment and order passed under Section 37 of the Act by the learned District Judge?

(ii) Whether an issue of limitation can be examined in

an application filed under Section 16 of the Act by the learned Arbitrator. In other words, whether the power of the learned Arbitrator to rule on his own jurisdiction would include the examination of the issue of limitation?

(iii) If the answer on point no.(ii) is in the affirmative whether the finding recorded by the learned Arbitrator that the claim is barred by limitation on the ground that the SHA self terminated on 7/09/2000, as confirmed by the learned District Judge, is illegal and perverse, so as to warrant interference?

(iv) Whether the impugned order rejecting the entire claim (as framed and filed), needs interference being perverse?

(v) What order?

43. **As to point no.(i)**: This point may not detain me long, for more reasons than one. In the first place, the issue of maintainability of the revision was not seriously contested by the respondents and, secondly and more importantly, the issue is covered by the decision of the Hon'ble Supreme Court in the case of ***ITI Ltd.*** (supra) in which it has been held that merely because the Second Appeal is barred under sub-section 3 of Section 37 remedy of revision would not cease to be available. In that view of the matter, the revision will have to be held to be maintainable, albit subject to the well established principles, on which and the limitations under which such jurisdiction is available. In the case of ***ITI Ltd.*** (supra) the Hon'ble Supreme Court has held in para 22 as

under :

> 22. The supervisory jurisdiction to be exercised by the High Court under Section 115 of the Code is for the purpose of correcting jurisdiction error if any committed by Sub-ordinate Court in exercise of power in appeal under Section 37(2) of the Act. The approach made to the Revisional Court under Section 115 of the Code is not a resort to remedy of appeal. In appeal, interference can be made both on facts and law whereas in revision only errors relating to jurisdiction can be corrected. Such revisional remedy is not expressly barred by the provisions of the Act. We have also not found any implied exclusion of the same on examination of the scheme and relevant provisions of the Act.

It is not necessary to multiply authorities on the point. Suffice it to mention that the revisional jurisdiction under Section 115 of the Code can be exercised;

when the sub-ordinate Court has (i) exercised jurisdiction not vested in it; (ii) failed to exercise jurisdiction vested in it; or (iii) exercised jurisdiction with material irregularity.

Thus unless and until a jurisdictional error is demonstrated the High Court would not step in or interfere with the order passed by the court/s below. Also if two views are equally possible on the rival circumstances and on appreciation the Court/s has taken a particular view, it would not be permissible for the revisional Court to substitute its

own view on the ground that it is more plausible. It has further to be borne in mind, that in the matters arising out of a challenge to the arbitral order, the same would be further limited as the scheme of the Act aims at minimal Court interference in arbitral matters. Thus, unless and until the findings recorded and the conclusions reached are shown to be perverse as for example when they are based on no evidence, and/or on gross misappreciation of the evidence or the conclusions reached are so absurd as no reasonable or prudent man would ever reach, in the given circumstances, the same cannot partake of a jurisdictional error, so as to warrant interference. With this, the point is answered in the affirmative.

44. **As to point no.(ii)**: There were great deal of arguments advanced at the Bar on this issue which is pivotal for the present purpose inasmuch as the main ground on which the petitioners have been non-suited is that the claim is barred by limitation. It is not disputed that the said submission (namely question of limitation not being a part of the issue which can be examined under Section 16 of the Act) was not advanced before the learned Arbitrator and was for the first time taken up in the appeal under Section 37 of the Act before the learned Principal District Judge. In the case of ***Tarinikamal Pandit & Ors.*** (supra) the Hon'ble Apex Court has inter alia held that a pure question of law which

goes to the root of the matter and which does not involve investigation into facts, can be allowed to be raised at any stage. This being a pure question of law, I find that the fact that it was not raised before the Arbitrator would be inconsequential and as the same has been examined by the learned Principal District Judge, it will have to be tested, in the context of the rival submissions.

Section 16 of the Act is based on the principle of competenz competenz and it reads as under:

> 16. Competence of arbitral tribunal to rule on its jurisdiction.—
>
> (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—
> (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and
> (b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.
> (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.
> (3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.
> (4) The arbitral tribunal may, in either of the cases

> referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.
> (5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral order.
> (6) A party aggrieved by such an arbitral order may make an application for setting aside such an arbitral order in accordance with section 34.

The question is whether limitation would form part of the issue 'as to jurisdiction' of the arbitral Tribunal.

45. The issue before the Constitution bench of the Hon'ble Supreme Court was whether the power exercised by the Chief Justice or his designate under Section 11(6) of the Act of 1996 is a judicial power or an administrative power. The issue arose in the context of a decision of a five Judge Bench decision in the case of ***Konkan Railway Corporation Ltd. & Anr. V/s Rani Construction Pvt. Ltd.*** reported in ***2002 (2) SCC 388*** taking the view that it is an administrative power. By the majority judgment in the case of ***Patel Engineering*** (supra), it was inter alia held that the power exercised by the Chief Justice under Section 11(6) of the Act is not an administrative power but a judicial one. The Hon'ble Apex Court summarised the conclusions in para 47 of the judgment. In particular, reliance is placed on the conclusions in para 47(iv) and (ix) which read as under:

> (iv) The Chief Justice or the designated judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be, his own jurisdiction, to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the judge designated would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the judge designate.
>
> (ix) In a case where an arbitral tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the arbitral tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act.

It is contended that while exercising the power under Section 11(6), the Hon'ble Chief Justice examines the question about existence and validity of the arbitration agreement as also the existence or otherwise of a live claim. In para 47(ix) it has been held that where the arbitral Tribunal is constituted by the parties without having recourse to Section 11(6) of the Act it will have jurisdiction to decide all matters as contemplated under Section 16 of the Act. Thus, in effect, the submission is that the arbitral Tribunal in the present case having been appointed with recourse to Section 11(6) of the Act and the question about there being a live claim already having been examined, the same could not have been gone into under Section 16 of the Act. I do not find

that the submission can be accepted, in the present case.

46. In a subsequent decision in the case of ***Boghara Polyfab Pvt. Ltd.*** (supra), the Hon'ble Apex Court after considering the decision in the case of ***Patel Engineering*** (supra) has culled out three categories of cases pertaining to the scope and ambit of the jurisdiction of the learned Arbitrator in the context of the arbitral Tribunal being appointed with the intervention of the Hon'ble Chief Justice under Section 11(6) of the Act as under:

> 22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in SBP & Co. This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is
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> (i) issues which the Chief Justice or his designate is bound to decide;
>
> (ii) issues which he can also decide, that is, issues which he may choose to decide; and
>
> (iii) issues which should be left to the Arbitral Tribunal to decide.
>
> 22.1) The issues (first category) which Chief Justice/his designate will have to decide are:
>
> (a) Whether the party making the application has approached the appropriate High Court.
>
> (b) Whether there is an arbitration agreement and

whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

22.2) The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

(a) Whether the claim is a dead (long-barred) claim or a live claim.

(b) Whether the parties have concluded the contract/ transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3) The issues (third category) which the Chief Justice/his designate should leave exclusively to the arbitral tribunal are :

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration.

It can thus be seen that in none of these cases it has been held that the question of limitation cannot be gone into under Section 16 of the Act of 1996. That apart, the situation in the present case would be governed by the order of the Hon'ble Supreme Court has appointing the Arbitrator in this case. In part 14 of the order dated 23/09/2010 in Civil Appeal No.9105/2010, the Hon'ble Apex Court clearly indicated that all issues relating to merits, limitation and arbitrability are left open to be urged in arbitration. It can thus be seen that the question of limitation was specifically left open to be urged and decided by the learned

Arbitrator. The moot question as set out herein above is whether the question of limitation could have been decided in an application under Section 16 of the Arbitration Act. The contention that the issue of limitation could not have been so decided is based on two grounds. In the first instance, it is contended that under Section 16 of the Act of 1996 which is based on the principle of competnz competenz, issue of limitation cannot be gone into as an issue of limitation would not be part of the jurisdictional issue. Secondly, it is contended that an issue of limitation always being a mixed question of law and fact, the same cannot be decided at the threshold without the parties having led oral evidence.

In this regard it would be worthwhile to refer to the decision of the Hon'ble Supreme Court in the case of ***National Thermal Power*** (supra). The Hon'ble Apex Court after considering its earlier decision in the case of ***Pandurang Dhoni Chougule*** (supra) held thus:

> 17. In the larger sense, any refusal to go into the merits of a claim may be in the realm of jurisdiction. Even the dismissal of the claim as barred by limitation may in a sense touch on the jurisdiction of the court or Tribunal. When a claim is dismissed on the ground of it being barred by limitation, it will be, in a sense, a case of the court or Tribunal refusing to exercise jurisdiction to go into the merits of the claim. In ***Pandurang Dhoni Chougule Vs Maruti Hari Jadhav [(1966) 1 S.C.R. 102]***, this Court observed that:
>
> "It is well-settled that a plea of limitation or a plea of

res judicata is a plea of law which concerns the jurisdiction of the court which tries the proceedings. A finding on these pleas in favour of the party raising them would oust the jurisdiction of the court, and so, an erroneous decision on these pleas can be said to be concerned with questions of jurisdiction which fall within the purview of Section 115 of the Code."

In a particular sense, therefore, any declining to go into the merits of a claim could be said to be a case of refusal to exercise jurisdiction.

18. The expression "jurisdiction" is a word of many hues. Its colour is to be discerned from the setting in which it is used. When we look at Section 16 of the Act, we find that the said provision is one, which deals with the competence of the Arbitral Tribunal to rule on its own jurisdiction. ***SBP & Co. Vs. Patel Engineering Ltd. & Anr. [(2005) 8 S.C.C. 618]*** in a sense confined the operation of Section 16 to cases where the Arbitral Tribunal was constituted at the instance of the parties to the contract, without reference to the Chief Justice under Section 11(6) of the Act. In a case where the parties had thus constituted the Arbitral Tribunal without recourse to Section 11(6) of the Act, they still have the right to question the jurisdiction of the Arbitral Tribunal including the right to invite a ruling on any objection with respect to the existence or validity of the arbitration agreement. It could therefore rule that there existed no arbitration agreement, that the arbitration agreement was not valid, or that the arbitration agreement did not confer jurisdiction on the Tribunal to adjudicate upon the particular claim that is put forward before it. Under sub-section (5), it has the obligation to decide the plea and where it rejects the plea, it could continue with the arbitral proceedings and make the order. Under sub- section(6), a party aggrieved by such an arbitral order may make an application for setting aside such arbitral order in accordance with Section 34. In other words, in the challenge to the order, the party aggrieved could raise the contention that the Tribunal had no jurisdiction to pass it or that it had exceeded its authority, in passing

> it. This happens when the Tribunal proceeds to pass an order. It is in the context of the various sub-sections of Section 16 that one has to understand the content of the expression 'jurisdiction' and the scope of the appeal provision. In a case where the Arbitral Tribunal proceeds to pass an order after overruling the objection relating to jurisdiction, it is clear from sub-section (6) of Section 16 that the parties have to resort to Section 34 of the Act to get rid of that order, if possible. But, if the Tribunal declines jurisdiction or declines to pass an order and dismisses the arbitral proceedings, the party aggrieved is not without a remedy. Section 37(2) deals with such a situation. Where the plea of absence of jurisdiction or a claim being in excess of jurisdiction is accepted by the Arbitral Tribunal and it refuses to go into the merits of the claim by declining jurisdiction, a direct appeal is provided. In the context of Section 16 and the specific wording of Section 37(2)(a) of the Act, it would be appropriate to hold that what is made directly appealable by Section 37(2)(a) of the Act is only an acceptance of a plea of absence of jurisdiction, or of excessive exercise of jurisdiction and the refusal to proceed further either wholly or partly.
>
> (Emphasis supplied)

It can thus be seen that any ground or reason (including that of limitation) by which the Court/Arbitrator would decline to go into merits of a claim could be said to be a case of refusal to exercise jurisdiction. Thus, it cannot be accepted that the Arbitrator could not have examined the question of limitation in an exercise conducted in accordance with Section 16 of the Arbitration Act.

47. This takes me to the second limb of the argument namely the

issue of limitation being a mixed question of law and fact could not have been gone into and decided, without, the parties being afforded an opportunity to lead evidence. Here again, the submission is misconceived. There cannot be any manner of dispute with the proposition that an issue of limitation is a mixed question of law and fact. This is because the issue as to whether an action is brought within the period of limitation may in a given case require examination of various questions both of law and fact. For instance, on the basis of the relief claimed it has to be ascertained as to under which of the Articles under the Limitation Act the action would fall. In that view of the matter, it would be a question of law. On the other hand, under Article 54 of the Limitation Act, with which we are presently concerned, the issue would be as to whether any time period is fixed for specific performance of the contract and if not what would be the date on which the plaintiff can be said to have first noticed that the performance is refused. This aspect would be part of the exercise which may be dependent on the examination of facts. If the facts on the basis of which the starting point of limitation is to be reckoned, are either undisputed or are clearly discernible from the record, the question of limitation may not depend upon any "disputed question of fact" notwithstanding that it would continue to be a mixed question of law and fact. We can draw an analogy which can be found in Order 7 Rule 11(d) of CPC which

provides for rejection of the plaint on the ground of the same being barred by any law. It is now well settled that while exercising the jurisdiction under Order 7 Rule 11(d) of CPC, the Court has to confine itself to the averments in the plaint without reference to any defence. The Hon'ble Apex Court in the case of ***Ramesh B. Desai*** (supra) has inter alia held that law within the meaning of Order 7 Rule 11(d) must include the law of limitation. Thus the rejection of the plaint on the ground of limitation is contemplated under Order 7 Rule 11(d) of CPC. It is clear that while exercising the jurisdiction under Order 7 Rule 11(d) of the Civil Procedure Code, the Court does not consider any oral evidence and confines itself to the allegations in the plaint and the documents annexed to it. If we were to say that the question of limitation can never be examined without the parties being given opportunity to lead oral evidence would tantamount to saying that a plaint can never be rejected on the ground of limitation under Order 7 Rule 11(d) of CPC. To put it otherwise, it is one thing to say that the question is a mixed question of law and fact and altogether different to say that the question being based on disputed facts, requires oral evidence.

48. Thus, it is not possible to accept the submission that without

the parties being given opportunity to lead oral evidence the Arbitrator could not have considered the application under Section 16 of the Act. In the present case, the question essentially turned upon the interpretation of the terms of the MOU and the SHA. The fact that the petitioners continued to be in the management and control of BBR till the year 2007 is also not in dispute. In that view of the matter, the determination of the question of limitation essentially turned upon the interpretation of the terms of the MOU and the SHA and the other relevant facts which were not in dispute. Thus in the absence of any disputed facts being involved in the matter of determination on the question of limitation it is not possible to accept that the Arbitrator could not have decided the question of limitation at the threshold. The submission accordingly stands refuted. The point is accordingly answered in the affirmative.

49. **As to point no.(iii)** : It would be necessary to reproduce clause (2) of the MOU as under:

> 2. SM will cause Trade Wings Ltd., the holder of the entire share capital of Trade Wings Hotels Ltd. to sell and THPL through itself or its nominees shall buy 50% of the equity capital of Trade Wings Hotels Limited within 90 days of the management of Bogmalo Beach Resort coming into the JVCO. The price for sale of the shares of TWHL will be on the

> basis of valuation of Trade Wings Hotels Limited in the range of Rs.27 crores to Rs.30 crores. The price per share will be jointly worked at between THPL and SM on the above basis. THPL/associates will bring in sufficient funds in Trade Wings Hotels Ltd. so as to ensure that the loans advanced by Trade Wings Ltd./associates and THPL/associates is equal. However, if THPL is not able to get a buyer within the time aforesaid, then THPL will cause TSHL (Tulip Star Hotels Ltd., formerly known as Cox & Kings Travel & Finance Ltd., having its registered office in New Delhi, to purchase 50% shares of the equity capital of Trade Wings Hotels Ltd., within 45 days of the expiry of this period for a minimum price on the basis of valuation of TWHL at Rs.27 crores.

It would also be necessary to set out the definitions of 'Agreement', 'Completion', 'Completion date', 'Effective date', 'Regulatory Agency' and 'Statutory Approval' as mentioned in the SHA as under:

> "**Agreement**" means this Agreement as amended in writing from time to time;
>
> "**Completion**" means the completion of the matters provided in clause 4.
>
> "**Completion date**" means 7th September, 2000 being the expiry of 135 days referred to in clause 2 of the MOU.
>
> "**Effective Date**" means the date on which all statutory approvals required under the laws of India shall have been obtained, including but not limited to the approvals on this Agreement, the Articles of Association and any other agreement;
>
> "**Regulatory Agency**" means any government, central or state including local authority, central

authority or central bank of a country, foreign exchange authority and any other authority, agency or instrumentality of any government or authority entitled to give any order, direction or mandate to any person and which the person receiving the same is bound to obey or act according to such order, direction, etc. whether or not having force of law;

"**Statutory Approval**" means an approval by a Regulatory Agency to a person to do or refrain from doing any act, deed or thing as therein mentioned whether or not such approval has force of law.

Clause (3) about 'consideration' and clause (4) 'completion' in the MOU read thus:

3. Consideration

Subject to the terms of this agreement THPL and or its nominees shall purchase 50% of the equity share capital of the company from Trade Wings and Trade Wings shall sell 50% of the equity share capital of the Company to THPL on or before the Completion Date for a consideration as set out in the MOU being Annexed "A". The transaction shall take place on or before the Completion Date on a spot delivery contract basis.

4. Completion

It is agreed that the Completion of the sale and purchase of the shares by TWL to THPL shall take place on or before the Completion Date subject to:

1. SM terminating the Hotel Management Agreement dated 1st July 1994, made between the Company and Sarovar Hotels Pvt. Ltd. (since changed to Sarovar Park Plaza Hotels & Resorts Pvt. Ltd.);

2. The parties executing the Hotel Management Agreement with respect to Bogmalo Beach Resort, Goa in favour of JVCO as mentioned in MOU;

3. THPL assigning the Hotel Operating Agreements

entered in to by THPL as mentioned in Annexure '1' of the MOU to JVCO for a consideration of Rs.1,00,000/- to be paid by JVCO to THPL.

4. The share holders Agreement being executed by and between SM and/or his nominee/s and THPL and/or its nominee/s in the JVCO.

5. The consideration being paid in cash for the Shares of the Company by THPL and/or its nominees to TWL.

It is undisputed that except clause no.4.1 namely SM terminating the Hotel Management Agreement with the SPP, the rest of the conditions at clause nos.4.2 to 4.5 have not been complied with.

The contention on behalf of the petitioners is that the 'completion' as defined in the SHA clearly means the completion of the matters provided in clause 4. Thus, according to the petitioners, in the absence of 4 out of 5 requirements of clause 4 not having been satisfied it cannot be said that there was “completion”, which was accomplished. Completion date was defined by the parties as 7/9/2000 being the expiry of 135 days referred to in clause 2 of the MOU. It is submitted that the period of 135 days comprised of the initial 90 days within which SM was to buy 50% of the equity capital of TWHL after the management of BBR coming into the JVCO. It is submitted that if THPL was not able to get a buyer within the aforesaid period of 90 days then THPL was to cause TSHL to purchase 50% equity share capital of TWHL within 45 days of

the expiry of the period of 90 days. It is thus submitted that none of these aspects having materialized, the period of 135 days never commenced.

50. It is not possible to accept the submission. It appears that on behalf of the petitioners it was contended before the learned Arbitrator that the SHA stood amended and/or waived with respect to :

(i) Completion date and subsequent transfer of the shares,

(ii) The formation of the joint venture company for management of BBR,

(iii) Payments to be made to third parties on behalf of respondents and which were to be treated as consolation to the SHA.

The submission as regards waiver has now not been pressed. Thus, the contention is that by conduct of parties, the completion date stood extended and/or the completion date cannot be equated with 7/09/2000 as it is commensurate with the completion of 135 days as contemplated in clause (2) of the MOU. It appears that certain observations of this Court made in the Arbitration Application No.10/2008 were tried to be pressed in service. However, the learned Arbitrator refused to rely on the same on the ground that the said judgment was challenged before the Hon'ble Supreme Court in Civil

Appeal No.9105/2010, in which the Hon'ble Supreme Court has rendered its own judgment and thus the learned Arbitrator found it to be impermissible to place reliance on the judgment of this Court. The learned Arbitrator placing reliance on clause 17.4 of the SHA found that it provided in express terms that no variance or amendment to the agreement shall be considered effective, unless it was in writing and signed by each of the parties to the agreement. The learned Arbitrator also found that the averments on the basis of which a plea for a deemed extension was put forth were vague averments without specifying the parties to the oral agreement, the time and the place where such agreement took place. The learned Arbitrator found it difficult to infer any such implied agreement to extend the date of the performance in the wake of clause 12.5 of the SHA and when it was obvious that the parties were aware that the shares could not be transferred unless the dues of TFCI were discharged. The learned Arbitrator also noticed that clause 17.7 provided that time shall be essence of the contract.

51. I have considered the circumstances and the submissions made. It is not possible to accept that by virtue of the conduct of the parties, the terms of the SHA stood amended particularly in the wake of the provisions of clause 17.4 which says that there shall not be any

variance in the terms of the contract, except by a document in writing signed by the parties. It is also not possible to accept that the completion date (which in the SHA is mentioned as 7/09/2000) never arrived as the completion date was dependent on the completion as stipulated in clause 4 of the SHA. Had this been so, nothing prevented the parties to stipulating it in so many words, instead of mentioning a specific date. On reading of the SHA as a whole and in particular paras 17.4 and 17.7 it is difficult to take exception to the finding recorded by the learned Arbitrator which is based on the interpretation of the terms of the agreement between the parties.

52. Let us now consider the submissions based on clause 12.5(i) The submission is that this is not a termination clause but a clause of indemnity or force majeure. Clause 12 of the SHA may be reproduced thus:

> 12. TERMINATION
>
> 12.1 The parties may by mutual consent agree to terminate this Agreement upon such terms and conditions and at such time as may be decided by the Parties.
>
> 12.2. In the event of TWL and THPL, agree to terminate the Agreement (and the other party is also willing to terminate the Agreement) but there is a dispute on the price at which the Shares may be are to

be transferred then such price shall not be less than the price to be determined by the statutory auditors of the Company at the relevant time taking all factors into consideration. The party which is willing to pay the higher price to the other party shall purchase the shares of the other party i.e. each party shall bid for the purchase of the shares of the other party.

12.3 In the event of however, the parties not agreeing to terminate the Agreement on mutual terms and conditions the parties agree that company shall be wound up and after paying off all the liabilities the cash and unrealized assets shall be distributed between the parties in the ratio of the shareholdings between the parties.

12.4 In the event of insolvency, bankruptcy, dissolution or winding up (as may be applicable) of a party (hereinafter referred to as the "party in liquidation/insolvency") the other party shall not be bound to carry out its obligations hereunder provided however, that a party in liquidation/ insolvency shall continue to be bound by the provisions of this Agreement including provisions relating to transfer of shares in Clause 14 confidentiality clause 10.

12.5 In the event of the Completion not taking place latest by the Completion date on account of;

(i) Any statutory or other approval of a third party required for completion of the transaction herein contemplated not available or on account of circumstances beyond control of a party, the Agreement shall stand terminated on the Completion date without any claim for damage by the party on the other party.

(ii) Any default, or on account of circumstances attributed to a party, the party not responsible for such a default shall at its option shall be entitled to terminate this Agreement with effect from a date specified in Notice of such termination given by a party to the defaulting party. Such Termination shall

> be without prejudice to the rights of the non-defaulting party to claim damages and other remedies available to it under law and contract as against the defaulting party.

It cannot be accepted that it is in the nature of a force majeure clause as there is a distinct clause namely clause no.13 which is a force majeure clause.

In so far as the submission that it is an indemnity clause is considered, it would be necessary to decipher clause 12.5(i). It provides for an automatic termination of the SHA on account of (i) any statutory or other approval of a third party required for completion of the transaction not being available or (ii) on account of circumstances beyond the control of a party.

Undoubtedly, it provides that in a case of such termination no party shall have claim for damages against the other. However, this part deals with the maintainability of the claim of one party against the other, in the event of such termination. To put it otherwise, clause 12.5(i) provides for automatic termination in the event of the aforesaid two circumstances namely the absence of statutory or other approval forthcoming or on account of circumstances beyond the control of other party. It then provides for the consequences namely the automatic termination of the SHA on the completion date with a rider that this shall be without any claim of the party for damages against the other. This

part of the stipulation about none of the parties having any claim of damages against each other only qualifies the consequences arising out of the termination namely the mutual liabilities which may arise on account of such termination. Basically clause 12.5(i) is a termination clause and only qualifies the nature of termination by saying that in the event of there being an automatic termination (which is clear from the use of the words "the agreement shall stand terminated on the completion date") none of the parties shall have any claim for damages against the other. Thus, it cannot be accepted that clause 12.5(i) is merely or only an indemnity clause. This submission overlooks the fact that basically it is a termination clause and the concluding part of 12.5(i) only indemnifies the party against the claim for damages against each other in the event of such termination. The submission thus will have to be refuted.

53. It is next submitted that clause 12.1 to 12.5 have to be read as a whole. In this regard clause 12.1 speaks of a terminations by mutual consent on such terms and conditions as may be decided by the parties. Clause 12.2 envisages a situation where although the parties are willing to terminate the agreement however, there is dispute on the price at which the shares may be or are to be transferred and then goes on to

provide that the party who is willing to pay higher price shall purchase the shares of the other party for which the parties shall mutually bid. Clause 12.3 envisages a situation where the parties are not agreeing to terminate the agreement on mutual terms and conditions in which the company shall be wound up and after paying all the liabilities the unrealized assets shall be distributed between the parties in the ratio of their respective share holding. Clause 12.4 provides for a situation where the party is declared insolvent, bankrupt or there is dissolution or winding up. It is thus difficult to accept as to how clauses 12.1 to 12.4 which provide for distinct contingencies can control clause 12.5. Thus it cannot be accepted that because clause 12.5 does not contain a non-obstante clause it cannot be read in isolation. It is not a matter of reading that clause in isolation, inasmuch as the various sub-clauses of clause 12 provide for termination in different and distinct circumstances. The question is as to which clause is attracted in the facts and circumstances of the case.

54. It is submitted that once the learned Arbitrator has observed in para 2 of the impugned order that the issue of limitation will have to be decided on the basis of the averments made in the statement of claim, the learned Arbitrator failed to then appreciate that in the clause concerning

the limitation in the statement of claim the cause of action is shown to have arisen on/or about July 2006 and on/or about November 2006 and therefore the claim filed by invoking the arbitration was within limitation. The submission cannot be accepted. It is true that while deciding as to whether the claim could be rejected under principles underlying Order 7 Rule 11(d) of CPC, the Court would confine itself to the pleadings in the plaint and the contents of the documents produced along with it. However, this does not preclude the Court from deciding as to the real nature of the suit/claim. It is one thing to say that the Court has to confine itself to the plaint/claim and the documents annexed to it and it is entirely different to say that the Court would be precluded even from looking to the real nature of the claim/cause of suit while doing so. To put it otherwise the exercise on the principles akin to action under Order 7 Rule 11(a) and in the matter of that Order 7 Rule 11(d) does not preclude the Court from examining the real nature of the claim and the cause of action alleged. It is well settled that a party cannot get away with intelligent drafting so as to camouflage the real cause of action and/or the nature of the claim. Thus, if the Arbitrator has considered the statement of claim and the documents annexed to it and has decided that the cause of action had arisen when the SHA self terminated itself on 7/09/2000 no exception can be taken to the same on the ground that the Arbitrator ought to have gone by the cause of action as shown in the

statement of claim. The learned Arbitrator on appreciation of the pleadings in the statement of claim and in particular para 27 thereof has found that on their own saying as per the petitioners the parties had arrived at a further arrangement which had resulted as a consequence of the understanding to be found in the minutes of 19/10/2005 between the petitioner no.2, the respondent no.2 and one Mr. Om Navani. Thus, in my humble opinion the petitioners cannot insist that the learned Arbitrator ought to have gone by the cause of action as shown in the statement of claim as in my considered view nothing prevented the learned Arbitrator to decide the real cause of action as against the camouflaged one (and which may be relatable to the further arrangement, which is pleaded in the statement of claim).

55. It is submitted on behalf of the petitioners that in para 43, the learned Arbitrator has observed that the respondents were yet to file their pleadings in response to the statement of claim and the Tribunal was yet to record evidence in support of the respective stands of the parties and thus it was incorrect for the claim to be rejected, on the basis of the objection raised.

It is significant to note that the said observation has come when the learned Arbitrator was considering one of the objections raised

on the ground that the claim falls outside the arbitration clause. The learned Arbitrator after considering para 27 of the statement of claim (in which the petitioners had averred that the share purchase amount could not have been paid as under the TFCI loan arrangement there was an embargo on the transfer of share till the loan was repaid) it was contended on behalf of the respondents that this was an admission that none of the payments for share transfer were made as contemplated under the SHA and claimed that the claim should be rejected on this ground. It is while negating this contention the learned Arbitrator has found that this contention of the respondents does not raise an issue of arbitrability of the claim. It merely concerns the justifiability of the claim on the ground as put forward by the respondents. It would thus appear that in fact where the issue required the parties leading evidence the Arbitrator has refused to decide the same at the stage of considering the application under Section 16 of the Act. The observations in para 43 have to be confined to the issue which was under consideration namely the defence/objection that the Arbitrator lacked jurisdiction, as the claims fell outside the arbitration clause.

56. It is submitted that the arbitration clause as contained in clause 19 of the SHA is wide enough, not only to cover the disputes under the

SHA but all disputes and differences between the parties in respect of any matters except fundamental matters mentioned in the SHA. It is submitted that thus this clause even covers the disputes under the MOU "which however, as per the order of the Hon'ble Supreme Court are not now arbitrable". The contention is that under clause 19 of the SHA disputes arising between the parties on the basis of alleged oral understanding can be covered and therefore the oral understanding cannot be treated dehors the arbitration clause in the SHA which transcends beyond the disputes mentioned in SHA and encompasses all arbitrable disputes arising between the parties.

As noticed earlier, the SHA contemplates that any modification or variation of its terms has to be in writing. Thus read as a whole it is not possible to conceive that clause 19 which forms part of the SHA would travel beyond the terms of the SHA when clause 17.4 in no uncertain terms states that any variation or modification can only be by an agreement in writing.

57. It is contended that clause 12.5(i) cannot apply in the absence of any pleadings by the respondents about necessity of approval by a third party. In this regard, it is undisputed that unless the TFCI dues were cleared the transfer of shares could not have been effected. It is further

disputed that no due certificate was issued by TFCI much after the completion date. In view of the said circumstances which are matters of record (namely the issuance of the no due certificate by TFCI) it is not possible to accept that on account of any absence of pleadings/claim about the necessity of a statutory or other approval by a third party, clause 12.5(i) could not have been called into aid.

58. This takes me to the submissions based on the observations of the learned Arbitrator in para 46 of the order. These observations have come in the context of the objections based on duplication of prayers. It is true that Special Civil Suit no.7/2007 was filed by the respondents in which the petitioners had filed an application under Section 8 and the learned Arbitrator has observed otherwise (namely the Special Civil Suit being filed by the claimants and the application under Section 8 being filed by the respondents). Ultimately the learned Arbitrator has held that the prayer 1.A(iii) and 2 cannot be arbitrated and entertained and much less granted by the Tribunal on grounds of propriety. The prayer 1.A(iii) as reproduced above pertains to a direction to the respondent to conduct the business of the running of the hotel along with claimants in terms of the SHA and in particular in terms of clauses 6,7 & 8 of the SHA while prayer (2) pertains to a claim on account of loss of management fee and

the gross operating profit as well as costs and interest for wrongful termination of the management agreement for 3 years 4 months and 13 days. It is undisputed that the suit filed by the respondents pertains to the MOU which was in respect of the management of the BBR. I find that notwithstanding an erroneous mentioning about the party who had filed the special civil suit and had moved the application under Section 8, the fact remains that the Arbitrator had found that the prayers 1.A(iii) and 2 cover the same ground as in the substantive suit namely Special Civil suit no.7/2007 and that there was an unsuccessful attempt to get the dispute therein referred to the Arbitrator under Section 8 of the Act. In either case these observations are in the context of objection on account of the duplication of prayers and the main ground on which the petitioners have been non suited is the ground of limitation. I have considered the observations in para 46 of the order and the submissions about there being non application of mind and I am unable to persuade myself to hold that the said observations are such which can vitiate the order of the learned Arbitrator as it will have no bearing on the issue of limitation.

Consequently, the point no.(iii) is answered in the negative.

59. **As to point no.(iv)** – It is submitted that the Arbitrator could

not have rejected the claim for repayment of Rs.16.25 crores and Rs.1.91 crores spent by the petitioners on renovation of BBR. It is contended that the claim for refund of the amount of Rs.16.25 crores would survive for adjudication and ought to have been adjudicated upon. It is submitted that the learned Arbitrator failed to appreciate that the petitioners had parted with a sum of Rs.16.25 crores and were seeking specific performance in the nature of 50% of share holding in the BBR. If the petitioners were not found to be entitled to the specific performance the claim for refund ought to have been adjudicated upon. It is submitted that the situation where the petitioners have already parted with the sum of Rs.16.25 crores and were also being denied specific performance were highly unjust and inequitable and against well established principles of restitution.

60. I have given my anxious consideration to the submissions made. It is pertinent to note that the claim for refund of Rs.16.25 crores is made by way of an alternate claim for specific performance. Thus, where the main relief is found to be barred by limitation, it is not possible to conceive that the alternate claim would survive for consideration. Even otherwise, the learned Arbitrator has found that payments were made by the petitioners after 7/09/2000 and thus would

not be referable to the SHA which had self terminated itself on 7/09/2000. Thus, I do not find that the said submission can be accepted.

The point no.(iv) is answered in the negative.

61. In the result, I do not find that any case for interference under Section 115 of the Code of Civil Procedure is made out. The Civil Revision Application is accordingly dismissed with no order as to costs.

C.V. BHADANG, J.

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