#J-1 & J-2

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Reserved On : 07.09.2020
Judgment Pronounced On : 24.12.2020

\+ **RFA (OS) 21/2020, CM APPL.9034/2020, CM APPL.9036/2020, CM APPL.9044/2020, CM APPL.10291/2020 & CM APPL.10293/2020**

DR BINA MODI .....Appellant

versus

LALIT KUMAR MODI & ORS ......Respondents

J-2

\+ **RFA (OS) 22/2020, CM APPL.9041/2020, CM APPL.9042/2020, CM APPL.10286/2020 & CM APPL.10289/2020**

CHARU MODI & ANR .....Appellants

versus

LALIT MODI & ANR ......Respondents

Advocates who appeared in this case:

For the Appellants: Mr. Mukul Rohatgi, Senior Advocate with Mr. Gyanendra Kumar, Ms. Amita Katragadda, Mr. Indranil Deshmukh, Ms. Shikha Tandon, Ms. Gathi Prakash, Mr. Nikhil Rohatgi, Mr. Robin Grover, Ms. Nivedita Aroa and Mr. Rishabh Malaviya, Advocates in RFA (OS) 21/2020

Mr. Kapil Sibal, Senior Advocate Mr. Rishi Agarwala, Mr. Karan Luthra, Ms. Niyati Kohli, Ms. Aarushi Tiku, Mr. Pratham Vir Agarwal & Mr. Koshy John, Advocates in RFA (OS) 22/2020

For the Respondents: Mr. Harish Salve, Senior Advocate with Ms. Anuradha Dutt, Ms. Fereshte Sethna, Ms. Ekta Kapil, Mr. Swadeep Hora, Mr. Haaris Fazili, Mr. Chaitanya Kaushik, Ms. Priyanka MP, Mr. Kunal Dutt and Mr. Shobhit Ahuja, Advocates for R-1 in RFA (OS) 21/2020 & RFA (OS) 22/2020

Mr. Kapil Sibal, Senior Advocate with Mr. Rishi Agarwala, Mr. Karan Luthra, Ms. Niyati Kohli, Ms. Aarushi Tiku, Mr. Pratham Vir Agarwal & Mr. Koshy John, Advocates for R-2 & 3 in RFA (OS) 21/2020

Mr. Mukul Rohatgi, Senior Advocate with Mr. Gyanendra Kumar, Ms. Amita Katragadda, Mr. Indranil Deshmukh, Ms. Shikha Tandon, Ms. Gathi Prakash, Mr. Nikhil Rohatgi, Mr. Robin Grover, Ms. Nivedita Aroa and Mr. Rishabh Malaviya, Advocates for R-2 in RFA (OS) 22/2020

CORAM:
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL
HON'BLE MR. MR. JUSTICE TALWANT SINGH

J U D G M E N T

SIDDHARTH MRIDUL, J *(via Video Conferencing)*

1. These two Regular First Appeals ('Appeals'), instituted under the provisions of Section 96 read with Order XLI of the Code of Civil Procedure, 1908 ('CPC'), impugn the judgment and decree dated the

03.03.2020 ('impugned judgment'), whereby the learned Single Judge dismissed CS(OS) 84/2020, titled as '*Dr. Bina Modi vs. Lalit Modi & Ors.'* and CS(OS) 85/2020, titled as *'Charu Modi & Anr. vs. Lalit Modi & Anr.'*, ('the Suits'), as not maintainable *in-limine*.

2. At the outset, it is relevant to observe that, the learned Single Judge did not issue summons in the Suits and proceeded to finally adjudicate them after hearing the learned Senior Counsel appearing on behalf of the contesting Caveator to oppose the very admission of the Suits, when they first came up before the Court.

3. Since, the averments made in the plaints were neither refuted nor traversed in any manner whatsoever—the Suits having been dismissed at the threshold—the facts stated therein, as are germane for the due adjudication of these Appeals are being considered. It is relevant to observe here that both the present Appeals, as well as, the Suits from which they arise, are identical *mutatis mutandis*.

4. Dr. Bina Modi ('Bina'), who instituted CS(OS) 84/2020, and is the appellant in RFA (OS) 21/2020, is the widow of the late K.K. Modi ('KK') and the mother of Charu Modi and Samir Modi ('Charu and Samir'), who are the appellants in RFA (OS) 22/2020, having

instituted CS(OS) 85/2020; (hereinafter collectively referred to as 'Appellants'). Lalit Modi ('Lalit'), is the elder son of Bina and the brother of Charu and Samir and is the solitary contesting party.

5. The Suits, were filed by the Appellants seeking *inter alia* Declaration and Permanent Injunction against Lalit, restraining the latter from proceeding with the Application for Emergency Measures ('Emergency Application'), in an arbitration initiated by the latter before the International Chambers of Commerce ('ICC'), referred to as ICC Case No.25137/HTG(EA), in relation to the "K.K. Modi Family Trust" ('Trust') established under the Indian Trusts Act, 1882 ('Trusts Act') and administered under the Restated Trust Deed dated 09.04.2014 ('Restated Trust Deed').

6. The Trust of which KK was the Settlor, is statedly governed by the provisions of the Trusts Act and has its registered office at K-1, Maharani Bagh, New Delhi-110065.

7. The Trust is governed by the Restated Trust Deed and as per Clause 38 thereof, operates in supersession of all previously executed Deeds, Memoranda, other Undertakings etc., save and except two

Deeds of Adherence executed by the parties separately. The Clause 38 reads as follows:-

> "38. It is agreed that henceforth this Deed shall operate in supersession of the Deed of trust dated 10th February, 2006, Memorandum of Oral Family Settlement dated 10th February, 2006, the Supplemental Deed of Trust dated 3rd October, 2006, Second Oral Family Settlement dated 3rd October 2006 and all other understandings and minutes recorded prior to the date of this Deed (save and except the Deed of Adherence dated 10th February, 2006 and Deed of Adherence dated 13th December, 2006), and all actions taken pursuant to the said Deeds and prior-to the execution of this Deed shall be deemed to be actions taken under this Deed. It is further clarified that this Deed shall be absolute and final and shall be the only document to be relied upon and all other documents executed prior to the date of this Deed shall not have any validity."

8. The Settlor passed away on 02.11.2019. Upon the demise of the Settlor, Bina in accordance with Clause 3.2 of their Restated Trust Deed, forthwith and without further action assumed the role of the Managing Trustee of the Trust.

9. A dispute has emerged amongst the Trustees of the Trust. It is contended on behalf of Lalit that after the demise of the Settlor, in view of the lack of unanimity amongst the Trustees regarding sale of trust assets, a sale of all assets of the Trust has been triggered immediately. On the other hand, it is the appellant's position that, a)

pursuant to the powers of the Managing Trustee under the Restated Trust Deed, it is Bina's sole and exclusive prerogative to determine whether to continue the Trust or to dispose of the Trust's Assets; and b) no sale of assets has been triggered and the Trust would continue with the legacy of the Settlor, in accordance with the terms of the Restated Trust Deed.

FACTS OF THE CASE: -

10. A conspectus of the facts giving the background of the said dispute between the parties is set out hereinbelow: -

(i) Upon demise of Settlor/ KK, Bina immediately assumed the role of the Managing Trustee of the Trust, in accordance with Clause 3.2 of the Restated Trust Deed, and wrote to the Secretary of the Trust on 05.11.2019 to transfer in her name, the equity and preference shares jointly held by KK as the sole holder of those shares. Similarly, she also informed the Secretary that, the equity and preference shares held by the Settlor as first holder, jointly with others, had to also be transferred in her name to be jointly

held with the existing second shareholder on behalf of the Trust.

(ii) The Secretary of the Trust addressed a letter dated 12.11.2019 to Godfrey Philips India Ltd. ('GPI'), intimating the recommendation of the Trust for appointment of Bina for the position of Managing Director of GPI for a period of 5 years.

(iii) Lalit addressed a letter dated 13.11.2019 to the Co-Trustees requesting that, as per Clause 4.1 of the Restated Trust Deed, a meeting of the Board of Trustees be convened within thirty days of the Settlor vacating the office of the Managing Trustee, which period was to expire on 01.12.2019. He requested that necessary steps for convening the meeting of the Board of Trustees be undertaken at the earliest.

(iv) Vide a letter dated 14.11.2019 addressed to the Trustees, Bina *inter alia* informed the Trustees that she is committed to holding the meeting of the Board of Trustees within 30 days of the demise of KK and

will take necessary steps for convening the said meeting.

(v) In a Board Meeting of GPI held on 14.11.2019, Bina was appointed as the President and Managing Director of GPI for a period of 5 years with effect from 14.11.2019. Similarly, in a Board Meeting of Indofil Industries Limited, Bina was appointed Chairperson and Managing Director of Indofil Industries Ltd.

(vi) A meeting of the Board of Trustees was called on 30.11.2019 at Waldorf Astoria, Dubai.

(vii) The meeting of the Board of Trustees was held in Dubai on 30.11.2019 and was attended by the Appellants and Lalit in person, along with a representative of the Secretary to the Trust. During the meeting, Lalit placed a letter of even date addressed to his Co-Trustees before the Board of Trustees. In the said letter, Lalit expressed his desire to sell the whole of the Trust Fund comprising of various assets including Family Controlled Businesses in terms of

Clause 11 of the Restated Trust Deed and to distribute the same in terms of Clause 6.2 of the Restated Trust Deed. Whereas, the Appellants signed a consent letter deciding to continue to own and manage all assets of the Trust Fund.

(viii) Draft minutes of the meeting of the Board of Trustees held on 30.11.2019 were circulated to the Board of Trustees along with Lalit's aforementioned letter dated 30.11.2019, for comments ('Draft Minutes') on 06.12.2019. The Draft Minutes *inter alia* record that no unanimous decision could be reached regarding sale of assets of the Trust.

(ix) In the spirit of exploring an amicable discussion, without prejudice, Bina requested Lalit to give a proposal that the latter thought would be fair on 13.12.2019. However, Lalit disputed the appointment of Bina as the President and Managing Director of GPI by addressing a letter dated 15.12.2019 to the Chairman of GPI, the Board of Directors of GPI and

the Co-Trustees of the Trust.

(x) Further, vide letter dated 17.12.2019, Lalit whilst reiterating that the trust assets were liable to be sold, agreed to discuss the possible settlement on a "without prejudice" basis.

(xi) On 21.12.2019, GPI addressed a letter to Lalit stating *inter alia* that the process of appointment of Bina as President and Managing Director of GPI, as well as, all disclosures and filings made in this regard were, in accordance with law. The said appointment would be confirmed upon approval by the shareholders.

(xii) Thereafter vide an email dated 23.12.2019, addressed by Bina to Lalit, it was *inter alia* stated that, it is common knowledge that the Settlor's priority was that the business legacy he created continues and prospers. Bina also stated that the Settlor, during his lifetime, encouraged her involvement in looking after the affairs of the Trust companies. Bina also called upon Lalit to stop making personal attacks on her and to

give written proposal for settlement which could be considered.

(xiii) Whilst the Draft Minutes could not be agreed to and finalized, Titus & Co. the new Secretary of the Trust addressed an email dated 27.12.2019 to all the Trustees giving notice for the meeting of the Board of Trustees on 08.01.2020. However, the meeting of the Board of Trustees scheduled on 08.01.2020 was postponed due to unavailability of Samir.

(xiv) The public shareholders approved the appointment of Bina as the President and Managing Director of GPI, with an overwhelming majority of 84.03% of the votes polled, as per the scrutinizer report. Similarly, the shareholders of Indofil Industries Ltd. approved the appointment of Bina as Chairperson and Managing Director with requisite majority.

(xv) On 27.01.2020, Lalit sent a letter to Appellants alleging that they have breached the provisions of the Restated Trust Deed. Lalit, while reiterating issues

raised by him in the past, also claimed that appointment of Bina as the Managing Director of GPI was in violation of the Restated Trust Deed and that such appointment could have only been made with unanimous consent.

(xvi) On 27.01.2020 and 28.01.2020, Lalit released on social media platforms *inter alia:* (a) statements imputing that the assets of KK Modi Group, including GPI, are up for sale; (b) copies of certain documents available to Lalit as a Trustee, such as the agenda and correspondence exchanged in relation to the meeting of Board of Trustees held on 30.11.2019 and the letters sent by the Secretary to merchant bankers; (c) confidential correspondence between GPI and Jupiter Asset Management, a shareholder in GPI, in relation to governance of GPI; and (d) the confidential scorecard prepared by IiAS on GPI corporate governance.

(xvii) Bina addressed a letter dated 28.01.2020 to Lalit,

Charu and Samir, *inter alia* stating that:-

(i) It is her sole and exclusive prerogative as the Managing Trustee of the Trust to determine whether to continue the Trust or to dispose of the Trust's assets;

(ii) Since she had decided to continue the Trust, there was no question of the Board of Trustees being empowered to take any decision to dispose of the Trust assets;

(iii) After the meeting of the Trustees held on 30.11.2019, neither the provisions requiring sale of assets nor the Date of Determination of the Restated Trust Deed had become applicable; and

(iv) There was no rationale for selling the assets of the Trust Fund at the time. Given the macro-economic conditions and the specific prospects of the Family Controlled Businesses, a decision to sell would be sub-optimal and the Trustees would lose a lot of value if the assets of the Trust are put on the block and sold piece by piece.

(xviii) In response to Bina's letter dated 28.01.2020, Lalit addressed three e-mails to Bina on the same day, threatening *inter alia* (i) to publicly release *"hundreds of e-mails and documents"* if she fought him; (ii) to *"bury"* her alive; (iii) that she will *"go down", "even if all companies are taken over by government",* (iv) that this is a *"public" "war";* (v) to teach her a

"lesson", and (vi) that *"Mr. Pawar"* and a *"no. 2"* are *"aware";* and (vii) that he will *"press the button"*.

(xix) GPI issued a cease and desist notice to Lalit on 29.01.2020 regarding public statements made by him that were impacting the stakeholders' value in GPI. Thereafter, on 30.01.2020, GPI addressed a letter to its Directors, Senior Management team and others regarding unauthorised communication of confidential information about GPI to Lalit in violation of SEBI (Prohibition of Insider Trading) Regulations, 2015.

(xx) On 30.01.2020, Lalit, in response to the letter of Bina dated 28.01.2020, reiterated his objections as set out in his earlier correspondence and further *inter alia* claimed that: (a) Bina is not capable of running such a large business enterprise; (b) the clarification issued by GPI to the National Stock Exchange of India Limited ('NSE') and BSE Limited ('BSE') on 28.01.2020, *inter alia* stating that GPI is neither engaged nor privy to discussions on potential sale by its promoters, is

false, and (c) the alleged lack of disclosures by Bina created a ripe situation for insider trading.

(xxi) On 31.01.2020, Bina responded to Lalit's letters dated 27.01.2020 and 30.01.2020, denying all allegations of wrongdoing, reiterating that she has been discharging her duties in accordance with the Restated Trust Deed and stating that she will respond to Lalit's specific allegations in due course.

(xxii) On 02.02.2020, Lalit, acknowledged receipt of Bina's letter dated 31.01.2020, but claimed that Bina is duty bound under Section 57 of the Trusts Act to share the 'legal advice' mentioned by her in her letter dated 28.01.2020.

(xxiii) On 18.02.2020, Lalit filed an Emergency Application before the International Court of Arbitration of the ICC. Bina was made Respondent No. 1 to the said Application. Charu and Samir were arrayed Respondent Nos. 2 and 3 to the Application. The following reliefs have been sought against Bina in the

said application: -

a) Direct and issue a restraining order injuncting B. Modi from holding herself out as the Managing Trustee of the K. K. Modi Family Trust;

b) In the alternative to prayer clause (a) direct the suspension forthwith of the right, power and authority of B. Modi to hold the office of Managing Trustee of the K. K. Modi Family Trust;

c) Appoint a suitable administrator, with requisite right, power and authority in relation to the Trust Fund and the K. K. Modi Family Controlled Businesses, including all matters of administration, execution and management of the assets held upon trust, with the specific mandate to implement clause 4.2 of the Restated Deed of Trust dated 9 April 2014;

d) Direct and issue a restraining order and injunction from B. Modi, C. Modi and/or S. K. Modi acting in any capacity whatsoever concerning the K. K. Modi Family Trust, including but not limited to transfer, alienation, creation of encumbrance whatsoever in relation to the assets, businesses and investments of the Trust Fund and/or in any manner to exercise voting rights in the K. K. Modi Family Controlled Businesses forming part of the Trust Fund, pending the sale of the whole of the Trust Fund in consonance with the mandate of clause 4.2 of the Restated Deed of Trust dated 9 April 2014;

e) Direct the suspension forthwith of the right, power and authority of Messrs. Titus & Co.,

to hold the office of secretary of the K. K. Modi Family Trust;

f) For the Costs of the Emergency Arbitrator Proceedings;

g) For such further reliefs, deemed fit and appropriate, in the facts and circumstances.

(xxiv) The ICC in response to the said letter *vide* its letter dated 19.02.2020 addressed to the Advocates of Lalit acknowledged receipt of the said application whilst confirming that Lalit had not filed a Request for Arbitration ('RFA').

(xxv) On 21.02.2020, Bina received an email from the ICC under subject ICC Case No.25137/HTG (EA), attaching a folder which *inter alia* contained soft copies of the Emergency Application filed on behalf of Lalit and other correspondence in connection therewith. On the same day viz. 21.02.2020, Bina also received an email dated 21.02.2020 from one Mr. Matthew Secomb, who Bina understood has been appointed by the ICC as the Emergency Arbitrator. Vide the said email, Mr. Secomb requested Bina and

Lalit to confirm (l) that they have received his email; (2) whether Bina will be represented by lawyers in the emergency procedure and if so to give contact details of the lawyers; (3) whether the parties would be available for the first call to discuss the procedural timetable for the emergency arbitration proceedings on Saturday i.e. 22.02.2020.

(xxvi) On 22.02.2020, Bina through her Advocates, strictly without prejudice to her rights, objections, contentions and reliefs, including but not limited to the questions of jurisdiction and arbitrability, and without waiving any of their rights, objections, contentions and/or reliefs that she is entitled to or are available to her under any relevant documents, in law or otherwise, confirmed that she will attend the call with the Emergency Arbitrator scheduled on 22.02.2020.

(xxvii) Pursuant to the call between the Advocates for the parties and the Emergency Arbitrator on 22.02.2020, the Emergency Arbitrator issued procedural timelines

and directions for filing of pleadings/reply by Bina by 01.03.2020 and set a date for physical hearing of the Emergency Application on 07.03.2020.

(xxviii) In the said Emergency Application filed on behalf of Lalit, he has relied upon Clause 36 of the Restated Trust Deed as the basis for moving the said application. The Clause 36 of the Trust Deed is reproduced below: -

> "Clause-36 — In the event of:
>
> (i) Any question arising as to the true import or interpretation of this Deed or otherwise in relation to their execution or implementation, or
>
> (ii) Any difference of opinion amongst the Trustees touching the execution and exercise of any of the Trustees' powers and provisions herein declared and contained or the true intent, meaning or construction of any of the clauses herein, or
>
> (iii) Or any dispute arising between the Settlor and the Trustees or between the Trustees inter se or between the Trustees and the Beneficiaries out of or in connection with any provision made in this Deed, or
>
> (iv) Breach of any provision of the Deed by any Trustee, any other non-defaulting Trustee or Beneficiary, as the case may be can give a notice of the breach along with the reasons thereof to the defaulting Trustee, Managing Trustee and the Secretary. In the absence of the

Managing Trustee, such notice shall be given to all the other Trustees, the CEO and the Secretary of the Trust, apart from the defaulting Trustee. An opportunity shall be given to the defaulting party (ies) to rectify the breach within a period of 90 days from the date of the breach.

The Trustees may try to amicably resolve the difference, dispute or breach of the provisions of the Deed as stated above.

In case the dispute or the breach continues for a period of more than 90 days, then all such disputes shall be settled under the Rules of Arbitration of the International Chamber of Commerce, Singapore ("ICC") by one or more arbitrators appointed in accordance with the said Rules.

The arbitration will be governed in accordance with the laws of India and ICC will follow India law as the substantive law for deciding the dispute arising between the parties under pursuant to this Deed

Each party shall bear its own cost of arbitration."

11. The learned Single Judge having heard learned Senior Counsel appearing on behalf of the parties, by way of the impugned judgement, dismissed the Suits at the admission stage for reasons which are extracted in extenso hereinbelow: -

"30. I have considered the rival contentions and am unable to take a view different from that taken by me consistently in Roshan Lal Gupta, Spentex Industries Ltd., Shree Krishna Vanaspati Industries (P) Ltd., M. Sons Enterprises Pvt. Ltd., Ashok Kalra and Bharti Tele-Ventures Ltd. supra i.e. that suits such as the

present one, to declare the invalidity of an arbitration clause/agreement and to injunct arbitration proceedings, whether falling in Part I or Part II, are not maintainable. My reasons therefor are as under:

(A) The contention, that Kvaerner Cementation India Limited supra (a dicta of the three Hon'ble Judges of the Supreme Court), is not a binding precedent for the reason of having no facts, no discussion and citing no precedent, at least before this Bench, cannot be sustained. It has been recently reiterated in Peerless General Finance and Investment Company Ltd. Vs. Commissioner of Income Tax 2019 SCC OnLine SC 851 that a pronouncement of the Supreme Court, "even if it cannot be strictly called the ratio decidendi of the judgment would certainly be binding on the High Court". Similarly, in Oriental Insurance Co. Ltd. Vs. Meena Variyal (2007) 5 SCC 428 it was held that even an observation or an obiter of the Supreme Court is binding on the High Court in the absence of a direct pronouncement on that question, of the Supreme Court and in Sanjay Dutt Vs. State (1994) 5 SCC 402 it was held that even the obiter dicta of the Supreme Court is binding on other Courts in the country. Of course, the counsels have the privilege to contend so, to build a case for finally arguing before the Supreme Court itself.

(B) The aforesaid argument cannot also be accepted because of Kvaerner Cementation India Limited supra having been cited with approval in A. Ayyansamy supra and very recently in National Aluminium Company Limited supra. It is thus not as if Kvaerner Cementation India Limited supra running into less than one page and pronounced on

21st March, 2001 but published as (2012) 5 SCC 214 has remained hidden and no other bench of the Supreme Court has had an occasion to go into the same.

(C) It is also not as if there is any contrary view of the Supreme Court qua suits for declaration of invalidity of the Arbitration Agreement / proceeding and for injuncting arbitration, for this Court being required to match the facts of the present case with the facts of two different views of the Supreme Court, to consider which one of the two to follow. Kvaerner Cementation India Limited supra holds the fray for the last nearly twenty years and binds the undersigned. It is just, reasonable and the need of the hour, that a view which has held fort for the last twenty years and on which parties have acted be not disturbed. It has been held in State of Himachal Pradesh Vs. Ashwani Kumar (2015) 15 SCC 534, Sakshi Vs. Union of India (2004) 5 SCC 518, Union of India Vs. Paras Laminates (P) Ltd. (1990) 4 SCC 453 and Bangalore Water Supply and Sewerage Board Vs. A. Rajappa (1978) 2 SCC 213 that an interpretation of statute which has stood for long and on which parties have acted, and based their dealings, should not be readily interfered with.

(D) That brings me to the reliance on behalf of Bina, Charu and Samir, on McDonald's India Private Limited and Vodafone Group PLC United Kingdom supra. Both do not notice Kvaerner Cementation India Limited supra. Though McDonald India Pvt. Ltd. supra being a dicta of the Division Bench of this Court would be binding on me but once the same is found

to be per incuriam qua Kvaerner Cementation India Limited supra, a dicta of the three Judges Bench of the Supreme Court, it has been held in Pal Singh Vs. National Thermal Power Corporation Limited 2002 SCC OnLine Del 178 that a dicta of a larger bench of the High Court does not bind when the law even if earlier in point of time pronounced by the Supreme Court is otherwise and especially when the larger bench of the High Court has not noticed the law as declared by the Supreme Court.

(E) Interestingly, both McDonald's India Private Limited and Vodafone Group PLC United Kingdom supra, though hold the Court to be vested with the jurisdiction to injunct arbitration, do not on facts injunct arbitration. I may in this context address an interesting facet of judicial decision making experience by the undersigned and inferred by the undersigned in other judgments. The Court is reluctant to denude itself of jurisdiction, especially when, in the facts before it, not opting to exercise jurisdiction. This is for the fear of such denudation of jurisdiction in future coming in the way of granting relief in a deserving case. Though I admit, the same to have governed my judicial decision making also, but find that the reluctance to return a finding of the Court having no jurisdiction, though for good reasons as aforesaid, results in the Courts being flooded with cases with each litigant taking a chance, that in the facts of his case, the Court which has not declined to be having jurisdiction, may grant the relief of injuncting arbitration.

(F) The Division Bench of this Court in Mcdonald's India Pvt. Ltd. supra, though held that under the Arbitration Act, whether Part-I thereof or Part-II thereof is applicable, the focus seems to have shifted towards directing the parties to arbitration rather than deciding the same subject matter as a civil suit, by referring to Sections 8 and 45 of the Arbitration Act, thereafter noticing LMJ International Ltd. Vs. Sleepwell Industries Co. Ltd 2012 SCC OnLine Cal 10733 (DB), dicta of the Division Bench of the Calcutta High Court which was concerned with the power and jurisdiction of a Civil Court to restrain a party from making a reference to an International Commercial Arbitration and to have the said dispute resolved by such international arbitration and which in turn referred to a dicta of the Supreme Court in Modi Entertainment Network Vs. W.S.G. Cricket Pte Ltd. (2003) 4 SCC 341 pertaining to anti suit injunction, proceeded to hold that the principles laid down therein would apply to anti-arbitration injunction suits as well. The Division Bench of this Court in Mcdonald's India Pvt. Ltd. supra, noticed that since the case involved an anti-arbitration injunction, the governing principles could not be the same as governing an anti-suit injunction, reasoning that the principles of autonomy of arbitration and competence-competence (kompetenz-kompetenz), still without considering that the alternative remedy under Section 16 of the Arbitration Act and as stated to be available under the ICC Rules also, is available in relation to anti-arbitration injunction suits as distinct from anti-suit injunctions, proceeded to hold that the Court would have jurisdiction to grant

anti- arbitration injunction, where the party seeking the injunction can demonstrably show that the agreement is null and void, inoperative or incapable of being performed, especially referring to cases where it was evident that the Arbitration Agreement had been forged and fabricated. It would thus be seen that the reasoning which prevailed with the Supreme Court in Kvaerner Cementation India Limited supra for holding the anti-arbitration injunction suit to be not maintainable, i.e. owing to the availability of the same remedy under Section 16 of the Arbitration Act, was not even argued before the Division Bench. Perhaps had the same been argued, a Google search would have taken also to Kvaerner Cementation India Limited supra.

(G) That brings me to another relevant aspect concerning the suits of the present nature i.e. for the reliefs of declaration and injunction. The grant of such reliefs by the Indian Courts is governed by the provisions of the Specific Relief Act, 1963, that of grant of declaratory decrees being governed by Section 34 thereof and that of grant of injunction being governed by Sections 38 to 42 thereof. The grant of relief of declaration to any person entitled to any legal character or to any right as to any property, is discretionary, with the proviso that declaration shall not be granted where the plaintiff being able to seek further relief than a mere declaration of title, omits to do so. Section 41(h) bars grant of injunction when equally efficacious relief can certainly be obtained any other usual mode of proceeding. It has been held in Pushpa Saroha Vs. Mohinder

Kumar 2009 SCC OnLine Del 57 and Roshan Lal Gupta supra that declaration with consequential relief shall not be granted if there is alternative efficacious remedy available by any other usual mode of proceeding to the person seeking such declaration and consequential relief. The Scheme of the Arbitration Act of the year 1996 as noticed by the Division Bench in Mcdonald's India Pvt. Ltd. supra also is to direct the parties to arbitration rather than deciding the same subject matter as a civil suit. The Arbitration Act, 1996 in a major change from the 1940 Act empowers the Arbitral Tribunal to rule on its own jurisdiction. It is not the contention of any of the senior counsels for the Bina, Charu and Samir that the Arbitral Tribunal constituted by ICA of ICC is not empowered to decide any of the objections which have been taken by them for injuncting arbitration. Once the statute has provided for the mode of obtaining the same relief before the Arbitral Tribunal, the Court under Section 41(h) would not grant the same relief i.e. of anti-arbitration injunction. Once the relief of permanent injunction cannot be granted, the grant of declaration would not serve any purpose and in any case cannot be made when consequential relief though prayed cannot be granted by the Court.

(H) The Arbitration Act is a complete code in itself (see Morgan Securities and Credit (P) Ltd. Vs. Modi Rubber Ltd. (2006) 12 SCC 642, Fuerst Day Lawson Limited Vs. Jindal Exports Limited (2011) 8 SCC 333 and Pam Developments Private Limited Vs. State of West Bengal (2019) 8 SCC 112). The Courts cannot interfere with the

code pertaining to arbitration laid down in the statute, by exercising jurisdiction to do, for which equally efficacious relief can certainly be obtained before the Arbitral Tribunal.

(I) As far as the contention of the senior counsels for Bina, Charu and Samir, of them being situated at Delhi, the Trust assets being at Delhi, the arbitration proceedings at Singapore being costly and thus oppressive and vexatious, are concerned, all that may be observed is that the parties, notwithstanding the same, deemed it fit to execute the Trust Deed at London and to consciously provide for arbitration of ICC, Singapore and when required, after the demise of KK, to hold a meeting of the Board of Trustees, of their own volition chose to hold it at Waldorf Astoria Dubai. They certainly cannot now be heard to contend that arbitration proceedings at Singapore are vexatious / oppressive to them. Even in the context of anti-suit injunction, in Modi Entertainment Network supra it was held that normally anti- suit injunction restraining the defendant would not be granted when parties have agreed to submit to the exclusive jurisdiction of a Court, including a foreign Court, a forum of their choice, in regard to the commencement or continuance of proceedings in the Court of choice, save in a exceptional case for good and sufficient reasons, in circumstances which permit a contracting party to be relieved of the burden of a Court. No such exceptional circumstances have been pleaded.

(J) Coming back to the judgments, relied upon by senior counsel for plaintiffs, a reading

of Vodafone Group PLC United Kingdom supra shows that the same was concerned with Bilateral Investment Treaty arbitration, outside the scope of Arbitration Act. What has been held therein, cannot apply to the present controversy which is fully covered by Kvaerner Cementation India Limited and other judgments supra.

(K) As far as the contentions of the counsels on the merits of the objection to arbitrability are concerned, once I have held that this Court does not have jurisdiction to decide the said merits, it would not be proper for the undersigned to foray into the same. All that needs to be observed is that the senior counsels for Lalit have made out an arguable case qua the non-applicability of Vimal Kishor Shah and Vidya Drolia supra.

(L) Reliance by Mr. Rajiv Nayar, Senior Advocate for Bina, Charu and Samir on Natraj Studios (P) Ltd. supra is not apposite. All that the same holds is that the Civil Court retains the jurisdiction to decide whether the Rent Act applies to the tenancy, notwithstanding the Rent Controller also being authorized to do so. Reliance on the said judgment loses sight of the fact that in a lis brought before the Civil Court, on the plea of the suit being maintainable owing to the Rent Act being not applicable, on the plea by the opposite party of the Rent Act being applicable, Civil Court cannot direct the Rent Controller to be approached if it is still to be decided whether the Rent Act applies and only in which case the Rent Controller would have jurisdiction. However as aforesaid the Scheme of the Arbitration Act is to direct the parties to arbitration,

rather than deciding the same subject matter as a civil suit. The decision, whether Vimal Kishor Shah and Vidya Drolia supra are applicable or not and owing thereto disputes not arbitrable, will be much more expeditious before the Arbitral Tribunal than before the Civil Court.

(M) No merit is also found in the contention, of the procedure being followed by ICC being repugnant to Arbitration Act. The Arbitration Act is governed by the principle of freedom of the parties and Section 19 thereof expressly provides that the parties are free to agree on the procedure to be followed by the Arbitral Tribunal in conducting the proceedings. The parties, though in the original Trust Deed provided for arbitration in New Delhi, while re-stating the Trust Deed, consciously changed the same to arbitration of ICC, Singapore. Considering the status of the parties, who belong to a business family and are well alive to litigations and arbitration of all kinds, it cannot be said that they were not aware of the procedure of ICC. Thus the ground of haste makes waste, cannot be invoked. A party, after having expressly agreed to a particular state of affairs, cannot raise the argument of forum non conveniens, which is available only in case of concurrent jurisdiction. Reliance on Mcdonald's India Pvt. Ltd. supra in which argument of forum non conveniens was rejected, also negates the said argument.

(N) The principles pertaining to anti-suit injunction suits, as held in Mcdonald's India Pvt. Ltd. supra also, are not attracted to anti- arbitration injunction suits, for the reason of the Arbitration Act being a

complete code in itself and the 1996 Act as distinct from the 1940 Act, empowering the Arbitral Tribunal itself to rule on its own jurisdiction. The reliance on the judgment of the High Court of Calcutta in Louis Dreyfus Armatures SAS supra which though records the argument qua Kvaerner Cementation India Ltd. supra, does not in the decision/discussion deal with the same and in any case concerned Arbitration Rules of the United Nations Commission on International Trade Law, 1976, on the basis of a Bilateral Treaty Agreement between Govt. of India and the Government of France, is also apposite.

(O) With respect to Enercon (India) Limited supra, I may state that the same was referred to generally in the arguments, without even citing or relying on the same and the need thus to deal therewith is not felt.

(P) With respect to the query posed by me qua the amendment to Section 8 of the Arbitration Act, I am satisfied with the contentions noticed above of Mr. C.A. Sundaram, senior counsel, that Section 8 or amendment thereto would have no application. The amendment to Section 8, does not change the bar to the jurisdiction of this Court vide Section 5 of the Act and which, notwithstanding the amendment to Section 8, remains unchanged. No window has been opened therein to permit a judicial authority to intervene, if finds no valid arbitration agreement existing, to injunct arbitration. It is only when a substantive action is brought before the Court and a plea of Section 8 is taken, that the Legislature has permitted the Court to go into the question of existence of a valid

> arbitration agreement, before referring the parties to arbitration."

12. Aggrieved by the impugned judgement, dismissing the Suits *in-limine*, without issuing summons thereon and without requiring Lalit to file his response to the averments made therein by way of written statement/reply, the Appellants have, as aforestated instituted the present Appeals.

13. These Appeals were heard at great length by us and extensive submissions were put forth by learned Senior Counsel appearing on behalf of the parties, who have also filed detailed Written Submissions, running into five volumes. Therefore, we have taken utmost care in taking note of all the rival contentions, the principles of law attracted for adjudication, in writing our considered decision, because of which, it has not been possible to write a brief judgment.

ARGUMENTS ON BEHALF OF THE BINA: -

14. Mr. Mukul Rohtagi, learned Senior Advocate appearing on behalf of Bina submits that, Clause 36 of the Restated Trust Deed is null and void, inoperative and incapable of being performed and unenforceable. It is further submitted that Clause 36 of the Restated Trust Deed provides that in case a dispute or breach continues for a

period of 90 days then all such disputes shall be settled under the *"Rules of Arbitration of the International Chamber of Commerce, Singapore (ICC)"* by one or more arbitrators appointed in accordance with the said rules. The said clause also provides that *"the arbitration will be governed in accordance with the laws of India and the ICC will follow Indian law as the substantial law for deciding the dispute arisen between the parties under/pursuant to the deed"*.

15. It is also submitted that Clause 36 of the Restated Trust Deed is not an arbitration agreement between Appellants and Lalit.

16. It is submitted that Clause 36 of the Restated Trust Deed is too vague, uncertain, unclear and is incapable of being performed in its material particulars, since it refers to settlement of disputes under the *"Rules of Arbitration of the International Chamber of Commerce, Singapore"* which rules do not exit. The rules of arbitration under which the ICC conducts institutional arbitration are referred to as the Rules of Arbitration of the ICC. The ICC does not have any rules which are referred to as Rules of Arbitration of the ICC, Singapore, as mentioned in Clause 36 of the Restated Trust Deed.

17. It is also submitted that Singapore can be considered a venue or geographical place of arbitration, even if one were to try and give meaning to Clause 36 of the Restated Trust Deed and construe it as manifesting an intention of the parties to arbitrate under the Rules of Arbitration of the ICC, the said Clause provides that the arbitral seat to be in India. This is for the following reasons: -

(i) In concluding an arbitration agreement, there are four distinct considerations: (a) the arbitral seat, which will give rise to the *lex arbitri* (comprising the law governing the arbitration process) and the national courts that will supervise the arbitration; (b) the rules (if any) that will govern the process of the arbitration; (c) the physical / geographical venue where the arbitration will take place; and (d) the law that will be applied to the substantive issues that are in dispute.

(ii) Here, each of the four considerations are provided for in Clause 36, as follows. (a) The arbitral seat is India: "the *arbitration will be governed in accordance with the laws of India."* (b) The applicable rules to the arbitration process are *"the Rules of Arbitration of the International Chamber of Commerce".* (c) The physical / geographical venue of the arbitration is identified by the reference to *"Singapore".* (d) The arbitration will apply *"Indian law as the substantive law for deciding the dispute".*

(iii) This is the only way to give meaning to all parts of the material provisions in Clause 36 and/or to avoid an internal inconsistency. For example, if the word *"Singapore"* is instead

> taken as a reference to the arbitral seat, then either the phrase "*the arbitration will be governed in accordance with the laws of India"* is inconsistent with Singapore as the arbitral seat, or the phrase refers to the law that will be applied to the substantive issues that are in dispute. But if the latter, the following phrase *"ICC will follow Indian law as the substantive law for deciding the dispute arising between the parties under/pursuant to this Deed'* would be made redundant.

18. Further, it is submitted that even assuming, whilst denying that Clause 36 of the Restated Trust Deed is an agreement, *inter alia* between Bina and Lalit, since all the signatories thereto are Indian nationals having permanent residence in India, choice of foreign seat of arbitration is null and void, invalid, unenforceable and contrary to Public Policy of India. Moreover, the question of arbitrability of the dispute that has arisen between Bina on the one hand and the Lalit on the other, has to be decided, in accordance with the laws of India.

19. It is further submitted that, it is well settled in India, that any dispute which arises *inter se* between the trustees or the trustees on the one hand and the beneficiaries on the other or between beneficiaries *inter se* is not arbitrable. The reason provided for non-arbitrability is that such disputes are subject to the exclusive

jurisdiction of "Courts" under the Trusts Act, which is a complete code for the purpose of the said disputes.

20. It is further submitted on behalf of Bina that, the disputes which form subject matter of the Emergency Application filed on behalf of Lalit and any request for arbitration, which he may file are essentially disputes which are covered under the judgement of the Hon'ble Supreme Court of India in the case *of* ***Vimal Kishor Shah and Others*** **vs.** ***Jayesh D. Shah and Others*** reported as **(2016) 8 SCC 788** and hence cannot be resolved by way of arbitration. It is submitted on behalf of Bina that, the prayers sought by Lalit in the Emergency Application and the prayers that are likely to be sought by Lalit in the RFA can only be entertained, tried and disposed of by a Court under the provision of the Trusts Act. It is thus submitted that, Clause 36 of the Restated Trust Deed which provides for settlement of disputes by taking recourse to arbitration is null and void, unenforceable, inoperative and incapable of being performed. It is submitted that Lalit's attempt in his application to recharacterize his claim as one based in contract, is an attempt to circumvent the public policy principle enshrined in the case of *Vimal Kishor Shah (supra)* In

any event, the said recharacterization is wholly erroneous, without merit and misconceived both in law and in fact. It is submitted that it does not matter whether the entitlement for reliefs set up by Lalit is based in contract or on the basis of trust principles, since the said entitlement depends on the correct interpretation of the Restated Trust Deed which is excluded from the purview of arbitrability by the public policy principle laid down in *Vimal Kishor Shah (supra).*

21. It is also submitted that emergency procedure initiated by Lalit and any arbitration proceedings that may be initiated on his behalf under the aegis of the ICC would be entirely vexatious and an abuse of the process and contrary to Public Policy of India. On the other hand, it is only jurisdictional Courts in India, which would have exclusive jurisdiction to try and entertain, dispose of the said disputes under the provisions of the Trusts Act.

22. It is submitted that Indian law is not only governing/proper/substantive law of the contract but also the law governing the arbitration and Indian law has the closest connection in relation to the dispute raised by Lalit. It is submitted that it is this Hon'ble Court that would have jurisdiction over the dispute under the

provisions of the Trusts Act. It is submitted that arbitration in Singapore as a forum for adjudication of the disputes raised by Lalit against *inter alia* Bina is *forum non conveniens,* as it would be oppressive and prejudicial to the interest of Bina. It is further submitted that on the other hand, no hardship will be caused to Lalit if he was to file proceedings in India. It is submitted that Lalit has, whilst he has been outside India since 2011, filed several legal proceedings and continues to prosecute and defend legal proceedings in India.

23. It is submitted on behalf of Bina that, Lalit has approached ICC and filed the Emergency Application in an attempt to avoid/evade the jurisdiction of this Hon'b1e Court to decide disputes under the Restated Trust Deed. It may be pertinent to mention here that Lalit left India after he was accused of several gross violations of Indian law. A non-bailable warrant was issued against Lalit in August, 2015 in proceedings under the Prevention of Money Laundering Act, 2002 ('PMLA') in relation to an alleged fraudulent arrangement between Lalit and a Mauritius sports company for a kickback of Rs.125 crores by defrauding a Singapore media company and the

Board of Control for Cricket in India ('BCCI'). A First Information Report ('FIR') was lodged against him jointly with some other individuals before the Metro Chennai Police for alleged kickback and bribes taken and the alleged manifest abuse of position by Lalit. Pursuant to the said FIR, a Criminal Case bearing No.507/2010 was registered against Lalit under Sections 409, 420, 468, 477A, 120B of the Indian Penal Code, 1860 ('IPC'). The Disciplinary Committee of the Board of Control for Cricket in India had also found Lalit guilty on eight different charges for various acts of indiscipline and misconduct during his tenure as the Vice President of the BCCI and as Chairman of the Indian Premier League's Governing Council. The charges relate to irregularities in various financial and administrative matters of the Indian Premier League. As a consequence, Lalit was expelled from the BCCI in 2013. Several investigations by the Directorate of Enforcement are also presently pending against Lalit, where warrants have been issued against him for failure to appear before the Directorate of Enforcement, pursuant to summons.

24. It is submitted that Lalit has been described time and again in Indian Parliamentary debates as being an "absconding

businessman", "fugitive" and "financial fraudster", under criminal investigation for financial irregularities. For instance, on 04.01.2019, while discussing the subject "Defaulting Businessmen Fleeing Abroad", the Minister of State, Ministry of Finance, in response to unstarred question No.4086 in the Lok Sabha, described Lalit as an "economic offender" who "fled the country to escape prosecution". In November, 2012, the Government of United Kingdom (UK) was formally requested to deport Lalit to India and the Indian Government has since been making various efforts, in order to bring Lalit back to India. It is thus submitted that, Lalit ought not to be permitted to exclude the jurisdiction of this Hon'b1e Court and evade its scrutiny.

25. It is submitted that, in view of the foregoing, it is in the interest of justice that Lalit be restrained from proceeding with or continuing with the Emergency Application filed by him and referred to as ICC Case No. 25137/HTG (EA); and/or instituting or proceeding with or continuing with any arbitration proceedings against Bina under Clause 36 of the Restated Trust Deed. The said proceedings would be an abuse of the process of the court and would cause immense prejudice to Bina and would be manifestly vexatious,

oppressive and unconscionable.

26. It has been argued on behalf of Bina that, a private trust was settled by KK and is administered by the Restated Trust Deed dated 09.04.2014. After his demise on 02.11.2019, his widow, Bina, succeeded as the Trust's Managing Trustee, and their children Charu and Samir continued as co-trustees. As per Clause 3.3 of the Trust Deed, the Trust assets cannot be sold without the Bina's consent. However, Lalit contends that unless all Trustees consent to continue the Trust, the Trust assets must be sold.

27. It is argued that Lalit initiated emergency arbitration proceedings ('Emergency Arbitration') against the Appellants under the aegis of the ICC relying on Clause 36 of the Trust Deed. It is further argued that Bina promptly filed a Suit being CS (OS) 84/2020, seeking declaration and anti-arbitration injunction, in respect of the emergency arbitration and any other arbitration. The Suit was dismissed vide the impugned judgment dated 03.03.2020, on the grounds of maintainability.

28. It is argued that Bina, aggrieved by the impugned judgment filed the present statutory Appeal challenging the validity of the

impugned judgment passed by the learned Single Judge. The said Appeal was listed on 05.03.2020, when this Hon'ble Court was pleased to stay the Emergency Arbitration, till further hearing of the Appeal.

29. It has been further argued that during the pendency of the Appeal, Bina has been directed by the ICC to file her answer to Lalit's RFA, initiated in furtherance of the emergency arbitration ('Main Arbitration') by 14.05.2020. As on the date of the stay order by this Court on 05.03.2020 Bina was only faced with the imminent action of the Emergency Arbitration proceedings and the directions to her on Main Arbitration (filed by Lalit in furtherance of the Emergency Arbitration) were only received from the ICC on 14.03.2020. As the hearing scheduled on 27.03.2020 was adjourned to 24.04.2020 (due to the Covid-19 lockdown, and now further adjourned to 24.06.2020), Bina promptly filed an application being C.M. No.10921 of 2020 (on 07.04.2020) to seek stay on the Main Arbitration.

30. It has been argued that the Main Arbitration pertains to the same dispute and admittedly is in furtherance of the Emergency Arbitration. The Division Bench of this Court has already vide order

dated 05.03.2020 stayed the Emergency Arbitration and the Hon'ble Supreme Court has dismissed the Special Leave Petition filed against the said order dated 05.03.2020. Therefore, the relief prayed for in the application ought to be granted.

31. Learned Senior Counsel would further urge that the present Appeal is a statutory Appeal and Bina is entitled to test the validity of the order and judgment passed by the learned Single Judge in Appeal.

32. It is further argued that the fundamental ground for relief is that, present is a trust dispute, and it is settled law that trust disputes (akin to guardianship and matrimonial cases) are not arbitrable. The Trust Deed is governed by the provisions of the Trusts Act (Clause 1.3). The Trust Deed expressly provides that the law governing the contract as well as arbitration is Indian law (Clause 36). Accordingly, the arbitrability of the dispute will have to be determined under Indian, law.

33. It is further submitted that, the Hon'ble Supreme Court in the matters of *Vimal Kishor Shah (supra)* and ***Vidya Drolia v. Durga Trading Corporation***, reported as **AIR 2019 SC 3498** have declared that disputes pertaining to trust, trustees and beneficiaries arising out

of a trust deed and the Trusts Act are non-arbitrable in nature, notwithstanding the existence of an arbitration agreement. In this, trust disputes have been expressly held to be one of the seven categories of non-arbitrable matters—on par with criminal offences; matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; guardianship matters; insolvency and winding-up matters; testamentary matters; and eviction or tenancy matters governed by special statutes.

34. It has been argued that Lalit has filed a vexatious and oppressive proceeding that is bound to be stillborn in an international jurisdiction with the sole intent to evade the jurisdiction of this Hon'ble Court and harass Bina. Lalit seeks to avoid the enforcement authorities and has been listed by the government as an economic offender absconding from India. Bina seeks the protection from this Hon'ble Court against the harassment and vendetta of Lalit.

35. It is further argued on behalf of Bina that even though a formal application under Section 8 of the Arbitration and Conciliation Act, 1996 ('Arbitration Act') has not been filed by Lalit, it has been held that, as long as, one party contends that the dispute before the court

must be referred to arbitration, the principles of Section 8 of the Arbitration Act will be applicable and will govern the grant of an anti-arbitration injunction. In this respect, Sections 8 of the Arbitration Act does not differentiate between a 'substantive suit' (as held in the Impugned Judgement) and a suit for injunction and declaration. Declining an anti-arbitration injunction is tantamount to referring the parties to arbitration. It is submitted that the Main Arbitration is vexatious, unconscionable, oppressive, forum non-convenience, inequitable and an abuse of process.

36. It is further submitted that the principle of *kompetenz-kompetenz,* enshrined under Section 16 of the Arbitration Act pre-supposes that the Arbitral Tribunal has inherent jurisdiction to entertain the disputes. Further, in ***SBP & Co. v. Patel Engineering*** reported as **(2005) 8 SCC 618** Constitution Bench of Hon'ble the Supreme Court has held that Section 16 of the Arbitration Act is only enabling in nature and does not confer exclusive jurisdiction on the Arbitral Tribunal to adjudicate upon its jurisdiction. In the instant case, the Arbitral Tribunal would lack inherent subject matter jurisdiction as the dispute is *prima facie* non-arbitrable, striking at the

root of the Arbitral Tribunal's jurisdiction, and making its jurisdiction *non-est.* Thus, it is the Arbitral Tribunal, and not this Hon'ble Court that lacks jurisdiction to adjudicate upon the arbitrability of the present dispute.

37. It is argued on behalf of Bina that, Lalit's contention that the entrustment has come to an end on 30.11.2019 and the parties have become tenants-in-common on the basis that the Trust assets are liable to be sold, is an incorrect and desperate attempt to rewrite the terms of the trust. *First*, the position that the Trust assets are liable to be sold is incorrect, and at best, yet to be adjudicated between the parties. This adjudication would require the interpretation of the Trust Deed, in accordance with the Trusts Act by a court. *Second,* Lalit has falsely stated that there was a unanimous decision to sell the Trust assets. *Third,* assuming that the Trust assets must be sold, the Trust would still not be extinguished as per Section 77 of the Trusts Act, a Trust is *inter alia* extinguished when its purpose is fulfilled. Clauses 2.30 *(Trust Period), 6 (Trust fund and management thereof),* 8 *(No vested interest till distribution), 11 (Sale/ Bidding Process and Investment Banker)* and 26A *(Dissolution of Trust)* of the Restated

Trust Deed clearly provide that the Trust's purpose would be complete only upon sale, as well as, distribution of the Trust Fund.

38. It is argued on behalf of Bina that neither of Lalit's contention *qua* arbitrability, need to be determined, as per Singapore Law or English Law, are viable since: -

(i) It is settled law that arbitrability will be determined by the law of the arbitration agreement. Both parties agree that the substantive law of the Trust Deed is Indian Law. It is also settled law that in the absence of any contra indicia, the substantive law of the agreement will also be the law of the arbitration agreement. Accordingly, the law of the arbitration agreement in this case is Indian law and arbitrability will be determined basis Indian law. RI 's contention that the parties have agreed to Singapore as the place of the arbitration and that Singapore law is the law of the arbitration is not only misconceived from the text of Clause 36 (where the parties have expressly agreed that the *"arbitration will be governed in accordance with the laws of India"* and Singapore is only referenced in the description of the procedural rules adopted) but also irrelevant for the determination of arbitrability.

(ii) Further, the arbitration proceedings would be governed by Part I of the Arbitration Act The assertion of a "foreign seated arbitration" by Lalit is only a red herring. Lalit does not state in his reply that the present arbitration is an 'international commercial arbitration', a prerequisite for the application of Part II. In any event, the dispute is not commercial and is in fact a dispute amongst trustees of a family trust who are family members.

(iii) Lalit's contention that the curial law is the law of Singapore is also misconceived. Clause 36 of the Trust Deed expressly provides that "The arbitration will be governed in accordance with the laws of India" which shows that the parties have expressly chosen Indian law as the curial law and accordingly India as the place of the arbitration. A plain reading

of Clause 36 will show that the parties have not expressly or impliedly agreed for Singapore to be the place of arbitration or even the venue of the arbitration. The acronym ("ICC") is placed after the words "International Chamber of Commerce" and "Singapore". The word "Singapore" is thus part of a composite phrase which the parties included only as a means of identifying the procedural rules which would apply to the arbitration. Singapore is neither the agreed place or venue for the arbitration.

(iv) Further, merely because the document is executed in London (because of Lalit's fugitive status that too), there is no basis or merit in the submission that English Law will be the Governing law of the Trust Deed. This goes against the fundamental principles of private international law and also the express declaration under the Trust Deed where the parties have expressly adopted Indian law, and specifically the Indian Trusts Act. [Clauses 1.3 & 36].

39. It is argued on behalf of Bina that the Suit and the Interim Application filed thereunder, from which the present Appeal arises, *inter alia* sought an injunction against Lalit from pursuing the Emergency Arbitration, as well as, initiating or continuing Main Arbitration against the Bina. At the time, the Suit and Interim Application was filed, Lalit had not filed the RFA with the ICC. It is during the pendency of the Interim Application that Lalit filed the RFA. Under the Rules of Arbitration of ICC, the main arbitration moves forward and the Applicant is required to take steps only after the ICC serves the RFA upon the Applicant. The said service took place only on 14.03.2020. By an order dated 03.03.2020 the learned

Single Judge dismissed the Suit on the first hearing on the ground that the Suit was not maintainable.

40. The present Appeal was filed impugning the said order dated 03.03.2020 passed by the learned Single Judge. The hearing in the Emergency Arbitration was scheduled on 07.03.2020. The Division Bench of this Hon'ble Court *vide* its order dated 05.03.2020 directed Lalit not to pursue the Emergency Arbitration during the pendency of the present Appeal, whilst fixing the date of hearing of the appeal on 27.03.2020. Due to the ongoing lockdown the said hearing before the Division Bench of this Hon'ble Court scheduled for 27.03.2020 did not take place. There was no occasion for Bina to apply for urgent stay on the Main Arbitration on 05.03.2020 since the RFA filed by Lalit before the ICC was not served upon Bina in terms of the Rules of Arbitration of ICC and in any case the next hearing was fixed for 27.03.2020. Since the Rules of Arbitration of ICC required the Bina to take steps pursuant to the RFA which was served by the ICC upon the Bina only on 14.03.2020 and the hearing fixed on 27.03.2020 did not take place, on 07.04.2020 the present Application was filed by the Appellant seeking urgent stay on the Main Arbitration instituted

by Lalit.

41. It is argued on behalf of Bina that the learned Single Judge was also wrong in holding that Section 41(h) of the Specific Relief Act 1963, ('Specific Relief Act') bars the relief requested for by the Appellant. Section 41(h) of the Specific Relief Act provides that an injunction cannot be granted when an equally efficacious relief can be obtained by any other usual mode of proceeding. Section 16 of the Arbitration Act does not provide an equally efficacious relief in the instant case. *First,* Section 16 of the Arbitration Act is inapplicable, as Section 2(3) of the Arbitration Act excludes the applicability of the Arbitration Act to non-arbitrable disputes. *Second,* and in *the alternative,* in case it is assumed that the remedy under Section 16 of the Arbitration Act is available to the parties, it does not provide an equally efficacious relief when the concerned dispute is not arbitrable, as then the arbitral tribunal, as in the instant case, is wholly without jurisdiction. *Third* and *in the alternative,* Specific Relief Act is inapplicable to the present dispute, as the reliefs of declaration and injunction are covered within Sections 8 and 45 of the Arbitration Act.

42. In order to support Bina's exhaustive oral submissions, the following decisions have been pressed into reliance: -

(i) ***Sumitomo Heavy Industries Ltd. v. ONGC Ltd***. reported as **1998 (1) SCC 305.**

(ii) ***Reliance Industries Limited v. Union of India*** reported as **(2014) 7 SCC 603.**

(iii) ***Vimal Kishor Shah v. Jayesh D. Shah*** reported as **(2016) 8 SCC 788.**

(iv) ***Vidya Drolia v. Durga Trading Corporation*** reported as **AIR 2019 SC 3498.**

(v) ***A. Ayyasamy v. A. Paramasivam & Ors***. reported as **(2016) 10 SCC 386.**

(vi) ***Ameet Lalchand Shah v. Rishabh Enterprises*** reported as **(2018) 5 SCC 678**.

(vii) ***K.K. Modi v. K.N. Modi*** reported as **(1998) 3 SCC 573.**

(viii) ***Central Warehousing Corporation v. Fortpoint Automotive*** reported as **2010(1) MhJ 658.**

(ix) ***Emaar MGF Land Limited v. Aftab Singh*** reported as **2019 (12) SCC 751.**

(x) ***World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte Ltd***. reported as **(2014) 11 SCC 639.**

(xi) ***Mcdonald's India Private Limited v. Vikram Bakshi*** reported as **2016 SCC OnLine Del 3949.**

(xii) ***Union of India Vs. Vodafone Group PLC United Kingdom*** reported as **2018 SCC OnLine Del 8842.**

(xiii) ***Devinder Kumar Gupta (Dr.) vs. Realogy Corporation***, reported as **2011 (3) Arb. LR 227 (Delhi) (DB).**

(xiv) ***Sukanya Holdings (P) Ltd.· v. Jayesh H. Pandya*** reported as **(2003) 5 SCC 531.**

(xv) ***Associate Builders v. DDA*** reported as **(2015) 3 SCC 49.**

(xvi) ***Enercon (India) Ltd. v. Enercon Gmbh*** reported as **(2014) 5 SCC 1.**

(xvii) ***Addhar Mercantile Private Limited v. Shree Jagdamba Agrico Exports Pvt Ltd***. reported as **2015 SCC Online Born 7752.**

(xviii) ***SBP & Co. v. Patel Engineering*** reported as **(2005) 8 SCC 618.**

(xix) ***Mantoo Sarkar v. Oriental Insurance Co. Ltd*** reported as **(2009) 2 SCC 244.**

(xx) ***Ranjit Kumar Bose v. Anannya Chowdhury*** reported as **(2014) 11 SCC 446.**

(xxi) ***MSP Infrastructure Ltd. v. M.P. Road Devl. Corp. Ltd***. reported as **AIR 2015 SC 710.**

(xxii) ***M.M. Nagalinga Nadar Sons v. Sri Lakshmi Family Trust*** reported as **(2001) 4 CTC 449.**

(xxiii) ***Kvaerner Cementation Limited v. Bajranglal Agarwal*** reported as **(2012) 5 SCC 214.**

(xxiv) ***Dhulabhai v. State of MP*** reported as **(1968) 3 SCR 662.**

(xxv) ***Abdul Gafur v. State of Uttarakhand*** reported as **(2008) 10 SCC 97.**

(xxvi) ***Natraj Studios (P) Ltd. v. Navrang Studios*** reported as **(1981) 1 SCC 523.**

(xxvii) ***Siddhi Vinayak Industries Private Limited v. Virgoz Oils & Fats PTE***, GA No. 1459 of 2009, High Court of Calcutta, dated 7 September 2009

(xxviii) ***Booz Allen and Hamilton INC. v. SBI Home Finance Limited and Ors.*** reported as **(2011) 5 SCC 532.**

(xxix) ***Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS*** reported as **2014 SCC OnLine Cal 17695.**

(xxx) ***Himachal Sorang Power .Private Limited v. NCC Infrastructure Holdings Limited*** reported as **2019 SCC OnLine Del 7575.**

(xxxi) ***RRB Energy Limited v. Vestas Wind Systems*** reported as **2015 SCC OnLine Del 8734.**

ARGUMENTS ON BEHALF OF CHARU AND SAMIR: -

43. Mr. Kapil Sibal, learned Senior Advocate appearing on behalf of Charu and Samir, whilst adopting the detailed and extensive submissions made by Mr. Mukul Rohtagi, learned Senior Advocate appearing on behalf of Bina, submitted in addition thereto, that the ratio in the case of *Kvaerner (supra)*—heavily relied upon by the learned Single Judge in the impugned judgment—is not attracted in the facts and circumstances of the present case, because of the following reasons:-

(i) It stands impliedly over-ruled by *SBP* & Co. *vs. Patel Engineering (supra);*

(ii) It was not a case under Section 2(3) of the Arbitration Act which governs "inarbitrability"; and

(iii) The present claim of the Lalit before the Arbitral Tribunal arising out of Clause 36 of the Trust Deed dated 09.04.2014, is inarbitrable in view of the authoritative judgments of the Hon'ble

Supreme Court of India in *Vimal Kishor Shah (supra)* and *Vidya Drolia (supra)*.

44. It is further submitted that the impugned judgment was passed by the learned Single Judge without; a) there being any pleading on behalf of Lalit, b) issuance of summons, c) direction to file written statement and/or d) application under any provision of the CPC.

45. It is further submitted that learned Single Judge has on its own assumed that the suit filed by Charu and Samir/the other Appellants is not a "substantive suit". Without a contrary pleading, the learned Single Judge could not have on its own come to the conclusion that the Respondent's suit could be dismissed for not being "substantive" in nature.

ARGUMENTS ON BEHALF OF LALIT: -

46. Per contra, Mr. Harish Salve learned Senior Advocate appearing on behalf of Lalit has argued that, the stipulated meeting, as per Clause 4.1 of the Trust Deed, was held on 30.11.2019 between Appellants and Lalit in Dubai. Appellants voted in writing to continue the Trust Fund and Lalit voted in writing for disposal of the Trust Fund.

47. Learned Senior Counsel for Lalit has further argued that, there is absent unanimity, as to the future of the Trust amongst the parties to the Trust Deed, mandatory as per Clause 4.2 of the Trust Deed, wherein it was agreed that, the Trust Fund be sold, with the parties mutually agreeing to a 30 day window for amicable resolution, in which event the decision to sell the Trust Fund would be revoked. The secretary to the Trust—M/s Crawford Bayley & Co, resigned shortly after the meeting of 30.11.2019; a purportedly newly appointed secretary Titus & Co. proceeded to adopt steps in implementation of the resolution of 30.11.2019, through issuing notices to merchant bankers for conflict checks on the anvil of sale of the Trust Fund.

48. It is submitted that on 28.01.2020, Bina in a *volte face* illegally cancelled the decision to sell the Trust Fund unilaterally, purporting to usurp powers of the Managing Trustee.

49. It is further submitted that, admittedly Bina agreed to the fact that the Resolution dated 30.11.2019 to sell the entire Trust Fund was passed, but belatedly sets up a defence, unknown in law, of 'common mistaken assumption', in aid of perpetuating illegality, the said

defence adopted by Appellant in her reply to Emergency Application before the Emergency Arbitrator. The provisions of the Restated Trust Deed admit of no ambiguity. There is no mistake of fact—there is lack of unanimity, and there is no mistake of law, as the Restated Trust Deed provides that, if there is lack of unanimity, there shall be a sale. Bina, who is purporting to act as a Management Trustee under the Restated Trust Deed cannot question the legality, validity or efficacy of any of the provisions of the Restated Trust Deed.

50. It has been argued on behalf of Lalit that, Bina's illegal usurpation of powers of Managing Trustee, failure to abide by the resolution of 30.11.2019 and actions to exclude Lalit, in parallel with illegal assumption of financial powers in K.K. Modi Group family businesses, led to invocation of emergency arbitration under the ICC Rules

51. It is further argued that, after participating in the emergency arbitration proceedings, purporting to act without prejudice, Bina filed a Suit being CS(OS) 84/2020 on 26.02.2020 to injunct the emergency arbitration, as well as, any other arbitration initiated under Clause 36 of the Restated Trust Deed. The challenge was premised on the

ground that the Restated Trust Deed was governed by the Trusts Act. It is argued that the defence of Lalit is three-fold—the overarching defences are that, the Restated Trust Deed was executed in the UK, and at the time of its execution, opted for Singapore as the seat of the arbitration. The question of arbitrability would be governed by Singaporean law and not Indian law and any limitations on arbitration of such disputes in Indian law would thus be irrelevant. Two other defences raised are as follows: - (i) the Restated Trust Deed includes immovable property (Clause 6.1 r/w Schedule IIB and 6.5.5, 6.5.6 and 6.5.7 of the Trust Deed) and was, therefore, compulsorily registrable under Section 5 of the Trusts Act and Section 17 of Registration Act, 1908. Clause 34 empowered KK to register the Restated Trust Deed, yet admittedly no steps were taken. As such, and otherwise too, the defence of non-arbitrability under the Supreme Court's judgments relied upon by the Appellants would not apply; (ii) since a lack of unanimity emerged at the meeting of the Board of Trustees held on 30.11.2019, rendering all KK family controlled businesses, including assets, businesses and investments liable to be sold and distributed amongst the four branches of the KK family, i.e. the Appellants and

Lalit. The invocation of such Date of Determination to Sell, rendered the entrustment to an end, with the identity of trustees and beneficiaries, each with defined interest in the Trust Fund, to hold assets as tenants-in-common, being an arbitrable dispute, and as such the same are not amenable to the Trusts Act, but rather lie in the narrow ambit of failure of Bina to implement sale and distribution of Trust Funds.

52. It has been submitted on behalf of Lalit that, the learned Single Judge has rightly dismissed the suit holding that all the contentions be raised before Arbitral Tribunal and these issues cannot be raised in a suit.

53. It is further submitted by Mr. Harish Salve, learned Senior Advocate that the Restated Trust Deed is not a Trust Deed within the meaning of the Trusts Act, but rather is in the nature of a family arrangement, not amenable to the Trusts Act. It has been argued on behalf of Lalit that, the Restated Trust Deed was executed by the Settlor and Trustees in London, and is governed by English Law, which permits arbitrability of trust disputes. Furthermore, as the parties have agreed for Singapore as the place of arbitration, the curial

law being the law of Singapore, also permits arbitration of trust disputes.

54. It has been argued on behalf of Lalit that, Bina has also alleged in her Rejoinder that under Clause 6.1 of the Restated Trust Deed, the Trustees will hold and stand possessed of immovable properties only as and when such properties are received and/or are acquired and till date no such immovable property has ever been entrusted to Trust and is not part of Trust Fund as per the balance sheets of the Trust. This allegation is incorrect, in view of the provisions of the Restated Trust Deed. Further, the words "as and when received and/or acquired" used in Clause 6.1 Restated Trust Deed are not applicable to immovable properties mentioned in Schedule II B as the same have been specifically declared to be part of the Trust Fund. The term Trust Fund is defined under the Trust Deed to include all the immovable properties, mentioned in Schedule II B, irrespective of whether these are reported in the balance sheet of the Trust. Therefore, the balance sheet of the Trust is plainly erroneous and in any event, wholly irrelevant.

55. It is submitted that, in view of the principles of *kompetenz-kompetenz,* it is the Arbitrator alone, before whom Bina has already raised jurisdiction issues, who must decide questions raised by the parties on jurisdiction, rather than this Hon'ble Court. It is argued that Bina has incorrectly contended that the governing law of the contract being Indian law and the present case is a domestic arbitration. While Singapore arbitration law governs the law of arbitration, it is only the substantive law applicable on merits that would be governed by Indian law. Moreover, it is settled law that, two Indian parties can agree to a foreign seated arbitration under Indian law, which will not nullify the arbitration agreement entered into willingly by parties.

56. It has been argued on behalf of Lalit that, Bina's aspersion of Lalit being an Indian national, with a view to evade the jurisdiction of this Hon'ble Court, is claiming to be a habitual resident of another country. However, the definition of "International Commercial Arbitration", provided in Section 2(1)(f)(i) of the Arbitration Act, makes it clear that an arbitration will be an international commercial arbitration where at least one of the parties is an individual, who is national of, or habitually resident in, any country other than India. The

expressions "national" and "habitually resident" are separated by the term 'or', which means they have been used disjunctively. Therefore, it is not necessary that Lalit must be a national of and a habitual resident of United Kingdom for the definition of "International Commercial Arbitration" to be attracted. In this regard, it is necessary to note that, the material relied upon by Bina indicates London as the present residence of Lalit. As such, by mandate of law, the arbitration is an international commercial arbitration, and it is wrong to state that Lalit is evading the jurisdiction of this Hon'ble Court.

57. It has been further argued on behalf of Lalit that, this Hon'ble Court ought not to entertain a suit to injunct a foreign seated arbitration. Since ICC is the chosen forum, it is for the ICC to fix a venue as per the ICC Rules.

58. It has also been argued on behalf of Lalit that, by the common judgment dated 03.03.2020, the learned Single Judge dismissed the Suits of Appellants, as being not maintainable. The judgment clearly spells out the defences taken by Lalit and concludes that these defences of Lalit on arbitrability of disputes are arguable cases, which should be decided by the Arbitrator.

59. In the Appeal itself and in the prayer seeking interim relief, Bina prayed for restraining Lalit from taking further steps in the main arbitration. This has been admitted in paragraph 7 of Bina's rejoinder. Even though Bina was aware of the notice of arbitration, it did not press for stay, nor was any stay granted in the main arbitration.

60. It is also submitted that ICC's letter dated 12.03.2020, admittedly received on 14.03.2020, only required Bina to reply to the notice of arbitration issued by Lalit on 26.02.2020 and to nominate an Arbitrator, including responding to whether there should be three Arbitrators, as Clause 36 of the Trust Deed is silent on the number of arbitrators.

61. It is also submitted that Appellants took no steps even on 16.03.2020 to seek stay of reply to the ICC letter. It is further submitted that Bina finally wrote a letter seeking extension of time from the ICC only on 13.04.2020. It is also submitted that Lalit did not object to grant of time till 15.05.2020 to reply to the notice of arbitration but opposed grant of time for appointing an Arbitrator and/or replying to issue of number of Arbitrators and place of arbitration.

62. It is submitted that at the time of hearing of this application before the Division Bench on 15.04.2020, when the Hon'ble Bench observed that a reply could be filed by Bina without prejudice, and no stay was required at this stage, counsel for the Appellant suppressed from the Hon'ble Bench that it had already written a letter to that effect to ICC seeking liberty for extension of time. The ICC wrote a letter on the same date granting time of 15 days for appointment of Arbitrator and for responding to the issue of number of Arbitrators, and also granted 30 days for filing a reply to the request for arbitration.

63. It has been argued on behalf of Lalit that, Bina communicated a distorted view of the proceedings before this Hon'ble Court on 15.04.2020 to the ICC and sought further extension of time from ICC on 17.04.2020. It has been also argued that Lalit opposed the aforesaid request, based on which the ICC rejected the further extension on 22.04.2020.

64. It has been argued on behalf of Lalit that, there is no urgency in the matter, as no prejudice will be caused to Bina, if she gives a reply to the arbitration notice. It is also argued that the Appellants had earlier,

before the Emergency Arbitrator, proceeded with the Emergency Arbitration, on a without prejudice basis.

65. It has been further argued that the notice of arbitration dated 26.02.2020 was communicated to Appellants on 27.02.2020, but Bina has suppressed factum of prior knowledge.

66. It is also submitted by Lalit that, Bina has raised the question on the seat of arbitration and arbitrability of the dispute before the Emergency Arbitrator. It is, therefore, evident that Bina has approached this Hon'ble Court and also ICC (in the Main and Emergency Arbitration) urging identical grounds. It is submitted that this is an abuse of process of the Court and a case of forum shopping, as such the appeal ought to be dismissed.

67. In support of his submissions learned senior counsel appearing on behalf of Lalit has relied upon the following decisions: -

1. ***Vimal Kishor Shah v Jayesh Dinesh Shah*** reported as **(2016) 8 SCC 788.**
2. ***Aluminium Corporation of India v Workmen*** reported as **(1964) 4 SCR 429**.
3. ***Kaverner Cementation India Limited v Bajranglal Agarwal*** reported as **(2012) 5 SCC 214**.
4. ***A. Ayyasamy v A. Paramasivam*** reported as **(2016) 10 SCC 386.**

5. ***National Aluminium Company Limited v Subhash Infra*** reported as **2019 SCC Online SC 1091.**

6. ***Union of India v Vodafone Group PLC, Delhi High Court*** reported as **CS (OS) 383/2017.**

7. ***Uttrakhand Purv Sainik v Northern Coal*** in **[SLP(C) No. 11476/2018].**

8. ***Atlas Export Industries v. Kotak & Co.*** reported as **(1999) 7 SCC 61**.

9. ***GMR Energy Limited v. Doosan Power Systems India Pvt. Ltd. & Ors.*** reported as **2017 SCC OnLine Del 11625.**

10. ***Sasan Power Ltd. v. North American Coal Corporation India Pvt. Ltd.*** reported as **2015 SCC OnLine MP 7417.**

11. ***Sasan Power Ltd. v. North American Coal Corporation (India)*** reported as **(2016) 10 SCC 813.**

12. ***Imax Corporation v. E-City Entertainment (India) Pvt Ltd.*** reported as **(2017) 5 SCC 331.**

13. ***BGS SGS Soma JV v. NHPC Ltd***. in **Civil Appeal No.9307/2019.**

14. ***Mankastsu Impex Private Limited v Airvisual Limited*** in **Arbitration Petition No. 32/2018.**

15. ***Dalip Singh v. State of U.P. & Ors.*** reported as **(2010) 2 SCC 114.**

16. ***Om Prakash v. Raj Kumar Mittal*** reported as **258 (2019) DLT 248**.

DISCUSSION AND CONCLUSION: -

68. Having heard learned Senior Counsel appearing on behalf of the parties and after due consideration of the rival submissions in the context of the facts and circumstances on record, as well as, the relevant provisions of law and the decisions relied upon by the parties, the substantial questions of law that arise for consideration in these Appeals are: -

(i) Whether there is a valid arbitration agreement between the parties?

(ii) Whether the subject matter of the Suit is "arbitrable", that is capable of being adjudicated by the Arbitral Tribunal?

69. In order to effectively adjudicate the said issues, it would be necessary and profitable to consider the relevant provisions of the Arbitration Act and for the sake of felicity the same are extracted hereinbelow: -

> "Section 2(3)
>
> This part shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration.
> xxxx xxxx xxxx xxxx xxxx
> xxxx xxxx xxxx xxxx xxxx
>
> Section 5 Extent of Judicial Intervention—

Notwithstanding anything contained in any other law for the time being in force, in matters governed by this part, no judicial authority shall intervene except where so provided in this Part.

xxxx xxxx xxxx xxxx xxxx
xxxx xxxx xxxx xxxx xxxx

Section 8 Power to refer parties to arbitration where there is an arbitration agreement

(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.;
(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

[Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.]

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

xxxx xxxx xxxx xxxx xxxx
xxxx xxxx xxxx xxxx xxxx

Section 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 he 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 subsection (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 award.
(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.

xxxx xxxx xxxx xxxx xxxx
xxxx xxxx xxxx xxxx xxxx

Section 45 Power of judicial authority to refer parties to arbitration

Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, 1[unless it prima facie finds] that the said agreement is null and void, inoperative or incapable of being performed."

70. On a conjoint reading and harmonious interpretation of the above extracted provisions, considered in the backdrop of relevant, applicable and binding decisions, elucidated hereinafter, the following legal position emerges: -

(a) A judicial authority, before whom an action or suit is brought in a matter, which is stated to be the subject of an arbitration agreement shall, if a party to the said arbitration agreement applies not later than the date of submitting his first Written Statement on the subject of the dispute, refer the parties to arbitration, unless it

finds that *prima facie* no valid arbitration agreement exists. [Ref: Section 8 of Arbitration Act]

(b) In matters governed by Part I of the Arbitration Act, no Court shall intervene except where so provided in that Part. [Ref: Section 5 of the Arbitration Act]

(c) No provision contained in Part I of the Arbitration Act shall affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration. [Ref: Section 2(3) of the Arbitration Act]

(d) 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, unless the disputes submitted to the Arbitration Tribunal, are "non-arbitrable". [Ref: Section 16 and Section 45 of the Arbitration Act, *Booz Allen (supra)*, *Vimal Kishor Shah (supra)*, *Vidya Drolia (supra)*, *Emaar MGF Land Limited (supra)* and *Devinder Kumar Gupta (supra)*.]

71. Our understanding of the settled legal position, expressed hereinabove, finds support from the relevant paragraphs of the afore-referenced decisions, which are extracted hereinbelow: -

A. ***Booz Allen and Hamilton INC. (supra)***

> **"33.** But where the issue of "arbitrability" arises in the context of an application under Section 8 of the Act in a pending suit, all aspects of arbitrability will have to be decided by the court seized of the suit, and cannot be left to the decision of the arbitrator. Even if there is an arbitration agreement between the parties, and even if the dispute is covered by the arbitration agreement, the court where the civil suit is pending, will refuse an application under Section 8 of the Act, to refer the parties to arbitration, if the subject-matter of the suit is capable of adjudication only by a public forum or the relief claimed can only be granted by a special court or Tribunal.
>
> **34.** The term "arbitrability" has different meanings in different contexts. The three facets of arbitrability, relating to the jurisdiction of the Arbitral Tribunal, are as under:
>
> (*i*) *Whether the disputes are capable of adjudication and settlement by arbitration*? That is, whether the disputes, having regard to their nature, could be resolved by a private forum chosen by the parties (the Arbitral Tribunal) or whether they would exclusively fall within the domain of public fora (courts).
>
> (*ii*) *Whether the disputes are covered by the arbitration agreement*? That is, whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the "excepted matters" excluded from the purview of the arbitration agreement.
>
> (*iii*) *Whether the parties have referred the disputes to arbitration*? That is, whether the disputes fall under

> the scope of the submission to the Arbitral Tribunal, or whether they do not arise out of the statement of claim and the counterclaim filed before the Arbitral Tribunal. A dispute, even if it is capable of being decided by arbitration and falling within the scope of arbitration agreement, will not be "arbitrable" if it is not enumerated in the joint list of disputes referred to arbitration, or in the absence of such joint list of disputes, does not form part of the disputes raised in the pleadings before the Arbitral Tribunal.

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

36. The well-recognised examples of non-arbitrable disputes are: (*i*) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (*ii*) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (*iii*) guardianship matters; (*iv*) insolvency and winding-up matters; (*v*) testamentary matters (grant of probate, letters of administration and succession certificate); and (*vi*)

eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

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

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

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

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

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

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

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

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

> "In practice therefore, the question has not been whether a particular dispute is capable of settlement by arbitration, *but whether it ought to be referred to arbitration* or whether it has given rise to an enforceable award. No doubt for this reason, English law has never arrived at a general theory for distinguishing those disputes which may be settled by arbitration from those which may not. …
>
> Second, the types of remedies which the arbitrator can award are limited by considerations of public policy and by the fact that he is appointed by the parties and not by the State. For example, he cannot impose a fine or a term of imprisonment, commit a person for contempt or issue a writ of subpoena; nor can he make an award *which is binding on third parties or affects the public at large, such as a judgment in rem* against a ship, an assessment of the rateable value of land, a divorce decree, a winding-up order…."
>
> (emphasis supplied)

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

> "Many commentaries treat it as axiomatic that 'real' rights, *that is, rights which are valid as against the whole world, cannot be the subject of private arbitration*, although some acknowledge that

subordinate rights in personam derived from the real rights may be ruled upon by arbitrators. The conventional view is thus that, for example, rights under a patent licence may be arbitrated, but the validity of the underlying patent may not … An arbitrator whose powers are derived from a private agreement between *A* and *B*plainly has no jurisdiction to bind anyone else by a decision on whether a patent is valid, for no one else has mandated him to make such a decision, and a decision which attempted to do so would be useless."

(emphasis supplied)"

B. *Vimal Kishor Shah (supra)*

"53. We, accordingly, hold that the disputes relating to trust, trustees and beneficiaries arising out of the trust deed and the Trusts Act, 1882 are not capable of being decided by the arbitrator despite existence of arbitration agreement to that effect between the parties…….

54. We thus add one more category of cases i.e. Category (*vii*), namely, cases arising out of trust deed and the Trusts Act, 1882, in the list of six categories of cases specified by this Court in para 36 at pp. 546-47 of the decision rendered in *Booz Allen & Hamilton Inc.* [*Booz Allen & Hamilton Inc.* v. *SBI Home Finance Ltd.*, (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781] which as held above cannot be decided by the arbitrator(s)."

C. *Vidya Drolia (supra)*

30. In *Vimal Kishor Shah* v. *Jayesh Dinesh Shah*, (2016) 8 SCC 788, this Court, after referring to *Dhulabhai* v. *State of M.P.*, (1968) 3 SCR 662, came to the conclusion that disputes which arose under the Indian Trusts Act, 1882, which applies only to private trusts, were also not arbitrable as this was excluded by necessary implication. This was so stated as follows:

"49. So far as the question involved in the case at hand is concerned, it is governed by Condition 2 of *Dhulabhai case* [*Dhulabhai* v. *State of M.P.*, AIR 1969 SC 78] which reads as under: (AIR p. 89, para 32)

> "*32.* (*2*) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.
>
> Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not."

50. When we examine the scheme of the Trusts Act, 1882 in the light of the principle laid down in Condition 2, we find no difficulty in concluding that though the Trusts Act, 1882 does not provide any express bar in relation to applicability of other Acts for deciding the disputes arising under the Trusts Act, 1882 yet, in our considered view, there exists an implied exclusion of applicability of the Arbitration Act for deciding the disputes relating to trust, trustees and beneficiaries through private arbitration. In other words, when the Trusts Act, 1882 exhaustively deals with the trust, trustees and beneficiaries and provides for adequate and sufficient remedies to all aggrieved persons by giving them a right to approach the Principal Civil Court of Original Jurisdiction for redressal of their disputes arising out of trust deed and

the Trusts Act, 1882 then, in our opinion, any such dispute pertaining to affairs of the trust including the dispute inter se trustee and beneficiary in relation to their right, duties, obligations, removal, etc. cannot be decided by the arbitrator by taking recourse to the provisions of the Act. Such disputes have to be decided by the civil court as specified under the Trusts Act, 1882.

51. The principle of interpretation that where a specific remedy is given, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar, and which runs through the law, was adopted by this Court in *Premier Automobiles Ltd.* v. *Kamlekar Shantaram Wadke* [*Premier Automobiles Ltd.* v. *Kamlekar Shantaram Wadke*, (1976) 1 SCC 496 : 1976 SCC (L&S) 70 : AIR 1975 SC 2238] while examining the question of bar in filing civil suit in the context of remedies provided under the Industrial Disputes Act (*see* G.P. Singh, *Principles of Statutory Interpretation*, 12th Edn., pp. 763-64). We apply this principle here because, as held above, the Trusts Act, 1882 creates an obligation and further specifies the rights and duties of the settlor, trustees and the beneficiaries apart from several conditions specified in the trust deed and further provides a specific remedy for its enforcement by filing applications in civil court. It is for this reason, we are of the view that since sufficient and adequate remedy is provided under the Trusts Act, 1882 for deciding the disputes in relation to trust deed, trustees and beneficiaries, the remedy provided under the Arbitration Act for deciding such disputes is barred by implication."

31. *Dhulabhai* (supra) refers to and relies upon the three famous categories that are contained in *Wolverhampton New Waterworks Co.* v. *Hawkesford*, 141 ER 486. Willes, J. had set out these three categories as follows:

> "There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, and the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class, viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it."
>
> (at page 495)

32. The Indian Trusts Act, 1882, in fact, provides an excellent instance of how arbitration is excluded by necessary implication. It is important to bear in mind the fact that the statute, considered as a whole, must lead necessarily to a conclusion that the disputes which arise under it cannot be the subject matter of arbitration.

33. A few sections of the Indian Trusts Act will suffice to demonstrate how disputes under this Act cannot possibly be the subject matter of arbitration. Under Section 34 of the Indian Trusts Act, a trustee may, without instituting a suit, apply by petition to a principal Civil Court of original jurisdiction for its opinion, advice, or direction on any present questions respecting management or administration of trust property, subject to other conditions laid down in the Section. Obviously, an arbitrator cannot possibly give such opinion, advice, or direction. Under Section 46, a trustee who has accepted the trust, cannot afterwards renounce it, except, *inter alia*, with the permission of a principal Civil Court of original jurisdiction. This again cannot be the subject matter of arbitration. Equally, under Section 49 of the Indian Trusts Act, where a discretionary power conferred on a trustee is not exercised reasonably and in good faith, only a principal

Civil Court of original jurisdiction can control such power, again making it clear that a private consensual adjudicator has no part in the scheme of this Act. Under Section 53, no trustee may, without the permission of a principal Civil Court of original jurisdiction, buy or become mortgagee or lessee of the trust property or any part thereof. Here again, such permission can only be given by an arm of the State, namely, the principal Civil Court of original jurisdiction. Under Section 74 of the Indian Trusts Act, under certain circumstances, a beneficiary may apply by petition to a principal Civil Court of original jurisdiction for the appointment of a trustee or a new trustee, and the Court may appoint such trustee accordingly. Here again, such appointment cannot possibly be by a consensual adjudicator. It can only be done by a petition to a principal Civil Court of original jurisdiction. Also, it is important to note that it is not any civil court that has jurisdiction, but only one designated court, namely, a principal Civil Court of original jurisdiction. All this goes to show that by necessary implication, disputes arising under the Indian Trusts Act cannot possibly be referred to arbitration.

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35. We may only indicate that *Vimal Kishor Shah* (supra) has, in a Consumer Protection Act situation, been recently followed by a Division Bench of this Court in *Emaar MGF Land Limited* v. *Aftab Singh*, 2018 SCC OnLine SC 2771.

D. ***Emaar MGF Land Limited (supra)***

"36. Two more provisions of the 1996 Act need to be noted before we proceed further to consider the issues. The 1996 Act contains two Parts — Part I and Part II. Part I contains heading "Arbitration" and Part II contains heading "Enforcement of Certain Foreign Awards". Chapter I of Part I is "General Provisions", in which Section 2 deals with definitions. Section 2(1) begins with the words "In this Part, unless the context otherwise requires". Section 2(1) contains definitions. Section 2(3) provides:

> "**2. (3)** This Part shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration."

37. There are two aspects to be noticed in the scheme of Section 2, firstly, Section 2 contains a heading "Definitions" but it is covered by general heading of Chapter I "General Provisions". Section 2(3) does not contain any definition but contains a general provision which clarifies that "This Part shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration". Section 2(3) gives predominance of *any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration*.

38. We have already noted several categories of cases, which are not arbitrable. While referring to the judgment of this Court in *Booz Allen & Hamilton Inc.* [*Booz Allen & Hamilton Inc.* v. *SBI Home Finance Ltd.*, (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781] , those principles have again been reiterated by this Court in *A. Ayyasamy* [*A. Ayyasamy* v. *A. Paramasivam*, (2016) 10 SCC 386 : (2017) 1 SCC (Civ) 79] , Dr A.K. Sikri, J. delivering the judgment in that case has noticed certain cases, which are not arbitrable, in para 14, which is as follows: (*A. Ayyasamy case* [*A. Ayyasamy* v. *A. Paramasivam*, (2016) 10 SCC 386 : (2017) 1 SCC (Civ) 79] , SCC pp. 401-02)

> "*14.* In the instant case, there is no dispute about the arbitration agreement inasmuch as there is a specific arbitration clause in the partnership deed. However, the question is as to whether the dispute raised by the respondent in the suit is incapable of settlement through arbitration. As pointed out above, the Act does not make any provision excluding any category of disputes treating them as non-arbitrable. Notwithstanding the above, the courts have held that certain kinds of disputes may not be capable of adjudication through the means of arbitration. The courts have held that certain disputes like criminal offences of a public nature, disputes arising out of

illegal agreements and disputes relating to status, such as divorce, cannot be referred to arbitration. The following categories of disputes are generally treated as non-arbitrable:

(*i*) patent, trade marks and copyright;

(*ii*) anti-trust/competition laws;

(*iii*) insolvency/winding up;

(*iv*) bribery/corruption;

(*v*) fraud;

(*vi*) criminal matters.

Fraud is one such category spelled out by the decisions of this Court where disputes would be considered as non-arbitrable."

39. Dr D.Y. Chandrachud, J. in his concurring opinion has referred to *Booz Allen & Hamilton Inc.* [*Booz Allen & Hamilton Inc.* v. *SBI Home Finance Ltd.*, (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781] and noticed the categories of cases, which are not arbitrable. Para 35 of the judgment is quoted as below: (*A. Ayyasamy case* [*A. Ayyasamy* v. *A. Paramasivam*, (2016) 10 SCC 386 : (2017) 1 SCC (Civ) 79] , SCC pp. 409-10)

"*35.* Ordinarily every civil or commercial dispute whether based on contract or otherwise which is capable of being decided by a civil court is in principle capable of being adjudicated upon and resolved by arbitration 'subject to the dispute being governed by the arbitration agreement' unless the jurisdiction of the Arbitral Tribunal is excluded either expressly or by necessary implication. In *Booz Allen & Hamilton Inc.* v. *SBI Home Finance Ltd.* [*Booz Allen & Hamilton Inc.* v. *SBI Home Finance Ltd.*, (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781] , this Court held that (at SCC p. 546, para 35) adjudication of certain categories of proceedings is reserved by the legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not exclusively reserved for adjudication by

courts and tribunals may by necessary implication stand excluded from the purview of private fora. This Court set down certain examples of non-arbitrable disputes such as: (SCC pp. 546-47, para 36)

(*i*) disputes relating to rights and liabilities which give rise to or arise out of criminal offences;

(*ii*) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights and child custody;

(*iii*) matters of guardianship;

(*iv*) insolvency and winding up;

(*v*) testamentary matters, such as the grant of probate, letters of administration and succession certificates; and

(*vi*) eviction or tenancy matters governed by special statutes where a tenant enjoys special protection against eviction and specific courts are conferred with the exclusive jurisdiction to deal with the dispute.

This Court held that this class of actions operates in rem, which is a right exercisable against the world at large as contrasted with a right in personam which is an interest protected against specified individuals. All disputes relating to rights in personam are considered to be amenable to arbitration while rights in rem are required to be adjudicated by courts and public tribunals. The enforcement of a mortgage has been held to be a right in rem for which proceedings in arbitration would not be maintainable. In *Vimal Kishor Shah* v. *Jayesh Dinesh Shah* [*Vimal Kishor Shah* v. *Jayesh Dinesh Shah*, (2016) 8 SCC 788 : (2016) 4 SCC (Civ) 303] this Court added a seventh category of cases to the six non-arbitrable categories set out in *Booz Allen* [*Booz Allen & Hamilton Inc.* v. *SBI Home Finance Ltd.*, (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781] , namely, disputes relating to trusts, trustees and beneficiaries arising out of a trust deed and the Trust Act."

40. Another section, which needs to be noted is Section 5, which is as follows:

> "**5.** ***Extent of judicial intervention***.— Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."

41. **Section 5 contains an injunction to judicial authority from intervening except where so provided in this part. Section 2(3), Section 8, Section 11 and Section 34 are some of the provisions, which provide for judicial intervention in matters**. Here, we are concerned with power of judicial authority under Section 8, hence Section 5 is not much relevant in the present case.

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60. Reference is also made to the judgment of this Court in *Vimal Kishor Shah* v. *Jayesh Dinesh Shah* [*Vimal Kishor Shah* v. *Jayesh Dinesh Shah*, (2016) 8 SCC 788 : (2016) 4 SCC (Civ) 303] . This Court in the above case had occasion to consider the provisions of Section 8 of the 1996 Act in reference to special remedy provided under the Trusts Act, 1882. This Court noticed the judgment of this Court in *Booz Allen & Hamilton Inc.* [*Booz Allen & Hamilton Inc.* v. *SBI Home Finance Ltd.*, (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781] with approval in paras 40 and 42 which is to the following effect: (*Vimal Kishor Shah case* [*Vimal Kishor Shah* v. *Jayesh Dinesh Shah*, (2016) 8 SCC 788 : (2016) 4 SCC (Civ) 303] , SCC pp. 805-06)

> "*40.* Before we examine the scheme of the Trusts Act, 1882, we consider it apposite to take note of the case law, which has a bearing on this issue. The question came up for consideration before this Court in *Booz Allen & Hamilton Inc.* v. *SBI Home Finance Ltd.*[*Booz Allen & Hamilton Inc.* v. *SBI Home Finance Ltd.*, (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781] as to what is the meaning of the term

"arbitrability" and secondly, which type of disputes are capable of settlement by arbitration under the Act. Their Lordships framed three questions to answer the question viz.: (SCC p. 546, para 34)

> (*1*) Whether the disputes having regard to their nature could be resolved by a private forum chosen by the parties (Arbitral Tribunal) or whether such disputes exclusively fall within the domain of public fora (courts)?;
>
> (*2*) Whether the disputes are covered by the arbitration agreement?; and
>
> (*3*) Whether the parties have referred the disputes to arbitrator?"

***

42. The question to be considered in this appeal is whether the disputes relating to affairs and management of the Trust including the disputes arising inter se trustees, beneficiaries in relation to their appointment, powers, duties, obligations, removal, etc. are capable of being settled through arbitration by taking recourse to the provisions of the Act, if there is a clause in the trust deed to that effect or such disputes have to be decided under the Trusts Act, 1882 with the aid of forum prescribed under the said Act?"

61. After noticing the issues which have arisen in the above case this Court laid down the following in paras 51 and 53: (*Vimal Kishor Shah case* [*Vimal Kishor Shah* v. *Jayesh Dinesh Shah*, (2016) 8 SCC 788 : (2016) 4 SCC (Civ) 303] , SCC pp. 808-09)

> "51. The principle of interpretation that where a specific remedy is given, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar, and which runs through the law, was adopted by this Court in *Premier Automobiles Ltd.* v. *Kamlekar Shantaram Wadke* [*Premier Automobiles Ltd.* v. *Kamlekar Shantaram Wadke*,

(1976) 1 SCC 496 : 1976 SCC (L&S) 70] while examining the question of bar in filing civil suit in the context of remedies provided under the Industrial Disputes Act (*see* G.P. Singh, *Principles of Statutory Interpretation*, 12th Edn., pp. 763-64). We apply this principle here because, as held above, the Trusts Act, 1882 creates an obligation and further specifies the rights and duties of the settlor, trustees and the beneficiaries apart from several conditions specified in the trust deed and further provides a specific remedy for its enforcement by filing applications in civil court. It is for this reason, we are of the view that since sufficient and adequate remedy is provided under the Trusts Act, 1882 for deciding the disputes in relation to trust deed, trustees and beneficiaries, the remedy provided under the Arbitration Act for deciding such disputes is barred by implication.

* * *

53. We, accordingly, hold that the disputes relating to trust, trustees and beneficiaries arising out of the trust deed and the Trusts Act, 1882 are not capable of being decided by the arbitrator despite existence of arbitration agreement to that effect between the parties. A fortiori, we hold that the application filed by the respondents under Section 11 of the Act is not maintainable on the ground that firstly, it is not based on an "arbitration agreement" within the meaning of Sections 2(1)(*b*) and 2(1)(*h*) read with Section 7 of the Act and secondly, assuming that there exists an arbitration agreement (Clause 20 of the trust deed) yet the disputes specified therein are not capable of being referred to private arbitration for their adjudication on merits."

62. This Court held in *Vimal Kishor Shah case* [*Vimal Kishor Shah* v. *Jayesh Dinesh Shah*, (2016) 8 SCC 788 : (2016) 4 SCC (Civ) 303] that disputes within the trust, trustees and beneficiaries are not capable of being decided by the arbitrator despite existence of arbitration agreement to that effect between the parties. This Court held that the remedy provided under the Arbitration Act for

deciding such disputes is barred by implication. The ratio laid down in the above case is fully applicable with regard to disputes raised in consumer fora."

E. *Devinder Kumar Gupta (supra)*

"**6.** In *Kvaerner Cementation India Ltd.* v. *Bajranglal Agarwal*, 2001 (6) Supreme 265, their Lordships had specifically taken pains to observe that - "there cannot be any dispute that in the absence of any arbitration clause in the agreement, no dispute could be referred for arbitration to an arbitral Tribunal". The facts in that case were that a suit had been filed seeking a Declaration that there does not exist any arbitration clause between the parties. The High Court ruled that in view of Section 5 of the A & C Act read with Section 16 thereof, since the Arbitral Tribunal possesses power to rule on its own jurisdiction, civil courts ought not to pass an injunction restraining the arbitral proceedings. A study of the brief Order does not reveal the precise nature of the Plaintiffs contention. We must, therefore, perforce assume that the factual matrix in Kvaerner carved out an exception to the categorical statement that the existence of an arbitration clause is unquestionably the foundation for a reference to arbitration.

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13. In the impugned Judgment, the learned Single Judge has applied the Division Bench Judgment in Spentex as also the Single Judge decision in *Roshan Lal Gupta* v. *Parasram Holdings Pvt. Ltd.*, 2009 (157) DLT 712. The first feature to be noted is that Roshan Lal deals with a domestic arbitration and, therefore, Section 45 of the A & C Act was not in contemplation. The learned Single Judge, *inter alia*, concluded that the word 'party' in Section 8 of the A & C Act refers to a party to the suit in contradistinction to a party to the arbitration agreement. The learned Single Judge, in the impugned Judgment, has dismissed the applications seeking interim relief but

> inexplicably has kept the Suit alive for further consideration. The learned Single Judge was statutorily bound to return a finding with regard to whether or not the action or suit was the subject, matter of an arbitration agreement. In the facts of the case before us, since we are dealing with an international commercial arbitration, Section 45 of the A & C Act comes into play. After considering all the complexities in the case, one of us had concluded in Bharti that a formal application under Section 45 of the A & C Act was not necessary, since it is incumbent for a Court seized of an action in a matter in respect of which the parties have made an arbitration agreement as envisaged in Section 44, to refer the parties to arbitration except if the Court finds that the said agreement is null and void, inoperative and incapable of being performed. The dismissal of the Suit or the rejection of the application for interim relief under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908 (CPC) has the effect of referring the parties to arbitration. By sagaciously not making a statement under Section 8 of the A & C Act, the Defendant has achieved indirectly what he could not have achieved directly, namely, making it inevitable for the Plaintiff to join arbitral proceedings without any consideration or adjudication of its plea that no arbitration agreement exists between the parties. It is for this reason that it seems to us essential that the Court should have proceeded under Section 8 or Section 45 of the A & C Act, as the case may be and with a view to return a finding on the existence of an arbitration agreement between the parties. If the *prima facie* finding is in favour of the existence of an arbitration agreement, the Court would rightly leave it to the Arbitral Tribunal to go into and determine the details and the minute objections raised by the Plaintiff. The Court ought not to skirt this issue, as it would tantamount to running counter to the decisions of the Supreme Court in Kvaerner, SBP and Sukanya."

72. It would be relevant to observe that the impugned judgement does not determine whether the arbitration initiated by Lalit falls

within Part I or Part II of the Arbitration Act, although it was urged on behalf of Lalit that the same is an International Commercial Arbitration.

73. It would also be pertinent to consider that the arguments on behalf of the Appellants was predicated on their contention that, the disputes between the parties were non-arbitrable, on account of the same arising under the Trusts Act and consequently, subject to the Bar created by the rigour of sub-section (3) of Section 2 of the Arbitration Act, which mandates that the same cannot be submitted to arbitration, as being opposed to Public Policy.

74. On the other hand, it was Lalit's case that the Trust Deed was executed in the United Kingdom and Singapore was opted as the seat of the arbitration and, therefore, the question of arbitrability would be governed by Singaporean law and not Indian law. In other words, it was submitted that any limitations on arbitration of such disputes under Indian law were thus irrelevant. In this regard, we must comment on Lalit's conduct, inasmuch as, by sagaciously not filing any pleading in response to the averments made by the Appellants in the plaint, he has achieved indirectly, what he could not have achieved

directly, namely, making it inevitable for the Appellants to join the arbitral proceedings, without any consideration or adjudication of its plea that no valid arbitration agreement exists between the parties and the disputes between them arising out of the Trusts Act are incapable of being submitted to arbitration. At this juncture, it would also be pertinent to observe that, the above submission is evidently in the teeth of Clause 36 of the Restated Trust Deed, which provides as follows:-

> "…..The Arbitration will be governed in accordance with the laws of India and ICC will follow India law as the substantive law for deciding the dispute arising between the parties under pursuant to this Deed".

75. Assuming arguendo, we accept the abovesaid submission made on behalf of Lalit, the same would be covered against him by the ratio of the decision of the Division Bench in *Devinder Kumar Gupta (supra),* wherein it was observed that in case of foreign arbitration enormous expenses and efforts get involved and as such the legislature in its wisdom has thought that the question relating to the validity of arbitration agreement, its cooperativeness and capability of being performed should be examined by the Court itself instead of leaving those in the hands of an Arbitrator in a foreign land.

76. From a plain reading of the impugned judgement it is axiomatic that the learned Single Judge was of the view that the Suits being in the nature of anti-arbitration injunction suits, were not maintainable, in view of the Three Judge Bench decision of the Hon'ble Supreme Court in *Kvaerner (supra),* which had been followed by the learned Single Judge in his several judgments, elaborated in paragraph 30 of the impugned judgment. The learned Single Judge having already followed the view that "bearing in mind the very object with which Arbitration Act has been enacted and the provisions thereof contained in Section 16 conferring the power of the Arbitral Tribunal to rule on its own jurisdiction, including ruling on any objection with respect to existence of validity of the arbitration agreement, we have no doubt in our mind that the Civil Court cannot have jurisdiction to go into that question", expressed in *Kvaerner (supra),* naturally found himself "unable to take a view different from that taken by me (sic.) consistently in Roshan Lal Gupta, Spentex Industries Ltd., Shree Krishna Vanaspati Industries (P) Ltd., M. Sons Enterprises Pvt. Ltd., Ashok Kalra and Bharti Tele-Ventures Ltd. supra i.e. that suits such as the present one, to declare the invalidity of an arbitration

clause/agreement and to injunct arbitration proceedings, whether falling in Part I or Part II, are not maintainable."

77. In so doing, in our considered view, the learned Single Judge fell into a fundamental error, by failing to appreciate that the ratio in *Kvaerner (supra),* was not attracted to the facts and circumstances of the case, inasmuch as, the same is not an authority for the proposition that disputes *inter alia* relating to the Trusts Act—which are 'non-arbitrable'—may also be, without question, submitted to arbitration. In *Kvaerner (supra),* the Hon'ble Supreme Court was not addressing the issue of validity of an arbitration agreement, nor was it a case relating to the principles governing disputes, that may not be referred to arbitration. Further, the decision in *Kvaerner (supra)* did not deal with the exceptions carved out of Section 5 of the Arbitration Act by the provision of Section 2(3) thereof, which provides for judicial intervention in matters, in relation to disputes which may not be submitted to arbitration, on account of any other law for the time being in force.

78. We further observe here that the decisions of the Supreme Court in *Booz Allen and Hamilton INC. (supra), Vidya Drolia, Vimal Kishor*

Shah (supra) and *Emaar MGF Land Limited (supra)* are axiomatically "law in force" within the meaning of the provisions of Section 2(3) of the Arbitration Act.

79. The learned Single Judge further failed to appreciate that even in the decision in *A. Ayyasamy (supra),* cited in the impugned judgement, the Supreme Court having noticed the decision in *Kvaerner (supra),* clearly enunciated and expressly confirmed in paragraph 13 thereof, that the Civil Courts have jurisdiction to "pronounce upon arbitrability or non-arbitrability of the disputes".

80. The impugned judgement then erroneously proceeded to hold that "it is also not as if there is a contrary view of the Supreme Court *qua* Suits for declaration of invalidity of the arbitration agreement/proceedings and for injuncting arbitration", by relying on authorities, none of which dealt with the question of the exceptions to arbitrability. In our considered view, disputes relating to Trusts fall squarely within the ambit of the provisions of Section 2(3) of the Arbitration Act. In *Emaar MGF Land Limited (supra)* the Hon'ble Supreme Court *inter alia* held that apart from proceedings under the Consumer Protection Act, 1986, which are required to be continued

under the said Act despite an arbitration agreement, there are large number of other fields, where an arbitration agreement can neither stop nor stultify the proceedings;…..Similarly, there are several issues which are non-arbitrable. It was further observed that there can be prohibition, both express or implied, for not deciding a dispute on the basis of an arbitration agreement. The above observation clearly and unequivocally provides for judicial intervention within the meaning of Section 2(3) of the Arbitration Act, notwithstanding the fetters imposed by the provisions of Section 5 of the Arbitration Act. It is also relevant to observe that Section 2(3) of the Arbitration Act remains on the Statute Book, even after the amendments, since the same is a standalone provision and that the amendments to the Arbitration Act have nothing to do with the issue of non-arbitrability of certain disputes, specified jurisprudentially. The Hon'ble Supreme Court has further proceeded to enunciate the various disputes which are non-arbitrable by citing with approval the judgment of the Apex Court in *Booz Allen and Hamilton INC. (supra).*

81. The Hon'ble Supreme Court in *Vimal Kishor Shah (supra)* added a category (vii), to the list of categories elaborated in *Booz*

Allen and Hamilton INC. (supra), in the following extracted paragraphs, as under:-

> **"53.** We, accordingly, hold that the disputes relating to trust, trustees and beneficiaries arising out of the trust deed and the Trusts Act, 1882 are not capable of being decided by the arbitrator despite existence of arbitration agreement to that effect between the parties…….
>
> **54.** We thus add one more category of cases i.e. Category (*vii*), namely, cases arising out of trust deed and the Trusts Act, 1882, in the list of six categories of cases specified by this Court in para 36 at pp. 546-47 of the decision rendered in *Booz Allen & Hamilton Inc.* [*Booz Allen & Hamilton Inc.* v. *SBI Home Finance Ltd.*, (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781] which as held above cannot be decided by the arbitrator(s)."

82. We are constrained to observe that, although the learned Single Judge's attention was invited to the decisions of the Hon'ble Supreme Court in *Vimal Kishor Shah (supra)* and *Vidya Drolia (supra),* he skirted the binding effect of the ratio clearly and unequivocally enunciated therein, *qua* the disputes under the Trust Act being 'non-arbitrable', in a cavalier manner, by dismissing their applicability, merely by observing "*that the Senior Counsel for Lalit have made out an arguable case qua the non-applicability of Vimal Kishor Shah and Vidya Drolia (supra)'.*

83. A plain reading of the above decisions in conjunction with each other leaves no manner of doubt that disputes arising under the Trusts Act, are not arbitrable, by necessary implication. Our expression of the legal position that obtains is affirmed by the clear enunciation of the decision of the Supreme Court in *Vidya Drolia (supra),* wherein it was observed as follows: -

> **"32.** The Indian Trusts Act, 1882, in fact, provides an excellent instance of how arbitration is excluded by necessary implication. It is important to bear in mind the fact that the statute, considered as a whole, must lead necessarily to a conclusion that the disputes which arise under it cannot be the subject matter of arbitration.
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> **33.** A few sections of the Indian Trusts Act will suffice to demonstrate how disputes under this Act cannot possibly be the subject matter of arbitration. Under Section 34 of the Indian Trusts Act, a trustee may, without instituting a suit, apply by petition to a principal Civil Court of original jurisdiction for its opinion, advice, or direction on any present questions respecting management or administration of trust property, subject to other conditions laid down in the Section. Obviously, an arbitrator cannot possibly give such opinion, advice, or direction. Under Section 46, a trustee who has accepted the trust, cannot afterwards renounce it, except, inter alia, with the permission of a principal Civil Court of original jurisdiction. This again cannot be the subject matter of arbitration. Equally, under Section 49 of the Indian Trusts Act, where a discretionary power conferred on a trustee is not exercised reasonably and in good faith, only a principal Civil Court of original jurisdiction can control such power, again making it clear that a private consensual adjudicator has no part in the scheme of this Act. Under Section 53, no trustee may, without the permission of a principal Civil Court of original jurisdiction, buy or become mortgagee or

> lessee of the trust property or any part thereof. Here again, such permission can only be given by an arm of the State, namely, the principal Civil Court of original jurisdiction. Under Section 74 of the Indian Trusts Act, under certain circumstances, a beneficiary may apply by petition to a principal Civil Court of original jurisdiction for the appointment of a trustee or a new trustee, and the Court may appoint such trustee accordingly. Here again, such appointment cannot possibly be by a consensual adjudicator. It can only be done by a petition to a principal Civil Court of original jurisdiction. Also, it is important to note that it is not any civil court that has jurisdiction, but only one designated court, namely, a principal Civil Court of original jurisdiction. All this goes to show that by necessary implication, disputes arising under the Indian Trusts Act cannot possibly be referred to arbitration.
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> **35.** We may only indicate that Vimal Kishor Shah (supra) has, in a Consumer Protection Act situation, been recently followed by a Division Bench of this Court in Emaar MGF Land Limited v. Aftab Singh, 2018 SCC OnLine SC 2771."

84. We may further observe that, the **i**mpugned judgement eschews reliance on *McDonald's India Private Limited (supra)* and *Vodafone Group PLC United Kingdom (supra),* on the specious ground that, although being a dicta of the Division Bench of this Court, it would be binding, but holding the same to be per incuriam *qua Kvaerner (supra)*. In *Mcdonald's India Private Limited (supra)* a Division Bench of this Court held as follows: -

"44. In another decision referred to by the respondents, which was of a learned single Judge of the High Court in Calcutta in the case of the *Board of Trustees of the Port of Kolkata* v. *Louis Dreyfus Armatures SAS*: G.A. No. 1997/2014 in CS No. 220/2014, the circumstances under which an anti-arbitration injunction could be granted were summarised as under:-

> "(i) If an issue is raised whether there is any valid arbitration agreement between the parties and the Court is of the view that no agreement exists between the parties.
>
> (ii) If the arbitration agreement is null and void, inoperative or incapable of being performed.
>
> (iii) Continuation of foreign arbitration proceeding might be oppressive or vexatious or unconscionable."

45. It would be noticed straightaway that the points (i) and (ii) extracted above are essentially taken from Section 45 of the 1996 Act. The only addition being point No. (iii) where it was submitted that an anti-arbitration injunction could be granted if the continuation of 'foreign' arbitration proceedings were to be oppressive, vexatious or unconscionable.

46. In *Essel Sports Pvt. Ltd.* v. *Board of Control for Cricket in India*: ILR (2011) V Delhi 585, the plaintiff (BCCI) had prayed for a perpetual injunction against ESPL from initiating any action against BCCI in any other judicial forum in respect of the allegations, subject matter and reliefs contained and covered in an earlier suit which was pending before the Delhi High Court. The Division Bench observed, after examining the claims and contentions of the parties, that the causes of action in the two proceedings in India and in England were substantially and materially the same. Reliance was thereafter placed on *Modi Entertainment Network* (supra) to observe that a

subsequent suit, if held to be vexatious and oppressive could be injuncted by the Indian courts provided other necessary ingredients were also satisfied. It was observed that if a party endeavoured to invoke the jurisdiction of a foreign court to a cause of action already being prosecuted in the national forum, it would amount to vexatious litigation. It also sounded a note of caution that the courts have to be circumspect in exercising their power to issue an anti-suit injunction. But, it must do so where the ends of justice would otherwise be defeated. In conclusion, the Division Bench in *ESSEL Sports Pvt. Ltd.* (supra) held that BCCI had been able to establish the vexatious and oppressive nature of the U.K. action which ESPL was pursuing and, therefore, passed an interim injunction against ESPL from proceeding with the U.K. action to the extent the U.K. action contained allegations against BCCI or that the adjudication of that action overlapped the pending suit in India. It goes without saying that the said decision of the Division Bench in *ESSL Sports Pvt. Ltd.* (supra) was also a case of an anti-suit injunction and was not concerned with an anti-arbitration injunction. It applied the principles for an anti-suit injunction laid down in *Modi Entertainment Network* (supra).

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52. It is also important to note that although the competence-competence principle was applicable and the arbitral tribunal had the requisite competence to determine its own jurisdiction, the courts in England retained the jurisdiction to determine the issue as to whether there was ever an agreement to arbitrate. In our view, the same principle would apply insofar as the courts in India are concerned. The courts in India would certainly have the jurisdiction to determine the question as to whether an arbitration agreement was void or a nullity.

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> **63.** Courts need to remind themselves that the trend is to minimize interference with arbitration process as that is the forum of choice. That is also the policy discernible from the 1996 Act. Courts must be extremely circumspect and, indeed, reluctant to thwart arbitration proceedings. Thus, while courts in India may have the power to injunct arbitration proceedings, they must exercise that power rarely and only on principles analogous to those found in sections 8 and 45, as the case may be, of the 1996 Act."

85. On a conspectus of the paragraphs extracted hereinabove, it is evident that, the Division Bench in *Mcdonald's India Private Limited (supra)* proceeded to hold that, the Court would have jurisdiction to grant anti-arbitration injunction, where the party seeking the injunction can demonstrably show that the agreement is null and void, inoperative or incapable of being performed. The learned Single Judge having observed that in *Mcdonald's India Private Limited (supra)*, the Court expressed reluctance to denude itself of jurisdiction, for the fear of such denudation of jurisdiction in future coming in the way of granting relief in a deserving case, erroneously declined to exercise jurisdiction vested in the Court, to determine the question, as to whether the subject arbitration agreement was null and void and/or oppressive and vexatious, on the untenable ground that, it would result in the Courts being flooded with cases, seeking the relief

of injuncting arbitration; thereby failing to determine even *prima facie* on merits the issue articulated by the Appellants that, the provisions of Section 16 of the Arbitration Act were not attracted since the disputes between the parties were not arbitrable and the arbitration clause was invalid and inoperative by implication, on the ground of being opposed to Public Policy. In so doing, the impugned judgement also fails to appreciate that, the Court is under a duty to consider the validity of an arbitration agreement in the facts and circumstances of the case, and the issue that "in case of foreign arbitration enormous expenses and efforts get involved and as such the legislature in its wisdom has thought that the question relating to the validity of arbitration agreement, its cooperativeness and capability of being performed should be examined by the Court itself instead of leaving those in the hands of an Arbitrator in a foreign land." [Ref: *Devinder Kumar Gupta (supra)*]. Moreover, the subject dispute ought to have been *prima facie* adjudicated by the learned Single Judge, who had to exercise the jurisdiction vested in the Court, as a) all parties are Indian citizens; b) situs of immovable assets of the Trust is in India; and c) in the Restated Trust Deed itself, it is categorically stipulated that the

same will be governed, in accordance with the laws in India, as the substantive law for deciding the disputes, arising between the parties, under the Trust Deed. In our view, therefore, the principles of autonomy of arbitration and *kompetenz-kompetenz* did not *prima facie* arise in the present case, since the disputes themselves are not be capable of being submitted to arbitration. *A fortiori* the impugned judgement is erroneous for its misplaced reliance on the principles enunciated in the provisions of Section 16 of the Arbitration Act—which in view of the Constitution Bench decision in *SBP & Co. vs. Patel Engineering (supra)*, is only an enabling provision and does not confer exclusive jurisdiction on the Arbitration Tribunal—without rendering a decision on the issue of 'non-arbitrability' of the subject disputes. The learned Single Judge further fell into error in not appreciating the dictum of the Supreme Court in *Vimal Kishor Shah (supra),* wherein it was held that, a Trust Deed is not in law an 'arbitration agreement'.

86. In view of the foregoing discussion, we are of the considered view that the learned Single Judge gravely erred by failing to exercise the jurisdiction vested in the Court, which statutorily required him to

adjudicate, whether the disputes between the parties, in relation to the Trust Deed, were *per se* referable to arbitration. This, in our respectful view, is tantamount to wrong exercise of jurisdiction by the learned Single Judge. The impugned judgment cannot resultantly be sustained, since it failed to consider that, the Trust Deed is not an arbitration agreement in law and consequently, the reliance placed therein, on the decision in *Kvaerner (supra),* was erroneous. In our opinion, issues under the Trusts Act cannot be the subject matter of arbitration since the same are excluded from the purview of the Arbitral Tribunal by necessary implication. We are also of the view that, in the present case the Arbitral Tribunal lacks inherent subject matter jurisdiction; and the present is not a case of concurrent jurisdiction, in view of the settled legal position that, disputes under the Trusts Act raised herein, are *prima facie,* incapable of being submitted to arbitration. We are further of the view that, in the instant case, it is the Arbitral Tribunal that evidently lacks jurisdiction and not this Court, which has the inherent jurisdiction to determine whether the disputes are arbitrable, particularly when, as in the present case, the ends of justice would otherwise be defeated. The reference to

Section 41(h) of the Specific Relief Act, 1963 in the impugned judgment, is also fallacious, since the provisions of Section 16 of the Arbitration Act, cannot, in the facts and circumstances elaborated hereinabove, provide any relief in the present case, much less an equally efficacious relief. The provisions of Section 2(3) of the Arbitration Act, exclude the applicability thereof to the present case, as the disputes that have arisen under the Trusts Act, are in our considered view non-arbitrable disputes. We also hold that, inherent and substantive rights enure to the benefit of the Appellants, to urge that the disputes between the parties in relation to the Trust Deed were not arbitrable and that consequently, they were duly entitled to prosecute their claim for the substantive relief of declaration and permanent injunction, as prayed for.

87. Consequently, the issues framed hereinabove are answered in the negative and are decided in favour of the Appellants and against Lalit.

88. We, therefore, allow the present Appeals and set aside the impugned common judgment and decree dated 03.03.2020 and remand the Civil Suits being CS(OS) 84/2020, titled as '*Dr. Bina*

Modi vs. Lalit Modi & Ors.' and CS(OS) 85/2020, titled as *'Charu Modi & Anr. vs. Lalit Modi & Anr.',* to the learned Single Judge for further proceedings, in accordance with law, from the stage of issuance of summons. Pending applications are also disposed of.

89. The Registry is directed to list the said Suits for further hearing, in accordance with law, before the learned Single Judge, on 08.01.2021. The parties will appear before the Court on the said date, either in person or through counsel.

90. Copy of this judgment be provided to learned counsel appearing on behalf of the parties electronically and be also uploaded on the website of this Court forthwith.

SIDDHARTH MRIDUL
JUDGE

TALWANT SINGH
JUDGE

DECEMBER 24, 2020
dn/danish

Click here to check corrigendum, if any