NATIONAL COMPANY LAW TRIBUNAL
GUWAHATI BENCH
T.A.No.14/2016
(C.A.No.907/2016)

In

T.P.No.20/397/398/GB/2016
(C.P.No.143/2015)

Binod Kr Bawri & Ors. ... Applicants

-Versus-

Calcom Cement Ltd. & Ors. ... Respondents

Present: Hon'ble Mr Justice P.K. Saikia, Member (J)

Mr D. Baruah, Advocate
Ms N. Upadhya, Advocate

...for respondent No.1 –applicants

Dr U.K. Chodhury, Sr. Advocate
Mr Atul Sood, Advocate
Mr Saumitra Saikia, Advocate
Mr Raktim Gogoi, Advocate
Mr Himanshu Vij, Advocate
Mr Pabitra Saikia, Advocate

...for respondent No.2 –applicants

Mr S.N. Mukherjee, Sr. Advocate
Mr S. Dutta, Sr. Advocate
Mr S. Mitra, Advocate
Ms S. Dalmia, Advocate

...for petitioner Nos.1-9 –respondents

Mr P. Chatterjee, Sr. Advocate
Mr O. Chatterjee, Advocate
Ms N. Modi, Advocate

...for petitioner Nos.10-15 –respondents

05. 01. 2017

JUDGMENT

This application under Section 8 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the Act of 1996) has been filed by the respondent No. 1, (namely, Calcom Cement India Ltd) and respondent No. 2, (namely, Dalmia Cement (Bharat) Ltd) in CP No.143/2015 seeking reference of C.P.

No.143/2015 to arbitration in view of arrangements made in shareholder's agreements dated 16.01.2012 as well as in the shareholder's agreement dated 30.11.2012.

2 Dalmia Cement (Bharat) Ltd (in short, Dalmia Group) and Calcom Cement India Ltd (in short, the Company) would also be referred to hereinafter as the applicant No.1 and applicant No.2 respectively. The shareholder's agreements dated 16.01.2012 and in the shareholder agreement dated 30.11.2012 would be referred to hereinafter as SHA-I and SHA-II respectively.

3. I have heard Dr. U.K. Chaudhary, learned Sr. Counsel for the applicant No.2, assisted by learned counsel Mr Atul Sood, Mr. Soumitra Saikia , Mr Raktim Gogoi, , Mr Himanshu Vij, , Mr Pabitra Saikia. I have also heard Mr. D. Baruah and Miss Nirmala Upadhya, learned counsel for applicant No.1.

4. Also heard Mr S.N. Mukherjee, Mr S. Dutta, learned Sr. Counsel, appearing for the non-applicants/ petitioner Nos.1-9 assisted by Mr S. Mitra, Advocate Ms S. Dalmia, Advocate. I have also heard Mr P. Chatterjee, learned Sr. Counsel appearing for non-applicants/petitioner Nos.10-15, assisted by counsel Mr. O. Chatterjee, and Ms N. Modi.

5. Before proceeding further, I find it necessary to recount briefly the facts and circumstances, so narrated in the petition under section 397/398 of the Companies Act, 1956, (in short, the Act of 1956) which are found necessary for adjudication of proceeding under section 8 of the Act of 1996. Calcom Cement India Ltd. was incorporated on 20.09.2004 as a company limited by shares under the Act of 1956 with its head office at Anil Plaza-II, ABC, G.S.Road, Guwahati- 781005, Assam.

6. According to the constitutional documents of the company, it was to engage in business of manufacturing of cement, clinker and ready - mix concrete and has one of its units at Umrangshu in Dima Hasao District of Assam whereas the second one is located at Lanka in Nagaon District of Assam. The issued, subscribed and paid-up share capital of the company was Rs.408,78,64,800/- divided into 40,87,86,480/- equity shares of Rs.10/- each. The petitioner Nos.1-9 (a part of Bawri Group and hereinafter referred to as Bawri Group) are the shareholders of the company and were originally in the control of the company.

7. However, with a view to strengthen and extend the business activities of the company, Bawri Group had taken a decision in the month of January 2012 to induct Dalmia Group as a strategic investor. Accordingly, on 16.01.2012, several agreements including SHA-I was executed by and between Bawri Group/ Promoter Group on one side and Dalmia Group & the company on the other side. However, it was agreed upon by the parties that the management of the company would remain with Bawri Group. Following the execution of SHA-I, the Articles of Association of the company (in short, the AOA) was suitably amended.

8. According to such agreement, the Board of Directors shall comprise of 12(twelve) Directors of which 8(eight) shall be nominated by Promoter Group and Dalmiai Group in equal number, one of them shall be nominated by AIDC while remaining 3(three) Directors would be Independent Directors to be nominated jointly by Promoter Group and Dalmiai Group. Under such agreement, Dalmia Group was to infuse necessary funds to the company so that the various schemes, incorporated in the SHA-I, could be implemented properly.

9. But in spite of the agreement between the parties aforementioned to the effect that Dalmia Group would infuse required funds for proper running of the company, the later failed to release funds as per terms and conditions of the agreement. Instead, they started interfering in day to day management of the company for which Bawri Group was not in a position to discharge its part of the obligations under the SHA-I and was ultimately compelled to hand over the management of the company to Dalmia Group .

10. In order to facilitate such changes in the management, several agreements including SHA-II were also executed by and between Bawri Group and Dalmia Group on 30.11.2012 laying down terms and conditions agreed to by the parties and the AOA of the company was once again suitably amended so as to incorporate therein the terms and conditions in SHA-II. In view of the aforesaid agreements, the control and management of the company stood transferred to Dalmia Group.

11. Under the SHA-II too, it was agreed upon between the parties that the maximum number of the Directors of the company shall be 12 (twelve) but out of total number of 12(twelve) Directors, Dalmia Group shall nominate 5 (five), Bawri Group shall nominate 3 (three) and AIDC shall have right to nominate one Director. It has also been agreed upon between the parties that there shall be no independent Directors in the Board, vide clause No. 3.6 of the SHA-II.

12. Very unfortunately, despite aforesaid agreements between the parties aforementioned, Dalmia Group started indulging in several malpractices of extremely enormous proportion which quite adversely affected all concerned, more particularly, the company and its shareholders. Such illegalities, resorted to by Dalmia Group, resulted in huge mismanagement in running of the company besides subjecting the petitioners to enormous oppression for which the company had to suffer loss to the tune of Rs. 550.30 crores.

13. In such a scenario, Bawri Group had to approach Hon'ble Delhi High Court by way of an application under Section 9 of the Act of 1996 seeking some interim measures against Dalmia Group for protecting the interest of the company as well as the shareholders thereof. Such an application was numbered and registered as O.M.P. (I) 279/2015. On hearing the parties, Delhi High Court was pleased to treat such petition as an application under Section 17 of the Act of 1996 and was also pleased to pass the order dated 19.10.2015 which runs as follows:

> *"The respondents shall not transfer, alienate or create any third party interest in respect of their fixed assets as well as their shares in Calcom Cement India Ltd. till disposal of Section 17 applications by the learned Arbitrator "*

14. Dalmia Group too approached Delhi High Court invoking provisions in Sec. 9 of the Act of 1996 seeking some interim reliefs. Such application was numbered and registered as OMP (1) 341/2015. On hearing both the parties, by the order dated 19.10.2015, Delhi High Court was pleased to order that the petition, filed by Dalmia Group, too would be treated as petition U/s. 17 of the Act of 1996.

15. Thereafter, the petitioner Nos.1--9 approached the CLB, Kolkata having filed a Company Petition under Section 397, 398, 402, 403 & 406 of the Companies Act, 1956, which was numbered as C.P.No.143/2015. In such application, Bawri Group alleged that Dalmia Group and other respondents from 3-25 have resorted to huge illegalities in managing the affairs of the company which resulted in huge loss to

the company besides perpetuating huge harassment on the petitioners who are admittedly minority shareholders of the company.

16. Some of the allegations, so stated in the petition U/s.397/398 of the Companies Act, 1956, are as follows:

> ***i).*** *Breach of Article 15 (ii), 15 (iii) & Article 92 of the AOA: - Dalmia Group has caused the company to obtain loans in excess of Rs.150 crores at high rate of interest from R2 without express consent of Bawri Group,*
>
> ***ii).****Non-resolution of 2 Deadlock events in accordance with requirement of Article 92,The company was not given an opportunity to exercise its right of first refusal to invest in R19 upto a maximum of 25% of its full diluted share capital,*
>
> ***iii).****Dalmia Group has not caused the company to assign the Brand names in favour of Bawri Group or its nominee for Re.1/-,*
>
> *iv).Dalmia Group has wrongfully withheld the project information flow and did not hold any review meetings for project and operations,*
>
> ***v).****Dalmia Group caused the company to change the scope of concurrent audit contrary to the manner specified in AOA,*
>
> ***,vi).****Company and Dalmia Group failed to complete the said plants by 31.03.2014,*
>
> ***vii).****Article 66(a) was introduced in AOA which declares that all the disputes relating to conflict of interest of Dalmia Group vis-a-vis R-19 shall be untenable and would be deemed to have settled,*
>
> ***viii),****Dalmia Group has violated Article 66 (d) of the AOA,*
>
> ***ix).****Dalmia Group has failed to appoint a Managing Director of the company in accordance with prescription of AOA*
>
> ***,x).****Dalmia Group entered into a contract with related parties in violation of statutory provision,*
>
> ***xi).****Dalmia Group failed to appoint governance committee in violation of provisions incorporated in the AOA and*
>
> ***xii).****Awarded contract to Gammon Dunkerley & Company Ltd. at a price much higher than the prevalent market price.*

17. As stated above, on the basis of above allegations, the petitioners had approached CLB, Kolkata seeking various reliefs, the prominent among them being,

> *(i) Framing of a scheme for management and administration of the company (9a),*
>
> *(ii) Declaration that Article 66 (a) of the amended Articles of Association is void, illegal, bad in law and is liable to be set aside and*
>
> *(iii) A direction requiring the respondents to compensate the company to the extent of Rs.550.32 crores or in alternative such sums as may be found due on proper enquiry.*

18. In the meantime, the respondents no I & 2 in the company petition have filed an application under Section 8 of the Act of 1996 urging the learned CLB to refer the parties to the arbitration, since, according to the counsel for the applicants , the allegations in the company petition arose from or in connection with the implementation or non –implementation of various terms and conditions incorporated in the SHA-I & SHA-II, **since** each of such agreements, contained an arbitration clause for resolution of disputes arose there-from and **since** the disputes in the company petition are well covered by the arbitration agreements requiring g such disputes to be decided by arbitrator alone and not by any other authority.

19. It may be stated here that on receipt of the petition under Section 397/398 of the Act of 1956, learned CLB, Kolkata has passed an interim order directing the parties to maintain status quo as regards the shareholding of the company and the composition of Board of Directors besides restraining both the parties from creating any third party's interest over the fixed assets of the company without leave of the CLB vide order dated 27.07.2015 in C.P.No.143/2015.

20. Such order was challenged before the Hon'ble Gauhati High Court by the applicants by filing an appeal as well as a revision petition alleging that order dated 27.07.2015 cannot be passed by CLB without first disposing section 8 application. However, after hearing the parties, Hon'ble High Court was pleased to reject such appeal/revision but leaving the section 8 application to be decided by the CLB, Kolkatta.

21. Dr. U.K. Chaudhary ,the learned Sr. counsel appearing for Dalmia Group, now, submits that though the disputes in company petition are basically commercial disputes which reportedly occurred for alleged violations of various clauses in the agreements and therefore, only the 'Arbitrator', and not the 'CLB', has necessary jurisdiction to adjudicate such disputes, yet , the petitioners drafted the company petition in such a way that it creates a false impression that the allegations in the company petition constitute what is contemplated in section 397/398 of the Act as "mismanagement and oppression".

22. In simple words, according to the learned counsel for Dalmia Group, the company petition is nothing but a dressed up petition which is designed to avoid the resolution of disputes through the mechanism of arbitration, so incorporated in the agreement itself. Mr. D. Baruah, counsel, appearing for applicant No1 too supported the contention, advanced by the learned counsel for the applicant No.2. In support of their various claims, the counsel for the applicants has relied on the following decisions: -

1. P. Anand Gajapathi Raju Vs. P.V.G. Raju 2004 (4) SCC 539

2. Hindustan Petroleum Corp Ltd. Vs. Pinkcity Midway Petroleum

2003 (6) SCC 503

3. Airtouch International (Marutius) Ltd. Vs. RPG Cellular Investment and Holding Pvt. Ltd. (2004) 121 Comp Case 647 (CLB),

4. Everest Holding Ltd. Vs. Shyam Kumar Shrivastava & Others

2008 16 SCC 744

5. Telenor Asia (P) Ltd. Vs. Unitech Wireless (Tamil Nadu) (P) Ltd. & Ors

MANU/CL/0003/2012,

6. Pinka Das Gupta Vs. Maadhyam Advertising (P) Ltd.

MANU/CL/0040/2002,

7. Ananthesh Bhakta Represented by Mother Usha A. Bhakta & Ors. Vs. Nayana S. Bhakta (Civil Appeal No.10837/2016,

8. Ramnish Kumar Sharm Vs. D.R. John Lab Pvt. Ltd.

MANU/NC/0112/2016,

9. Co-Operative Central Bank Ltd. Vs. Addl. Industrial Tribunal

MANU/SC/0611/1969 :: AIR 1970 SC 245,

10. Kinetic Engineering Ltd. Vs. Sadhana Gadia & Others

MANU/CL/))12/1992 and

11. S.S. Rajkumar Vs. Perfect Castings Private Ltd. MANU/TN/0323/1967

23. In *P. Anand Gajapati Raju,* (supra) Hon'ble Apex Court held that the language of section 8 is quite peremptory and, therefore, it is quite obligatory for the Court to refer the parties to the arbitration in terms of their arbitration agreement. Similar view was rendered by the Apex Court in Hindustan Petroleum Corporation Ltd. (Supra) where it was held that when there is an arbitration agreement, it is obligatory for the Court to refer the parties to arbitration and it is for the arbitral Tribunal to rule its own jurisdiction including ruling on any objection with respect to the existence or validity of the arbitration agreement.

24. On the other hand, the learned advocates appearing for **non-applicants/petitioners** strenuously contends that the arguments advanced from the side of the applicants structured more on surmise than on law, logic and facts. In that connection, it has been contended that Section 7 & 8 of the Act of 1996 mandate that before referring the parties to the arbitrator, the judicial authority must come to a clear finding that all the conditions, prescribed there- under are met, and that too, simultaneously. But none of the conditions, which are specified in Section 7 & 8 of the Act of 1996 and which are necessary for requiring the judicial authority to refer the parties before it to arbitration are met in the case in hand.

25. In elaborating such an argument further, it has been stated that the conditions specified in Section 7 & 8 of the Act of 1996 *are as follows:*

i). *A valid arbitration agreement between the parties is required to be in existence,*

ii). *The "subject-matter" of the proceedings which are sought to be referred to arbitration by way of the Section 8 application has to be the same subject-matter covered by the arbitration agreement in question.*

iii). *There has to be commonality of parties. This means that all the parties to the proceeding which are sought to be referred to arbitration by way of the Section 8 applications have to be "parties" to the arbitration agreement in question.*

iv). *The mandatory provisions of Section 7(2) of the said Act which provides that the arbitration agreement must not only be in writing but it must be signed by all the parties to the agreement are to be met.*

v). *The mandatory provisions of Section 8(2) of the said Act which provides that every application under Section 8(1) of the said Act shall be accompanied by the original arbitration agreement of a duly certified copy thereof, has also be complied with."*

vi). *The Arbitral Tribunal must be in a position to grant all the reliefs, sought for, in the company petition.*

26. Anything short of above would invariably require the judicial authority to turn the prayer in section 8 application. But according to Mr. S.N. Mukherjee, Sr. Advocate appearing for petitioner Nos. 1 to 9 and Mr. P. Chatterjee, Sr. Advocate appearing for petitioner Nos. 10 to 15, all those conditions remain far from

being satisfied in the proceedings under section 8 of the Act of 1996. In support of their case, the learned Sr. Counsel for the petitioners/non-applicants had relied on the following decisions:

The petitioners have relied upon the following decisions: -

1.(2007) 137 CC 513 (Gautam Kapur and Others Vs. Limrose Engineering and others
2. 123 CC 280 (Greisheim Gmbh Vs. Goyal Mg Gases Pvt. Ltd. and Others)
3.(2006) 4 CTC 377 (Sporting Pastime India Limited, Registered Office No.19, Kothari Road, Nungambakkam, Chennai – 600034 and Another Vs. Kasthuri & Sons Limited 859 and 860, Anna Salai, Chennai – 600002)
4. (1977) 47 CC 92 (Benett Coleman and Co. Vs. Union of India and Others)
5. 1980) 50 CC 771 (Debi Jhora Tea Co. Ltd. Vs. Barendra Krishna Bhowmick and Others)
6. AIR 1978 SC 375 (1978) 1 SCC 215 (Cosmos Steels Pvt. Ltd. and Others Vs. Jairam Das Gupta and Others)
7. (1977) 47 CC 276 (Surendra Kumar Dhawan and Another Vs. R. Vir and Others)
8. ILR 1975 Del (II) 911 (Shri O.P. Gupta Vs. M/S Shiv General Finance (P) Ltd. & Others)
9. 1984 Mh.Lj. 586 (Manavendra Chitnis and Another Vs. Leele Chitnis Studios Pvt. Ltd. and Others)
10. (2004) 2 Abr LR 241 (Sudarshan Chopra and Others Vs. Company Law Board and Others)
11. (2011) 5 SCC 532 (Booz Allen and Hamilton Inc. Vs. SBI Home Finance Limited and Others)
12. 2014 SCC Online Bom 1146 (Rakesh Malhotra Vs. Rajinder Kumar Malhotra
13. SC Order dated 10th September, 2014
14. 2015 SCC Online CLB 267 (Mr. Christians Muller & Others Vs. M/S A & C Braid and Rope Company Pvt. Ltd. & Others)
15. (Avigo PE Investments Ltd. Vs. M/S Tecpro Engineers Ltd. & Others) CLB order dated 18th March, 2016.
16. 2016 SCC Online Bom 2391 (Emgee Housing Private Limited Vs. ELS Developers Private Limited).
17. 2016 SCC Online Del 2312 (Apex FRP Chemicals Private Limited Vs. Om Prakash Gupta)
18. AIR 1958 Mad 587 (DB) (Syed Mahomed Ali Vs. Sundaramoorthy).
19. (2005) 11 SCC 314 (Sangramsinh P. Gaekwad and Others Vs. Shantadevi P. Gaekwad (dead) through LRS and others)
20. (1959) 1 WLR 62 (In Re: Harmer (H.R.) Ltd.
21. (2003) 5 SCC 531(Sukanya Holdings (P) Ltd v. Jayesh H. Pandya and Another).
22. (2016) 8 SCC 788 (Vimal Kishor Shah and others v. Layesh Dinesh Shah and others).
23. (2008) 2 SCC 602 [Atul Singh and Others v. Sunil Kumar Singh and Others]
24. (2015) 1 SCC 3 [State of West Bengal and Others v. Associated Contractors]
25. Madras High Court orders [Cellfone Ltd. V. RPG Cellular Investments & Holdings P. Ltd.]
26. 1981 (3) SCC 333 [Needle Industries (India) Ltd and Others vs. Needle Industries Newey (India) Holding Ltd. And Others]
27. (2009) 148 CC 742 [Ajay Kirti Dalmia vs. Company law Board and others]
28. (2007) 137 CC 737 [Premier Automobiles Ltd vs. Fiat India P. Ltd. and Others]
29. (2012) 4 CHN 157 [Keshav Mimani v. Indu Kocher]
30. 2012 (6) SCC 613 [Vodafone International Holdings B V v. Union of India and Antoher].

27. *In Sukayanya Holdings Private Limited (supra),* it has been held that one of the fundamental conditions for referring the parties before the judicial authority to the Arbitral Tribunal is that the subject matter in the proceeding before the CLB and subject matter in the arbitration agreement must be one and same. Without such a condition being met, the CLB cannot refer the parties to the Arbitral Tribunal.

28. Where the judicial authority has come to a conclusion that one part of the matter before it is triable by such authority and other part is triable by Arbitral Tribunal, in that event, judicial authority

cannot refer the parties to the Arbitrator since there is no scope for division of subject matters. In support of such contention, decision in *Sukanya Holding (P) Ltd. (supra)* is relief on.

29. According to the counsel for the petitioners, if the parties in the arbitration agreement and the parties before the judicial authority are not identical, the judicial authority cannot refer the party to the arbitrator as has been held in *Ajay Kriti Kumar Dalmia (supra)* and Premier Automobile Ltd. (supra).

30. In Christians Muller & Ors. (Supra), it has been held that the jurisdiction of CLB cannot be ousted by arbitration clause since CLB has vast powers for regulating the affairs of company. The decision in *Christians Muller (supra)* derives further support from decisions, rendered in the case of *Surendra Kumar Dhawan & Anr. (supra), Avigo PE Investments Ltd. (supra), Griesheim GmgH (supra), Gautam Kapur & Ors. (supra), Sangramsinh P. Gaekward & Ors. (supra), Cosmosteels Private Ltd. (supra), Bennet Colemen (supra), Debi Jhora Tea Co. Ltd. (supra) and Emgee Housing Private Limited and Ors (supra), Rakesh Malhotra (supra) & Shri O.P. Gupta (supra).*

31. *In Surendra Kumar Dhawan & Anr. (supra), Shri O.P. Gupta (supra), Manavendra Chitnis & Anr. (supra), Gautam Kapur & Ors. (supra), Griesheim GmgH (supra) and Christians Muller & Ors. (supra) and Debi Jhora Tea Co. Ltd. (supra),* it has further been held that CLB has vast and wide power and has necessary jurisdiction to pass direction which may be contrary to the provisions of the AOA.

32. *In Booz-Allen & Hamilton (supra),* it has been held that Arbitral Tribunal are private fora and, therefore, matters relating to public interest cannot be adjudicated by such Tribunal. Since the decisions on such matters create right in rem and therefore, the matters involving public interest can be adjudicated only by public fora like CLB, and, not by private fora like Arbitral Tribunal.

33. The reliefs which are made available under Section 402 and 403 are statutory reliefs and therefore, only statutory bodies like CLB can grant such reliefs. The Arbitral Tribunal has no authority whatsoever to grant reliefs, so specified in Section 402 & 403 of the Companies Act. In support of such claim, the decision in *Sporting Pastime India Limited* (supra) and Apex FRP Chemicals Private Limited (supra) are relied upon.

34. Referring to the decisions in *Sporting Pastime India Limited* (supra) and Premier Automobile Ltd. (supra), It has also been contended that if the allegations of oppression and mismanagement can be adjudicated upon by a Tribunal without any reference to the arbitration agreement, then, there is no question of referring the parties to the Arbitral Tribunal even if the arbitration agreement covers the same issue before the CLB.

35. Referring to the decision in *Sangramsinh P. Gaekward & Ors.* (supra), it has been submitted that there are certain matters, such as, transfer of shares in violation of AOA and Companies Act, increase in capital to gain control over the company, removal of Directors, amendment of articles violating the statutory right, and not permitting the existing shareholders to exercise rights are the violation of statutory rights of the shareholders of the company and same cannot be relegated to Arbitral Tribunal for adjudication.

36. Certain matters such as matter relating to trust, trustees and beneficiaries arising out of trust deed and the Trust Act, 1882 are not capable of being decided by the Arbitrator and as such, such matter cannot be referred to Arbitrator despite there being arbitration clause vide decision in *Vimal Kishore Shah and Ors.*

(supra). In re HR Harmer Ltd. (supra), it has been held that violation of the AOA itself is an act of oppression.

37. In *Sangramsinh P. Gaekwad* (supra), it has been held that certain matters, such as, removal of Director, transfer of shares in violation of Articles of Association and the Companies Act, increase in capital to gain control over the company, amendment of Articles violating the statutory rights and not permitting the existing shareholders to exercise their statutory rights etc. cannot be tried by Arbitrator. Such matters are in the exclusive domain of the Company Tribunal.

38. Referring to the decision in decision in Needles Industries (India) Ltd. (supra), it is being argued by Mr. Chaterjee , Ld Sr. Counsel appearing for the petitioner Nos. 10 t0 15 that even if the petitioner in a proceeding under Section 397/398 could not make out the allegation of oppression and mismanagement even then, the CLB has the jurisdiction to provide necessary relief to the petitioner in order to do substantial justice.

39. According to Sri S.N. Mukherjee, Sr. Advocate and Sri S. Dutta , Sr. Advocate appearing for petitioner Nos. 1 to 9 and Sri P. Chatterjee, Sr. Advocate appearing for petitioner Nos. 10 to 15 , laws, laid down through aforesaid decisions, are quite authoritative and unambiguous as well and being so, such decisions are clearly applicable to the instant case since the facts and circumstances in the case in hand are very similar to the facts and circumstances of the cases, relied on by the petitioners. In such a scenario, this court has no other option but to dismiss the section 8 proceeding.

40. On the other hand, Dr U.K. Choudhury, the learned Sr. Counsel for the applicant No. 2 submits that no one disputes the law laid down through the decisions cited by the counsel for the petitioners but the aforesaid decisions, according to Dr U.K.Choudhury, have no application to the case under consideration since the disputes projected through the company petition are nothing but disputes over various breaches of agreements in the SHAs which are quite contractual in nature.

41. **Since** the disputes which are the subject matters of the company petition are actually contractual dispute, and, not management disputes **and since** the actual parties to the petition and the parties to the arbitration agreements are identical **and since** the section 8 application satisfies all the requirements of law , there cannot be any escape from the conclusion that the parties to the company petition are to be referred to the arbitration, more so , when both SHA-I and SHA-II had in them a valid arbitration clause requiring the parties thereto to settle any dispute arising out or in connection with the implementation of such agreement only by arbitrator and by no other authority – argues the counsel for the applicant No.2.

42. Repeating the arguments, advanced by the counsel for the applicant No 2, Mr. D. Baruah, learned counsel for applicant No. 1, further submits that when the applicant No. 2 was allowed to join the company as a strategic partner, the company was in a morbid and moribund condition. In such a senerio, the applicant No. 2 was invited to join the company as strategic partner with the high hope that such joining of the applicant No.2 would revamp the company. Truly to such expectation, with t the arrival of the applicant No. 2 in the scene, the company gets new momentum. Such revelations –argues Mr. D. Baruah ----only show the falsity of the various pleas which the petitioners took in the proceeding under section 397/398 of the Act of 1956 which, in turn, requires the court to allow the proceeding under section 8 of the act of 1996.

43. Since both the parties have attacked each other on various points advancing lengthy argument on each count and had also relied on a series of judgment in support of their respective case, I find it necessary not to refer such arguments now. Instead, for convenience of discussion and for brevity as well, I propose to discuss the case of the parties point wise (so stated in para 25 of this judgment) and also propose refer to the arguments, advanced by the learned counsel for the parties point-wise at appropriate time and place. Being so, I have taken up point No.(i) aforesaid first for discussion.

Point No.(I)

(Whether there is an arbitration agreement requiring the parties to resolve their dispute(s) through arbitration).

44. The learned counsel for the applicants contend that the existence of a valid arbitration agreements was not in dispute and in that connection, it has been submitted that the petitioners themselves had annexed copies of the SHA-I and SHA-II with the petition Under Section 397/398 of the Act of 1956 and such agreements indisputably contain arbitration clauses. They also annexed copies thereof along with the reply to the Section 8 application. Such revelations, according to the applicant, are the clear proofs of there being valid arbitration agreements requiring the parties thereto settle the dispute, if any, through the device so incorporated in the agreements.

45. It may be stated here that the SHA-I contains an arbitration agreement. SHA-II too says that –the arbitration clause in SHA-I would also be applicable to the dispute(s) that may arise in implementation of the various clauses therein. For ready reference, the relevant clause in SHA-I, same being clause 17 is reproduced below: -

DISPUTE RESOLUTATION AND GOVERNING LAW

17.1 The provisions of this Agreement shall be governed by, and construed in accordance with the laws of India.

17.2 Any party(ies) who claims that a claim, dispute or difference in accordance with this Agreement or the performance of any provision hereunder ("Dispute") has arisen (" Disputing Party") must give notice seeking amicable settlement thereof to the other party(ies) (" Non-Disputing Parties") as soon as applicable after the occurrence of the event, matter or thing which is the subject of such Dispute and in such notice such party(ies) shall provide particulars of the circumstances and nature of such Dispute and of its claim(s) in relation thereto.

17.3 Any Dispute between the Parties under this Agreement shall be referred for negotiation and discussion between Mr. Binod Kumar Bawri on behalf of the Promoter Group and Mr. Y.H Dalmia on behalf of the Dalmia Group (together hereinafter referred as "Representatives") who shall meet as soon as practicable and attempt to resolve the Dispute.

17.4 Any dispute between the parties, which cannot be settled by such negotiations and discussions within 30 (thirty) days of the first meeting of representatives ("Consultation Period") shall, unless the parties otherwise agree in writing be resolved exclusively by arbitration and either party may refer the dispute, for settlement by arbitration in

accordance with the provisions of the Arbitration and Conciliation Act, 1956 ("Arbitration Act").

17.5 Within 10(ten days) of a party referring a dispute for settlement by arbitration, the parties shall jointly appoint Mr. S. Gurumoorthy who shall be the and Presiding arbitrator. Failing any such appointment of an arbitrator, due to non-availability or otherwise, the parties shall mutually appoint a suitable alternate person in place of Mr.S.Gurumoorthy as the sole arbitrator for the dispute. If the parties to the dispute fail to agree on the alternate person to be appointed as a sole arbitrator within 10(ten) days of a Party referring a dispute for settlement by arbitration, the dispute shall be decided by an arbitration panel of 3(three) arbitrators who shall be appointed in accordance with the provisions of the Arbitration Act.

17.6 The language of arbitration in relation to this agreement shall be English. The place of arbitration in relation to this Agreement shall be decided by the sole arbitrator or the panel of arbitrators as the case may be.

17.7 Any award shall be treated as an award made at the seat of the arbitration and the arbitral proceedings shall be conducted in accordance with the Arbitration Act. The arbitral award shall be final and binding upon the relevant parties.

17.8 Each party shall bear the cost of preparing and presenting its case, and the cost of arbitration, including fees and expenses of the arbitrators, shall be shared equally by the Parties unless the award otherwise provides.

17.9 To the extent possible and notwithstanding commencement of any arbitral proceedings in accordance with this Clause 17.

(i) the parties shall continue to perform their respective obligations under this Agreement; and

(ii) such arbitral proceedings shall be conducted so as to cause minimum inconvenience to the performance by the parties of the obligations under this Agreement.

17.10 subject to the provisions of this Clause 17, this agreement shall be subject to the exclusive jurisdiction of competent courts of New Delhi, India.

46. However, learned counsel for the petitioners submits that they have, no doubt, annexed the copies of aforesaid agreements along with the petition under Section 397/398 but they did so only for the purpose of elucidating their case properly. Therefore, under no circumstances, the annexing of copies of agreements aforesaid along with the company petition could be interpreted to mean that the existences of arbitration agreements in question have been admitted by the petitioners.

47. I have considered the rival submissions having regard to averments made in company petition as well as the pleadings of the parties in the proceeding U/s. 8 of the Act. On making such an exercise, I have found that admittedly, the petitioners had annexed copies of said SHAs along with the company petition. There is nothing on record to suggest, even remotely that arbitration agreements in the SHAs are not valid for any reason whatsoever.

48. On further perusal of the relevant materials on record, it is found that the petitioners annexed the copies of those agreements, not only for the purpose of elucidating their case properly but they did so to

lay the foundation of their case in the company petition as well. Being so, I have no hesitation in holding that the existence of valid arbitration agreements has been proved beyond any shadow of doubt.

Point No.(II)

(Whether subject matter in Arbitration and company petition are one and same.)

49. Here, the parties to this proceeding took diametrically opposite stances and argued at length to support their respective stand. We have already found that the learned counsel for the non-applicants/petitioners keeps on arguing that the allegations, made in the petition under Section 397/398 of the Act per se disclose mismanagement in running the affairs of the company and so also oppression, having been perpetuated by Dalmia Group on the minority shareholders. Being so, the disputes in company petition can be adjudicated by the CLB alone which is clothed with enormous power to grant statutory reliefs, so specified in section 402/403 of the Act of 1956.

50. But then, the applicant No.2 (respondent No. 2 in the C.P. No. 143/2015) categorically claims that the subject matters in the proceeding U/s 397/398 of the Company Act, 1956 are nothing but alleged violations of various clauses, incorporated in the SHA -I and SHA- II and therefore, all the disputes in the company petition are fairly and squarely covered by said agreements which quite importantly provide for an effective mechanism for resolution of disputes that may arise while executing various clauses in the agreements.

51. **The fact that** the petitioners could not complete the project conditions in time to the satisfaction of Dalmia Group ----- **the fact that** on the failure of the petitioners to complete the project conditions within the stipulated time, the applicant invoked the default clause in the agreement and asked Bawri Group to sell its remaining shareholding in the company for Re.1/---- as well as--- and---**the fact that** having been so served with notice, Bawri Group invoked mediation clause in the agreements ----are clear testimonies of various disputes, projected through the company petition, having their roots in the agreements aforesaid .

52. These apart, the fact that Bawri Group having been served with notice dated 15.5.2015, approached Delhi High Court by way of an application under section 9 of the Act of 1996, and prayed for, amongst other things, for a direction requiring Dalmia Group not to transfer, alienate or create any 3rd party interest over the fixed assets or in respect of shareholding of the petitioners in the company and the fact that Delhi High Court was pleased to grant some of those reliefs of interim nature are also testimonies to the fact that all the disputes in the proceeding u/s397/308 of the Companies Act having been covered by the arbitration agreements.

53. Despites above being the situations, the petitioners approached the CLB, Kolkatta with a petition under section 397/398 of the Act which was drafted in such a manner that it created an illusion of oppression and mismanagement in running the affairs of the company and same having been committed by Dalmia Group along with many others perpetuating oppression not only on the members of Bawri Group but on some other entities as well.

54. Situation being such, according to the applicants, the disputes, which were projected through the company petition, being commercial/contractual disputes, cannot be adjudicated by the CLB inasmuch as same is meant for purposes different altogether and therefore, the disputing parties are required to be sent to the Arbitral Tribunal for settlement of their disputes in accordance with the mechanism, so prescribed in those agreements.

55. Above being claims and counter claims, let us consider whose claim stands to reason. However, before we could answer the above query, we need to address some other contentious issues which are projected from the side of the petitioners. It may be stated here that these claims from the side of the petitioners, on their own, may not pronounce the final verdict on the matters under consideration in the proceeding in hand.

56. But then, the decisions on such issues, together with some other proved fact or facts would certainly help the court in deciding the truth or otherwise of various other issues involved in the section 8 proceeding. In other words, such revelations together with some other proved fact or facts may help the court in ascertaining whose claims, whether petitioners or applicants, are required to be accepted. One of such issues is the claim of the petitioners that under the SHA- I, Dalmia Group was to infuse funds, necessary to revamp the company, so that it can run effectively.

57. However, according to the Sr. counsel appearing for the petitioners, under the SHA- I, the management of the company was to remain in the hands of Bawri Group. Unfortunately, Dalmia Group did not act in accordance with the prescription in SHA- I and instead, it started interfering with the day to day management of the company for which Bawri Group was constrained to hand over the management of the company to Dalmia Group in the month of October, 2012. In simple words, Bawri Group had to hand over the management of the company to Dalmia Group under compulsion and coercion.

58. Does such a contention bear any truth? An answer to such a query can be found in the introductory part of SHA II. For ready reference, the introductory part of SHA- II is reproduced below:

> A. ***The Parties had entered into a shareholders' agreement dated 16 January 2012 (Shareholders' Agreement) for setting forth their specific mutual understanding and agreement as to their respective rights and obligations with regard to, inter alia, the organization, management and operation of the Company.***
>
> B. ***The BW Group, the Dalmia Group and the Company have executed a share purchase agreement ("Share Purchase Agreement"), whereby the BW Group has agreed to sell and the Dalmia Group has agreed to purchase 9,32,84,485 (Nine crore thirty-two lakh eighty-four thousand four hundred and eighty-five) Equity Shares of the Company for the consideration, on the terms and conditions and in the manner set out in the Share Purchase Agreement.***
>
> C. ***The Parties now wish to amend certain terms of the Shareholders' Agreement. In terms of Clause 22.1 of the Shareholders' Agreement, the Parties have agreed to execute this Agreement to set out the mutually agreed amendments to the Shareholders' Agreement.***

*NOW, THEREFORE, **in consideration of the mutual agreements, covenants, representation and warrantees set forth in the Agreement, and for other good and valuable consideration, the receipt and sufficiency of which is acknowledged by the Parties, the Parties hereby agree as follows:** ---*

59. The introductory part of SHA- II, more particularly, the recitals in bold letters, undoubtedly show that the SHA- II was entered into by the parties out of their free will without they being coerced and compelled by any party/authority, whatsoever. Such revelations overwhelmingly demonstrate that the very claim of the petitioners that they had to hand over the management of the company to Dalmia Group under compulsion is found to be wholly without any substance.

60. This apart, Section 92 of the Evidence Act is the stumbling block in accepting aforesaid claim of the petitioners. Section 92 of the Evidence Act says that when terms of a contract are reduced to writing, no oral agreement can be put in place to repudiate the terms and conditions incorporated in the written contract, unless the statements, incorporated in the written contract are found ambiguous.

61. We have found that terms and conditions, incorporated in SHA-II, vis-a –vis the circumstances leading to amendment of SHA-I are found to be absolutely free from any ambiguity, whatsoever and such averments, clearly show that Bawri Group handed over the management of the company to Dalmia Group willingly and also entered into SHA- II voluntarily. In the face of above revelations and also in view of law laid down in Section 92 of the Evidence Act, Bawri Group cannot be permitted to repudiate the statements in the SHA- II.

62. It is also the case of the petitioners which they projected in their oral argument, and also, in their written argument that only some of the agreements in the SHA -I and SHA -II were incorporated in the AOA. Such claim was, however, vehemently denied by the applicants stating that all the clauses in SHA I as well as all the clauses in SHA II were incorporated in the AOA of the company. In other words, the AOA is replica of the SHA- -I and SHA -II.

63. In order to ascertain the veracity of the claims of the parties on this score, I find it necessary to compare the AOA of the company with the SHA- I and SHA- II and **on doing so**, it is found that the AOA of the company was nothing but the para materia to the SHA-I and SHA-II. Therefore, above claim of the applicants that is found to be entirely truthful. Being so, I have no hesitation in dismissing the claim of the petitioners/non-applicants that only some --and --not all the clauses in the SHA- I and SHA --II ----were incorporated in the AOA.

64. This brings us to the most important aspect of the proceeding under consideration where we are to decide the question if the disputes, projected through the proceeding u/s 397/398 of the Act of 1956, are nothing but alleged violation of various clauses, incorporated in the SHA-I and SHA-II. In order to discuss such a contentious issue conveniently, I find it necessary to compare the various allegations in the company petition with the various clauses incorporated in the SHA-I and SHA-II.

65. In that connection, I also deem it necessary to compare the allegations in the petition with the various clauses in the SHAs as well as with the various Articles in the AOA of the company. On making an exercise as above, I have prepared Two Charts which are as follows:

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CHART-A

A comparative statement to ascertain the connection, if any, between the allegations of breach of Articles of Association of Respondent No.1 and the alleged breaches of various clauses in the SHA-I/ SHA-II

S L . N o .	Allegation in Para No of CP 143	Nature of Allegations	Corresponding clause in SHA-I& SHA -II	Corresponding article ,if any, in AOA
1	Para 6.11 (i)	**Additional Loan to the Company:** Breach of Article 15(ii), 15(iii) & 92 of AOA – Dalmia Group has caused the Company to obtain loans in excess of Rs 150 crores at a high rate of interest of 18%pa from the respondent no's 2 and 19 (without proposing equity contribution by the shareholders and without express consent of Bawri Group)	Clause 3.16 of Amended SHA of 30-Nov-12 which adds clauses 5.2 & 5.3 to the original SHA	Article 15(ii), 15(iii) & 92 of AOA
2	Para 6.11 (ii)	**Completion of Project Conditions / Deadlock Event** Non resolution of 2 Deadlock events: - a)Completion of Project conditions; b)Dissatisfaction in respect of audited accounts of the company on account of entries relating to transactions requiring written approval of the Bawri Group under Article 92 (veto rights)	Clause 3.19 of Amended SHA of 30-Nov-12 which amends clause 7.1 (f) of the original SHA & Clause 4.9 of Amended SHA of 30-Nov-12 which adds clause 14.12.1(c) to the original SHA	Article 45(f), 46, 64(c), & 92 of AOA
3	Para 6.11 (iii)	**Future Business through new subsidiary of DCBL:** Company was not given an opportunity to exercise its right of first refusal to invest in Adhunik (R19) up to a maximum of 25% of its fully diluted share capital.	Clause 21.1 of the original SHA of 16-Jan-12	Article 52 (ii) of AOA
4	Para 6.11 (iv)	**Use of Brand Names** Breach of Article 56 – Dalmia Group has not caused the Company to assign the Brand names in favour of members of Bawri Group or its nominee at Re.1/-	Clause 11 of the original SHA of 16-Jan-12	Article 56 of AOA
5	Para 6.11 (v)	**Disclosure of Project Information/ Review Meetings** Dalmia Group has wrongfully withheld the project information flow and not held any review meetings for projects and operations.	Clause 3.24 of Amended SHA of 30-Nov-12 which amends clause 14.8 to the original SHA	Article 62 of AOA
6	Para 6.11	**Scope of Mandate of internal Auditors & Concurrent Auditors**	Clause 4.8 & 4.9 Amended SHA of 30-Nov-12 which adds	Article 63 & 64

	(vi)	Dalmia Group caused the Company to change the scope of concurrent audit contrary to the manner specified in the Article and excluded audit procurement at Central Office.	clause 14.11.1 & 14.12.1 to the original SHA	of AOA
7	Para 6.11 (vii)	**Completion of Lanka & Umrangshu Plants:** Company and Dalmia Group failed to complete the said plants by 31.03.2014. Umrangshu plant has since been commissioned in April 2015.	Clause 4.9 of Amended SHA of 30-Nov-12 which adds clause 14.12.1 to the original SHA	Article 65 of AOA
8	Para 6.11 (viii)	**Conflict of Interest of DCBL vis-à-vis Respondent no. 19** Article 66(a) provides that all disputes relating to conflict of interest of Dalmia Group vis a vis the respondent no 19 shall be untenable and would be deemed to be settled. The same is void, patently illegal and detrimental to the interest of the Company.	Clause 4.11 of Amended SHA of 30-Nov-12 which adds clause 14.14.1 to the original SHA	Article 66(a) of AOA
9	Para 6.11 (ix)	**Release of pledged equity shares** Dalmia Group has violated **Article 66(d)** of AOA of the Company as it failed to release pledged equity shares within 180 days effective date of the amendment to SHA.	Clause 4.11 of Amended SHA of 30-Nov-12 which adds clause 14.14.4 to the original SHA	Article 66(d) of AOA
10	Para 6.11 (x)	**Appointment of MD** Dalmia Group has failed to appoint a Managing Director of the Company. Instead their own employee has been appointed as a Manager to act as mere puppet in their hands	Clause 3.7 of Amended SHA of 30-Nov-12 which adds clause 3.7.3 to the original SHA (appointment of MD), Clause 3.1 of original SHA (power of MD)	Article 78(iii), 84 & 86 of AOA
11	Para 6.11 (xi)	**Veto rights in favour of Bawri Group** Dalmia Group failed to obtain prior written consent of Bawri Group before causing the Company to enter in to related party transactions up to tune of Rs 550 crores.	Clause 3.9, 3.26 and 3.27 of Amended SHA of 30-Nov-12 which replaces clause 3.10, Schedule IV & Schedule V to the original SHA	Article 92(j) & 93 of AOA
12	Para 6.11 (xii)	**Constitution of the Governance Committee** Dalmia Group has failed to appoint a Governance Committee with the intention of avoiding affirmative voting right to be exercised by Bawri Group before entering into several related party transactions.	Clause 3.12.1.3 of the origin SHA of 16-Jan-12	Article 96(iii) of AOA

CHART-B

A comparative statement to ascertain the connection, if any, between the allegations pertaining to day management of company and the alleged breaches of various clauses in the SHA-I/ SHA-II

Sl. No.	Allegation Para No of CP 143	Nature of Allegation	SHA Clause no of CP 143	AOA Article no. CP 143
Impropriety in Financial Transactions				
1	Para 6.13 and 6.14	Awarding contracts to Gammon Dunkerley & Company Limited at a price much higher by Rs. 21.97 crores than the prevalent market prices and knowing that their credentials were not suitable for the project of the Company.	Clause 3.7 of Amended SHA of 30-Nov-12 which adds clause 3.7.3 to the original SHA *Read with* Clause 3.1 of the original SHA of 16-Jan-12 (powers of MD)	Article 78(iii) the of AoA *Read with* Article 86of the AoA
2	Para 6.17	The audit report on concurrent audit reported a shortfall of material to the extent of a value of Rs. 2.75 crores.	Clause 3.7 of Amended SHA of 30-Nov-12 which adds clause 3.7.3 to the original SHA *Read with* Clause 3.1 of the original SHA of 16-Jan-12 (power of MD)	Article 78(iii) the of AoA *Read with* Article 86 of the AoA
3	Para 6.17	Bawri Group had assessed the unaccounted loss of about 1006 tons of steel having an approximate value of Rs. 5.03 crores.	Clause 3.7 of Amended SHA of 30-Nov-12 which adds clause 3.7.3 to the original SHA *Read with* Clause 3.1 of the original SHA of 16-Jan-12 (power of MD)	Article 78(iii) the of AoA *Read with* Article 86 of the AoA
4	Para 6.19	Rs. 10.64 crores was sanctioned by the Dalmia Group from the Company on account of excavation work as against and agreed fixed budget of Rs 3.17 crores. No large scale of excavation work requiring such large amount was, however, evident at Umrangshu plant on the site as alleged by the petitioners	Clause 3.7 of Amended SHA of 30-Nov-12 which adds clause 3.7.3 to the original SHA *Read with* Clause 3.1 of the original SHA of 16-Jan-12 (power of MD)	Article 78(iii) the of AoA *Read with* Article 86 of the AoA
Diversions of Sales by Dalmia Group				

5	Para 6.11 (viii) Para 6.20 to 6.29	Article 66(a) provides that all disputes relating to conflict of interest of Dalmia Group vis-à-vis the respondent no.19 (Adhunik Cement) shall be untenable and would be deemed to be settled. The same is void, unconscionable and detrimental to the interest of the Company. However, taking advantage of the aforesaid clause the Dalmia Group is diverting sales to its wholly owned subsidiary, Adhunik Cement Limited (respondent no.19)	Clause 4.11 of Amended SHA of 30-Nov-12 which adds clause 14.11.1 to the original SHA	Article 66(a) the of AoA
6	Para 6.30	The security deposit of the customers have been kept and distributed between the Company and Adhunik Cement Ltd in a Disproportionate manner resulting to loss of Rs 73.70 lakhs. Other security deposit from the sales promoter and/or agents were also distributed in a disproportionate manner resulting to an interest loss of Rs. 28.06 lakhs.	Clause 4.11 of Amended SHA of 30-Nov-12 which adds clause 14.11.1 to the original SHA	Article 66(a) the of AoA
Operation and Analysis				
7	Para 6.36	Dalmia Group has engaged transporters charging higher rate of tariff which has caused loss to the Company to the tune of Rs. 9.63 crores	Clause 3.7 of Amended SHA of 30-Nov-12 which adds clause 3.7.3 to the original SHA *Read with* Clause 3.1 of the original SHA of 16-Jan-12 (power of MD)	Article 78(iii) the of AoA *Read with* Article 86 of the AoA
8	Para 6.37	Dalmia Group has also engaged other suppliers, inter alia for supply of packaging material, services, business promotion and other materials at rates higher than prevailing market rate and entering in to contracts with other related entities (respondent no.'s 22 to 24)	Respondents indicated include only related parties and GDC. Related parties covered by Clause 3.9 read with clause 3.26 of Amended SHA of 30-Nov-12 which replaces clause 3.10 & Scheduled IV to the original SHA GDC contract Clause 3.1 of the original SHA of 16-Jan-12 (powers of MD)	For related party transactions refer Article 92 of AOA
Related Party Transactions (RPT)				
9	Para 6.50 (A)	Dalmia Group has caused the Company to purchase clinker from third party sources at a higher rate than spot market. Over a period of 24 months a total quantity of 2,82,467 tonnes of clinker was purchased from the related parties of Dalmia Group (Respondent no. 19 & 23) representing 52% of total clinker purchased during the period. It was a device to off load	Clause 3.9 read with clause 3.26 of Amended SHA of 30-Nov-12 which replaces clause 3.10 & Scheduled IV to the original SHA	Article 92(j)of AOA

		excess clinker at exorbitant price.		
10	Para 6.50	Clinker belonging to the subsidiary of the Company, i.e. Respondent no. 10 (Vinay Cement) being sold to Respondent no. 19 (Adhunik Cement) causing the Company loss up to the tune of Rs. 1.31 crores.	Clause 3.9 read with clause 3.26 of Amended SHA of 30-Nov-12 which replaces clause 3.10 & Scheduled IV (item 10) to the original SHA	Article 92(j)of AOA
11	Para 6.50 (B)(vii)	Dalmia Group has caused the Company to purchase clinker from third party sources at a higher rate than spot market. Shubhashree Road Carriers (Respondent no. 24) based on a single quotation.	Clause 3.9 read with clause 3.26 of Amended SHA of 30-Nov-12 which replaces clause 3.10 & Scheduled IV to the original SHA	Article 92 of AOA

66. The **Chart -- A --** above shows that the various allegations in the company petition ,which were shown in serial No. 1 to 12 of the chart –A--- above, match with clause 3.16 of SHA-II, (clause 3.19&clause 4.9 of SHA-II) , clause 21.1 of SHA-II, clause 11 of SHA-II ,clause 3.4 of SHA-II, (clause 4.8 & 4.9 of SHA-II), clause 4.9 of SHA-II , clause 4.11 of SHA-II, clause 3.7 of SHA-II, (clause 3.9, clause 3.26 & clause 3.27) and clause 3.12.1.3 of SHA-I) respectively.

67. Similarly, the Chart -- B -- above shows that the some other allegations in the company petition ,which were shown in serial No. 1 to 6 of the Chart-B, above, match with the (clause 3.7 of SHA-II r/w clause 3.12 of SHA-I), (clause 3.7 of SHA-II r/w clause 3.1 of SHA-I), (clause 3.7 of SHA-II r/w clause 3.1 of SHA-I), (clause 3.7 of SHA-II r/w clause 3.1 of SHA-I), clause 4.11 of SHA-II and clause 4.11 of SHA-II respectively.

68. Likewise, the Chart -- B -- above shows that the allegations in the company petition ,which were shown in serial No. 7 to 11 of the Chart-B, above, are relatable **to** clause 3.7 of SHA-II r/w clause 3.1 of SHA-I), - (clause 3.9 of SHA-II r/w clause 3.26 of SHA-II), (clause 3.9 of SHA-II r/w clause 3.26 of SHA-II), (clause 3.9 of SHA-II r/w clause 3.26 of SHA-II) and (clause 3.9 of SHA-II r/w clause 3.26 of SHA-II) respectively.

69. On a further and very careful perusal of the company petition in the light of various documents attached therewith, more particularly, the SHA-I and SHA-II, one would also find that even those allegations in the company petition, which cannot be directly correlated to any of the clauses in the said agreements, seem to be the summery effect of alleged violations of various clauses incorporated in agreements under consideration. What, therefore, emerges from the charts above is that each of the allegations in the company petition could be correlated to a corresponding clause or cluster of clauses in the SHAs in one way or other.

70. Therefore, the bedrock of each of the allegations in the petition is nothing but a corresponding clause in the SHAs. In that view of the matter, each of such allegations clearly represents a breach of corresponding clause or a cluster of clauses in the SHAs. In simple words, each allegation in the company petition is nothing but a story about violation of a corresponding clause or a cluster of clauses in the SHAs Such revelations, in my considered view, give a very firm footing the claim of the applicants that the subject matters in company petition and the subject matters in SHAs are same.

71. Since each clause in SHAs is evidently a contractual in nature and since each of the allegations in the company petition is nothing but a story about violation of a corresponding clause or a cluster of clause in the SHAs and therefore, the disputes, projected through the company petition, in my considered opinion, are entirely commercial/contractual disputes and not at all management disputes as claimed by the counsel for the petitioners.

72. It is in those backdrops, let me consider yet another important aspect of the section 8 proceeding, the decision on which would greatly shape the outcome of the proceeding in hand. It may be stated here that the applicants persistently contend that though all the clauses in the SHA-I and SHA-II have their own importance in one way or other , yet , there were certain clauses in the SHA-I/SHA-II , which carry enormous importance and therefore, the parties to the agreements were expected to perform their part of duties under such agreements with unfailing dedication since the success or otherwise of various schemes , in the agreements, is dependent on meticulous execution of those schemes.

73. The project conditions, so incorporated in the SHA –I, were said to be one of such sets of very vital and very fundamental clauses in the agreements. Project conditions are incorporated in Clause 9.1 of the SHA—I. Evidently and admittedly too, the task of completing such project conditions under the SHA-I was originally entrusted to Bawri Group alone and none else. For ready reference, clause 9.1 is reproduced below:

> "9. **PROJECT CONDITIONS**
>
> 9.1 The Bawri Group undertakes to complete or ensure the completion of the following conditions ("Project Conditions") to the reasonable satisfaction of the Dalmia Group on or before June 30, 2013):
>
> *(a) The Company shall have obtained necessary clearance and renewals, as the case may be, from the Ministry of Environment and Forests with respect to its operations and use of land at: (i) Grinder Plant in Lanka, District Nagaon, Assam; (ii) Clinker Plant at Jamunanagar, Umrangshu, Assam for 0.75 mtpa; and (iii) cement grade limestone mining unit at New Umrangshu, North Cachar Hills, Assam.*
>
> *(b) The Company shall obtain "consent to operate" as required under Water (Prevention and Control of Pollution) Act, 1974 and with respect to (i) cement grade limestone mining unit at New Umrangshu, North Cachar Hills, Assam; (ii) Clinker Plant at Umrangshu; and (iii) the Grinder Plant in Nagaon, Lanka, as may be required.*
>
> *(c) The Company shall secure electricity supply through 132 KVA line to be set up by ASEB for the Clinker Plant at Jamunagar, Umrangshu.*
>
> *(d) The Company shall have renewed and have valid Mining Lease for the Project and obtained necessary authorizations for running the mines of the Project as its installed capacity, including but not limited to clearance from the Ministry of Environment and Forests and consent to operate.*
>
> *(e) Subject to funding being made available to the Company, the Company shall have constructed the railway siding at the Project.*
>
> *(f) Consent of N C Hill council for the surface rights over the area comprised in the Mining Lease.*
>
> *(g) Company shall have completed all actions and procedural formalities, required under the Central Government and the State Government subsidy schemes (except where such actions are required to*

be completed after commencement of commercial production), such as obtaining registrations and eligibility certificates with respect to all its units including but not limited to eligibility certificate for VAT remission/incentives for the Company and registration of Haflong unit for transport subsidy.

(h) Registration of Mining Lease as well as the lease deed for the factory land situated at Umrangshu, Assam.

In case of unforeseen delays to the completion of the Project Conditions, the time period to ensure completion of the Project Conditions to the satisfaction of the Dalmia Group shall stand extended to March 31, 2014 ("Project CP Satisfaction Date"). However, if the clinker unit is ready to commence production during the period July 1, 2013 and March 31, 2014 but unable to commence production because of non-availability of limestone, then the last date for the completion of the Project Conditions i.e. the Project CP Satisfaction Date shall be the date on which the clinker unit is unable to operate because of non-availability of limestone.

On or before the Project CP Satisfaction Date, the Bawri Group shall issue a notice to the Dalmia Group stating that the Project Conditions have been completed. Within 10 (ten) days, the Dalmia Group shall issue a notice ("Project CP Satisfaction Notice") to the Bawri Group, indicating that (i) all the Project Conditions have been completed to its satisfaction; or (ii) the Project Conditions which have not been completed to the reasonable satisfaction of the Dalmia Group and giving the Bawri Group a time period of 10 (ten) Business Days to complete such Project Conditions. If within the aforesaid period of 10 (ten) Business Days, Bawri Group are unable to complete such Project Conditions to the reasonable satisfaction of the Dalmia Group, the Dalmia Group shall have the right, at its sole discretion, to exercise the rights set out in Clause 9.2.

74. More importantly, what would be the consequences for failure to complete such project conditions within the specified time had also been stipulated in the SHA-I itself, vide clause 9.2 of the SHA-1. For ready reference, clause 9.2 is also reproduced below:

9.2 The Parties agree that upon the happening of any of the following events:

(a) the Bawri Group are unable to complete the Project Conditions in accordance with Clause 9.1 above.

(b) the Bawri Group and/or the Company issues a notice, in writing, to the Dalmia Group, that the Project Conditions will not be completed on the Project CP Satisfaction Date:

then notwithstanding the provisions of Clause 6, the Dalmia Group shall have the right, at its sole discretion, to either:

Purchase, by itself or through any nominee, Affiliate or Third Person nominated by the Dalmia Group, at its sole discretion, all and not less than all of the Shareholding of the Promoter Group in the Company for an aggregate consideration of Re.1 (Rupee One Only) and upon exercise of such right by the Dalmia Group, the Promoter Group shall be obliged to sell, and the Bawri Group shall cause Hold Co-1 to sell, all and not less than all of its Shareholding in the Company to the Dalmia Group for an aggregate consideration of Re.1 (Rupee One Only); or

(ii) Exercise the right to convert the Warrant issued to it, such that the Warrants shall be converted upto 99% (ninety nine percent) of the Share Capital of the Company. The Company shall be obliged to, and the Promoter Group shall be obliged to cause the Company to, undertake all necessary actions and obtain all necessary approvals, to effect the conversion of the Warrants.

75. The applicants alleged that such project conditions could not be completed within the time specified in the SHA-1 for which SHA-I was required to be amended suitably and in that connection, a modified SHA was put in place which we have referred to as SHA –II, but, according to the applicants, the liability of completing project conditions even under the SHA-II was again left with Bawri Group, but then,

the time for completion of the project conditions was extended further. In support of such contention, my attention has been drawn to various clauses including clause 3.20 of the SHA-II.

For ready reference, clause 3.20-of the SHA-II is also reproduced below:

3.20 The Parties hereby agree that within 60 (sixty) days from the Effective Date, the Parties shall mutually agree on the amendments to Clause 9.1 with respect to Project Conditions, the support required to be given by the Parties for completion of the Project Conditions and the effect thereof, if any. Such amended Project Conditions shall be deemed to form a part of this Agreement. The Parties hereby agree to forthwith effect necessary changes to the articles of association of the Company to give effect to the change in understanding with respect to the amended Project Conditions.

76. Unfortunately, according to Dr. U.K. Chaudhary, learned Sr. Advocate, appearing for the applicant No. 2, once again, Bawri Group could not complete such project conditions even within the extended time for which Dalmia Group invoked the default clause and issued notice dated 15.05.2015 requiring Bawri Group to sell its remaining 21% shareholding in the company, number of the same **being 7, 26, 62,742 to** Dalmia group for Re. **1/-** in terms of clause 9.2 of the SHA-I. However, instead of complying with the request in the letter dated 15.05.2015, Bawri Group sent the letter dated 18.05.2015 disputing such claim and also hurling the allegations of mismanagement and oppression against Dalmia Group and also invoked Mediation as per SHAI-I/SHA-II.

77. But the matter did not end there. Soon thereafter, Bawri Group rushed to Delhi High Court by way of an application under section 9 of the Act of 1996 invoking the arbitration clause in agreements and prayed for several reliefs including a relief in the form of a direction prohibiting Dalmia Group from alienating in any manner its remaining shares in the company. Delhi High Court, record reveals, obliged Bawri Group by granting some interim reliefs under order dated 19.10 2015 in O.M.P.(I)341/2015.

78. According to the learned counsel for the applicants, the completion of project conditions in time to the satisfaction of Dalmia Group was important so much so that only on the successful completion of project conditions, Bawri Group could have required Dalmia Group to discharge some very vital obligations, imposed on the later, under the agreements aforesaid which could have ultimately led to the successful commissioning of various plans in the agreements.

79. What is worse, in the event of its failure, Bawri Group was to compensate Dalmia Group adequately since Dalmia Group, allegedly spent a lot on the project under the terms and conditions incorporated in the aforesaid agreements. This is precisely the reason for which Bawri Group stared scurrying so frantically to the various fora including the CLB, Kolkata and kept on filing proceeding after proceeding, and that too, not on facts but on some imaginary, fanciful and far-fetched grounds. Thus, according to the applicants, the disputes concerning purchase of the remaining shareholdings of the Bawri group in the company by Dalmia Group were in the heart all the troubles—argue learned counsel for the applicants.

80. Bawri Group, however, refuted such contentions alleging that it was Dalmia Group who backpedaled from its earlier commitments, made in the SHA-I, since, according to the petitioners, soon after the execution of SHA-I, Dalmia Group started violating the various terms and conditions incorporated

in the SHA 1 (which were subsequently made part of the AOA) which had unfortunately forced Bawri Group, not only to hand over the management of the company to the Dalmia Group but also paved the way for putting in place a modified agreements (SHA-II).

81. Since the management of the company was handed over to Dalmia Group in October 2012, it was no longer possible for Bawri Group to complete the project conditions for which an understanding was reached between the parties where- under Bawri Group was no longer required to complete the project conditions and in that connection, it was also agreed upon between the parties that all the relevant clauses including clause No. 3.20 in SHA –II would also be suitably amended. That being the position, one cannot find fault with Bawri Group for its not completing the project conditions aforesaid within the time specified in agreements.

82. I have considered such submissions having regard to the materials on record and found that there was no dispute over the fact that the responsibility of completion of the project conditions within the stipulated time to the satisfaction of Dalmia Group was originally entrusted with Bawri Group. There was also no dispute whatsoever over the fact that the project conditions could not be completed within the original stipulated period----nay ---even in the extended period of time.

83. It is also not in dispute that for the alleged non-completion of the project conditions within the stipulated time, Dalmia Group invoked default clause in agreements and served notice dated 15.05.2015 on Bawri group asking the later to sell its remaining shareholding in the company to Dalmia Group for Re- 1 in terms of clause 9.2 of the SHA-I. The materials on record further show that following service of notice on it, Bawri Group responded with knee-jerk reaction and started knocking the doors of several judicial /quasi-judicial bodies leveling various serious allegations against Dalmia Group including the allegation of mismanagement and oppression.

84. Such disclosures prima facie establish that at the very bottom of all the proceedings--------- which were initiated by Bawri Group after it being served with notice dated 15.05.2015 including the company petition ---------- lies the disputes regarding the alleged inability of Bawri group to complete the project conditions in time to the satisfaction of Dalmia Group which---- as we have already noticed ----- entailed sweeping, grave and far-reaching consequences for the defaulting party .

85. **The fact** that Bawri Group chose to remain silent till middle of 2015 despite they being allegedly subjected to enormous oppression since the middle part of 2012 and in spite of management of the company aforesaid being allegedly conducted in profound violation of various statutory provisions in the Companies Act over a long period of time as well as **the fact** that they decided to initiate a series of litigations, including company petition U/s 397/398, only after they being served with aforesaid notice make such a conclusion inevitable.

86. However, more and more facts which have emerged from the record have rallied behind the above conclusion of mine. We have already found that Bawri Group claims that under certain compelling situations, it had to hand over the management of the company to Dalmia Group. However, according to

the petitioners, it was also agreed upon between the parties that since Bawri Group would no longer remain in the control of the management of the company, the later would be relieved off completely of the liability of completing the project conditions.

87. More importantly, it was also agreed to between the parties that all the relevant clauses, including the clause 3.20 of the SHA- II would be suitably amended recording the fact that Bawri group was relieved off the liability of executing the project conditions. But once again, it is alleged, Dalmia Group did a U-turn and did nothing to bring about the necessary amendment to the clause aforesaid.

88. Such a contention was, however, hotly opposed to by Dalmia Group stating that at no point of time, there was any understanding between the parties to the effect that Bawri Group would be relieved off the liability of completing the project conditions. According to Dr. U.K Chaudhary, learned Sr. Counsel appearing for the applicant No. 2, all such claims are afterthought and invented just to get rid of quagmire which the Bawri Group was in following its inability to perform the conditions, stated in clause 9.1 of the SHA-I.

89. In order to ascertain the veracity of rival pleas, I have carefully perused various clauses in the agreements including the clause-**3.20 in SHA-II. However,** a suave and dispassionate reading of the aforesaid clauses no way gives us any impression that there was an understanding between the parties to the effect that following changes in management of the company, Bawri Group would be relieved off the liability of completing the project conditions which, in turn, clearly demonstrates that aforesaid contention too, falls flatten on its face.

90. Even otherwise, the claim of the petitioners that there was an understanding between the parties to amend the clause **3.20 in SHA-II** so as to relieve the petitioners of the liability of completing project conditions cannot be accepted for the prohibition of section 92 of the Evidence Act --since ----section 92 of the Evidence Act ordains that when the terms of contract / grant etc. are reduced to writing, no oral agreement could be allowed to operate to repudiate the contents of the written contract.

91. But then, such apparent failure on the part of the petitioners to prove their claim that following the change of guards in the management of the company, it was agreed upon between the parties that Bawri Group would be relieved off the liability of completing the project conditions manifestly demonstrates that in presenting the company petition Bawri Group quite desperately tried to hide something very serious from the notice of the court.

92. Then the question is –what is that guarded secret which Bawri Group so desperately tried to hide? The answer is not hard to find. Our foregoing discussion, by now, makes it clear that only some commercial disputes ----and not management disputes as claimed by Bawri Group ----- were in the bases of all the allegations in the company petition. However, in the company petition under consideration, Bawri Group did everything to mask such commercial disputes as disputes under section397/398 of the Act of 1956. But then, as is evident from our discussion herein, such attempts from the side of Bawri Group to hide such a

very important facet of the disputes in question, in fact, reveals more than what Bawri Group actually tried to hide.

93. It is worth noting here that there some other materials in the company petition itself which also demonstrate that Bawri group had badly tried to color some contractual disputes as management disputes. In that connection, it may be stated that in para 6.11(i) of the petition, it was alleged that Dalmia Group caused the company to obtain loan from R—2 and R--19 beyond 150 crores at a high rate of interest, same being interest @18% pa, forcing the company to suffer huge loss. But then, the clause 5.2 of the SHA-II shows that even under the original agreement, Dalmia Group was allowed to obtain loan up to 150 crores with interest up to 18% pa.

94. Similarly, Bawri group claims **(i) that** Dalmia Group had caused the company to purchase clinker from related parties at gross over value and **(ii) that** the transportation contract with R-24 (who is a related party to Dalmia Group) was made in total violation earlier agreement etc. However, materials, found available on record, prima facie do not support such contentions. The above revelations, in turn, not only show that the allegations aforesaid are contractual disputes, but, more importantly, those revelations also establish that the petitioners had employed every possible measure to colour some commercial disputes as management disputes.

95. We have already found that following the service of the notice dated 15.05.2015 on Bowri Group by Dalmia Group on the invocation of default clause in the SHAs, Bowri Group too invoked the arbitration clause and rushed to Hon'ble Delhi High Court by way of application under section 9 of the Act of 1996 seeking various reliefs. It is also not in dispute that Dalmia Group too approached the Hon'ble Delhi High Court preferring a section 9 application seeking various reliefs.

96. The rushing of the parties to Hon'ble Delhi High Court by way of Sec. 9 of the Act of 1996 invoking arbitration clause in the SHAs, and that too, soon after the service of notice dated 15.05.2015 coupled with the subsequent events which led to filing of the company petition, in my opinion, lends more credence to our finding that the alleged breaches of the various clauses in the SHAs form the very foundation of the allegations in the company petition.

97. The net effect of all the revelations, which have emerged from our foregoing discussion, can be deduced as follows: --

i) *) The subject matters in company petition and the subject matters in arbitration agreements are same. In other words, all the disputes in the company petition are covered by the aforesaid agreements.*

ii) *Such disputes were entirely between the Bawri Group on one side and the Dalmia Group on the other side.*

iii) *. The disputes projected through the company petition are all commercial/contractual disputes, and, not management disputes as alleged by the learned counsel for the petitioners.*

iv) The dispute vis-a vis the failure of Bawri Group to complete the project conditions to the satisfaction of Dalmia Group within the time specified in the SHA-I/ SHA-II appears to be bone of contention which ultimately triggered the launching of series of proceedings including the proceeding under section 397/398 by the parties, more particularly by Bawri Group.

Point No.(iii)

(Whether there was commonality of the parties)

98. The next point that falls for our consideration is whether parties before the Tribunal and the parties in the agreements in question are one and same.

99. The learned counsel for the petitioners arduously contends that the parties before the Tribunal and the parties in the arbitration agreements are not identical. In support of such contention, it has been pointed out that though the signatories to the arbitration agreements are only petitioner No.1 (representing entire Bawri Group) and M/s Saroj Sunrise Pvt. Ltd (a member of Bawri Groupo) and respondent No.1 & 2, yet, there are as many as six other petitioners and as many as twenty-three other respondents in the proceeding before the Tribunal.

100. These are revealing testimonies to the fact there is no commonality of the parties in the proceedings under section 397/398 of the Act of 1956 and in the arbitration agreements. Since there is no commonality of the parties in the proceedings under consideration in view of the law laid down in *Sukunya Holdings Pvt. Ltd, (supra)*, the proceeding under section 8 of the Act of 1996 is required to be dismissed on this count alone –argues counsel for the petitioners.

101. Such contention was, however, sought to be grounded on counts more than one. First, it was contended that the petitioner Nos. 10 to 15, along with the petitioners Nos. 1 to 9 are integral part of Bawri Group and in the agreements in question, the petitioner Nos. 10 to 15 were duly represented by Bawri Group. In support of such contention, it has been contended that there are umpteen numbers of clauses and sub-clauses in SHA-I and SHA-II which unquestionably show that the petitioner Nos. 10 to 15 are integral part of Bowri Group. Some of the clauses, so referred to, are Clause 1.2 (x), clause 1.2 (xi) (b), clause 6.2.B, clause 6.5.1, clause 6.7.1 and clause 8.3 of SHA-I.

102. Secondly, according to the counsel for the applicants, the post agreements conducts of the petitioner Nos. 10 to 15, express, implied or constructive, are so tell taleing and so significant that such conducts, in no uncertain term, show that they are part and parcel of Bawri Group. In that connection, they referred to various clauses in the SHA-I and SHA-II, more particularly, clause 8.4 and 5.4 in the SHA-I, SHA-II respectively.

103. It was next contended that R-3 to R 25 too are the integral part of the R-2 since they do not have separate existences in so far as the matters, covered by agreements aforesaid are concerned. That being the position, R--2 duly represented them in the agreements in question. In that view of the matter, the

parties in the company petition and the parties in the agreements are one and same. In order to draw support to such contention, they referred me to the introductory part of the petition under section 397/398 of the Act of 1956 where the petitioners portrayed the identities of the various respondents.

104. Fourthly, and, also, in alternative to all those pleas, it has been submitted that the petitioner Nos. 10 to 15 or for that matter, R-3 to R-25 are not at all necessary parties----- nay even proper parties------- since for the effective adjudication of the disputes in question in all respects the presence of those parties in the proceeding under section 397/398 is not at all necessary. However, according to the applicants, they have been brought on record only to frustrate the arbitration agreements where an effective mechanism is provided for proper and effective resolution of disputes arising out of or in connection with execution of various clauses in those agreements.

105. Such contentions were, however, refuted by the counsel for the petitioners alleging that none of the clauses in the agreements in question, show, even remotely that the petitioner Nos. 10 to 15 are part and parcel of Bawri Group. Quite contrary to such claims, according to the learned counsel for the petitioners, there are several clauses in the agreements under consideration which unmistakably demonstrate that the petitioner Nos. 10 to 15 are independent identities, and, not at all part and parcel of Bawri Group as claimed by the applicants.

106. In support of such claims , it is being argued that the contention that clauses 1.2 (x), clause 1.2 (xi), clause 1.2 (xi) (b) show that the petitioner Nos. 10 to 15 are integral part of Bawri Group was without any substance , since, according to learned counsel for petitioners , clause 1.2 (x) and 1.2(xi)(b) merely say that for the purpose of calculating the shareholding and/or voting shareholding of the Promoter group, voting shareholding/ shareholding of the persons in Schedule XII to the SHA-I shall be aggregated to the shareholding of the Promoter Group. Such provisions do not, in any manner, make petitioner Nos.10 to 15 an essential part of Bawri Group.

107. In regard to argument, based on clause 6.5.1 and clause 6.7.1, it has been stated that clause 6.5.1 only serves to show that after a certain period, Dalmia Group shall have the right, but not the obligation, to acquire all shareholdings of Bawri Group/ Promoter Group in the company. Similarly, after a certain period, in view of clause 6.7.1 Bawri Group/ Promoter Group shall have the right, but not the obligation to sell their entire shareholding in the company to Dalmia Group or to its nominees etc.

108. But then, clause 6.5.1 or for that matter, clause 6.7.1 could hardly show that petitioner Nos.10 to 15 are the part of Bawri group. The fact that Dalmia Group has been authorized under the agreements to acquire the shareholding only of Bawri Group, so specified in schedule -1 to the SHA-I and not the shareholding of entities in schedule –XII of the SHA-I and the fact that Bawri Group was authorized under said agreemenst to sell their shares only, and not the shares of entities in scheduled-XII makes it more than clear that the petitioner Nos. 10 to 15 are entities different from Bawri Group.

109. In regard to clause 6.2 B, it has been stated that it is true that clause 6.2 B specifically forbids Dalmia Group from acquiring any share, held by the persons/entities, mentioned in the schedule XII which

included the petitioner Nos.10 to 15. It is also true that subject to certain pre-conditions, incorporated therein, Bawri Group shall have the right to acquire freely the equity shares, held by the persons/entities, mentioned in the schedule XII.

110. But such clauses hardly establish that the petitioner Nos.10 to 15 are the part of Bawri Group. Quite contrary to such claim of the applicants, said clause demonstrates more and more that the petitioner Nos.10 to 15 are very independent entities and they are not part and parcel of Bawri Group ---argues learned counsel appearing for the petitioners. The fact Dalmia Group is specifically forbidden from acquiring any share, held by the persons/entities, mentioned in the schedule XII only fortifies the conclusion that the petitioner Nos.10 to 15 are not part and parcel of Bawri Group.

111. In regard to contention that clause 8.4 of the SHA-I (which is para materia to clause 5.4 SHA-II), demonstrates that the petitioner Nos. 10 to 15 are the part of Bawri Group, it has been stated by the learned counsel for the petitioners that clause 8.4, along with very many other clauses in the said agreements, only shows that petitioner No.10 to 15 are not the part of Bawri Group. Had the petitioner Nos.10 to 15 been the part of Bawri Group, there would not have been any necessity for incorporating clause 8.4 in SHA-I (or for that matter clause 5.4 in SHA-II).

112. But then, there are some other facts, which, according to the learned counsel for the petitioners, supply the final seal of approval to the claim that the petitioners Nos. 10 to 15 are not part of Bawri Group. The facts, stated above, are: -

> *(a) Dalmia Group never called upon petitioner Nos.10-15 to discharge any obligation under SHA I and SHA II,*
> *(b) Dalmia Group did not serve any notice of demand upon petitioner Nos.10-15 although such notice was served on petitioner Nos.1-9,*
> *c) No notice of any proceeding or arbitrating meetings or mutation suites were served on petitioner Nos.10-15,*
> *(d) No consideration/price of shares held by petitioner Nos.10-15 has been specified nor was there any machinery for fixing of price thereof and Dalmia Group never made any offer to acquire any shares of petitioner Nos.10-15.*

113. Regarding the contention that the respondents Nos. 3 to 25 are the part of Dalmia Group, it has been argued by the learned counsel for the petitioners that the respondent Nos. 3 to 25 are not the part of Dalmia Group. Rather they are different identities altogether and they have been arraigned as respondents in the company petition inasmuch as they too took very active part in the mismanagement of company and also responsible in ways more than one in oppressing the petitioners over a long period of time.

114. Since neither the petitioner Nos. 10 to 15 nor the respondent Nos. 3 to 25 are parties to the agreements, under consideration, one of the fundamental conditions necessary for referring the parties to the arbitrator was found conspicuously absent in the proceeding under section 8 of the Act of 1996 and on this count also, this court requires to reject the application seeking reference of the parties to the arbitrator.

115. I have very carefully considered the arguments advanced from the sides of the parties. However, before taking up the case of the petitioners, I find it necessary to focus my attention on the claims of the applicants and for that purposes, I have very carefully perused the various clauses, referred to by the learned counsel for the applicants, which, the applicants claim, support the contention that petitioner Nos10 to 15 are integral part of Bawri Group.

For ready reference, some of the clauses referred to by the counsel for the applicant are reproduced below: -

1.2"(x) For the purpose of calculating the Shareholding of a Shareholder in the Company, including for determining the rights and privileges available to such Shareholder in the Company, the Shareholding of the Affiliates of such Shareholder shall be aggregated to the Shareholding of such Shareholder, provided however that (i) Vinay Cements Limited and RCL Cement Limited shall not constitute an Affiliate of either Shareholder; and (ii) the Shareholding of the Persons set out in Schedule XII or any transferee thereof shall be aggregated to the Shareholding of the Promoter Group;
1.2 (xi) For the purpose of calculating the Voting Shareholding of a Shareholder in the Company, including for determining the rights and privileges available to such Shareholder in the Company, the voting rights of the Affiliates of such Shareholder shall be aggregated to the voting rights of such Shareholder. For the avoidance of doubt it is further clarified that:
1.2(xi) (b)For the purpose of calculating the Voting Shareholding of the Promoter Group, the Voting Shareholding of the Persons set out in Schedule XII or any transferee thereof shall be aggregated to the Voting Shareholding of the Promoter Group and the Voting Shareholding assigned/transferred to in favour of the Dalmia Group in accordance with the Share Pledge Agreement-2 and this Agreement shall be subtracted from such calculation of Voting Shareholding of the Promoter Group.

6.2B notwithstanding anything to the contrary contained herein, it is agreed between the Parties that Dalmia Group shall not directly or indirectly, purchase any Securities held by Persons mentioned in Schedule XII.

Further it is hereby clarified that, notwithstanding anything contained herein, the Bawri Group shall have the right at all times to freely acquire any or all Equity Shares held by the Persons mentioned in Schedule XII, provided it exercises such right only through the Persons mentioned in Schedule I and/or their Affiliates.

6.5.1 At any time after July 31, 2017 and for a period upto July 31, 2020 (the "Put Option Period"), the Promoter Group shall have the right to but not the obligation to issue a notice ("Put Notice") to the Dalmia Group, to sell all, and not less than all, ***of the Equity Shares held by it in the Company ("Promoter Put Option Shares")*** *to the Dalmia Group or its Affiliates or any Person nominated by the Dalmia Group (the "Put Option Purchaser"), as applicable at the Promoter Group Put Option Price, on the terms and conditions contained in this Agreement (the "Promoter Group Put Option"). Such Put Notice shall only be issued by the Promoter Group after the accounts for the previous Financial Year has been approved by the Board. Such Put Notice shall specify the date on which such Transfer shall take place ("Put Date"), which shall not be less than 180 (one hundred and eighty) days from the issuance of the Put Notice.*

6.7.1 At any time after July 31, 2017 and for a period upto July 31, 2020 (the "Call Option Period"), the Dalmia Group shall have the right to but the obligation to issue a notice ("Call Notice") to the Promoter Group, to sell to the Dalmia Group or any nominee or Affiliate of the Dalmia Group ("Call Option Purchaser"), at its sole discretion, either (i) all, and not less than all, ***of the Equity Shares held by the Promoter Group in the Company;*** *or (ii) the entire Shareholding of the Promoter Group in the Company on a Fully Diluted Basis less 5% (five percent) of the Shareholding of the Promoter Group in the Company (such that the Promoter Group shall retain 5% (five percent) of the Share Capital of the*

Company on a Fully Diluted Basis post the exercise of Dalmia Group Call Option ("Call Option Shares") at the Call Option Price, on the terms and conditions contained in this Agreement (the "Dalmia Group Call Option").

Such Call Notice shall only be issued by the Dalmia Group after the accounts of the previous Financial Year has been approved by the Board. Such call Notice shall specify the date on which such Transfer shall take place ("Call Date"), which shall not be less than 30 (thirty) days and not more than 90 (ninety) days from issuance of the Call Notice, the identity of the Call Option Purchaser, the Call Option Price and the number of Call Option Share

8.4. The Bawri Group agrees to make best efforts to ensure that the parties set out in Schedule XII agree to abide by the terms of this Agreement' "

116. On reading the clause 1.2 (x), clause 1.2 (xi), clause 1.2 (xi) (b) in between the lines having regard to other materials on record, I find that clause 1.2 (x) and 1.2(xi)(b) merely provide that for the purpose of calculating the shareholding and/or voting shareholding of the Promoter group, voting shareholding/shareholding of the persons in Schedule XII to the SHA-I shall be aggregated to the shareholding of the Promoter Group. Such provisions hardly show that petitioner Nos.10 to 15 are the essential part of Bawri Group.

117. Similarly, clause 6.5.1--- I find----------only serves to show that after a certain period, Dalmia Group shall have the right, but not the obligation, to acquire all the shareholdings of Bawri Group/ Promoter Group in the company. Likewise, clause 6.7.1 of the SHA -I show that after a certain period, Bawri Group/ Promoter Group shall have the right, but not the obligation, to sell their entire shareholding in the company to Dalmia Group or to its nominees etc. However, such clauses do not augur well to advance the cause of the applicants in the proceeding in hand.

118. Rather, they support the claim of the petitioners that the petitioner Nos.10 to 15 are not the part of Bawri Group. The fact that after a certain period, Dalmia Group shall have the right to acquire all shareholdings of Bawri Group/ Promoter Group only, **but, not the shareholding of the petitioner Nos. 10 to 15,** coupled with the fact that after a certain period, Bawri Group/ Promoter Group, shall have the right to sell their shareholding in the company to Dalmia Group, **but, not the shareholding of the petitioner Nos.10 to 15,** make such conclusion inevitable.

119. Coming to the contention of the counsel for the petitioners that clause 6.2 B hardly establishes that the petitioner Nos.10 to 15 are the part of Bawri Group, I have found that such a contention too is entirely based on sound reason and logic and as such, such a contention, in my considered view, needs approval of this court. Resultantly, I have no difficulty in concluding that clause 6.2 B too does not establish that the petitioner Nos. 10 to 15 are part of Bawri Group.

120. On my further perusal of the record, I have also found that the contention of the learned counsel for the petitioners that clause 8.4 of the SHA-I (which is para materia to clause 5.4 SHA-II) ,never serves to show that the petitioner Nos.10 to 15 are the part of Bawri Group, is also found to be based on strong logic and reason. This is because of the fact that **had** the petitioner Nos.10 to 15 been the part of Bawri

Group, there would not have been any necessity for incorporating clause 8.4 in SHA-I (or clause 5.4 in SHA-II).

121. The learned counsel for the applicants, however, takes one more cudgel to assail the claim of the petitioners on this score alleging that the SHA-I and SHA-II were incorporated in the AOA of the Company in toto as back as 2012 and 2013 respectively. It is trite that MOA & AOA bind the company and members thereof to the extent as if they have been signed by company and by each member and all are bound by the covenants therein .But then, at no point of time, till the time of filing of proceeding under Section 397/398 of the Act of 1956 in 2015, the petitioner Nos.10 to 15 make any objection either against the inclusion of such clause in the agreements or incorporation of SHA-I and SHA-II with the aforesaid clauses in the AOA of the company.

122. Such a conduct on the part of the petitioner Nos.10 to 15 in not resisting the inclusion of the clause 8.4 in SHA-I (or clause 5.4 in SHA-II), or for that matter, their inability in resisting the inclusion of the SHA-I and SHA-II with aforesaid clauses in the AOA of the company over a long period of time , vividly demonstrates that those petitioners acquiesced to the fact that they are part and parcel of Bawri Group to be bound by terms and conditions incorporated in the SHA-I and SHA-II. Section 10 of the Act of 2013 makes such a conclusion inevitable –argues counsel for the applicants.

123. I have found little force in such submissions. It is true that the petitioner Nos.10 to 15, who are admittedly the shareholders of the company, had never objected to the inclusion of clause 8.4 and clause 5.4 in SHA-I and SHA-II respectively. It is also true that they never objected to the inclusion of SHA-I and SHA-II in the AOA with the aforesaid clauses till the time of preferring the section 397/398 proceeding in 2015. But then, such lapses on the part of the petitioner Nos.10 to 15 do not automatically make them part of Bawri Group.

124. This is because of the fact that the various definitions, so given in the SHAs in the introductory part of the agreements including the definition of Bawri Group/ Promoter Group, are so explicit and so clear that such definitions do not provide any scope either for admission of any third party to the grouping, so made in the agreements or for deletion of someone there-from as far as the matters covered by agreements are concerned. The enlargement or constriction of such definition may be possible only by the way of amendment to such clause which is agreed to by the parties which is, however, no body's case.

125. The various revelations which I have catalogued herein above, in their combined effect very firmly evince that the petitioner Nos.10 to 15 are not the part and parcel of Bawri Group. Rather, they are independent entities and therefore, those petitioners could not be held responsible for the omission/ commission of any act done by Bawri Group under the agreements aforesaid, of course, they would certainly fall or fly for their own deeds or misdeeds which they may have done in their individual capacities in relation to other matters pertaining to administration of the company concerned.

126. This brings me to a yet another important controversy where I am to see if the respondent Nos.3 to 25 are the part and parcel of Dalmia Group. Dalmia Group steadfastly claims that those respondents do not have any independent existence. Rather, their existences stand merged with the R-2 for all purposes

and it, in turns, makes them the very integral part of Dalmia Group at least in so far matters covered by agreements are concerned. In that connection, they have also placed heavy reliance on the description of the respondents, so given in the introductory part for the company petition, vide para No 3 of the petition. According to the applicants, descriptions of the respondents, so rendered in para 3 of the petition only firmly show that those respondents are part of Dalmia Group.

127. On considering such submissions in the light of materials available on record including depiction of the respondents, as rendered in para 3 of the petition, I have found that the contention, so advanced by the applicants, on this count , bears an element of truth. This is because of the facts that the portrayal of the respondents, as given in Para 5 of the petition, clearly shows that those respondents are either present or past officers of R-2 or its subsidiaries or the subsidiaries under the R-2 and being so, it can safely be held that their identities stand merged with the R-2 at least in so far matter covered by SHAs are concerned.

128. It may be stated here that though the applicants in the application in para No.6 & 7 specifically claim that that respondent No. 3 to respondent No. 25 are very closely associated with R-2 and although the petitioners had portrayed those respondents in their petition in such way giving an impression that they all closely associated entities as well as an impression that that they are part and parcel of Dalmia Group , yet , those respondents, including respondent Nos. 24 and 25, despite they having been posted with such information, did nothing to object such representations vis-a-vis their roles under the agreements are concerned.

129. Such revelations, in the facts and circumstances of the present case, further show that at least in respect of the matters, covered by the arbitration agreements, are concerned, all the respondents including respondent Nos. 24 & 25 too are part and parcel of the R-2 (Dalmia Group) and therefore, R-2 duly represents them not only in the agreements aforesaid but it duly represents them in the company-proceeding as well.

130. The fact that during the course of argument, too, the counsel for appearing for the applicants made a clear commitment that R-3 to R-25 would be bound by the commitments made in the SHAs makes such a conclusion more and more inevitable. Situations being such, in my considered opinion, the respondent Nos 3 to 25 too are the part and parcel of Dalmia Group at least in so far as the matters covered by the SHA-I and SHA-II are concerned.

131. It is worth noting here that while discussing **point No (. ii),** we have already found that the various disputes in the proceeding under Section 397/398 of the Companies Act are nothing but contractual disputes and all such disputes are well covered by the arbitration agreements aforementioned and in such disputes, only Bawri Group, on one side and Dalmia Group, on the other side, are the parties. What is, however, immensely important to note is that in such disputes, none of the petitioners, who are arraigned in serial No. 10 to 15 of the petition, not being the part of Bawri Group, are the parties.

132. One may note here that Mr P. Chatterjee, learned Sr. Advocate appearing for the petitioner Nos. 10 to 15 contends that though their shareholding in company was as little as 003 % of the paid up capital, yet , number wise , they constitute more than one tenth of total shareholders of the company and in that

capacity ,they, on their own, can maintain the proceeding under section 397/398 , even if, it is found the case, projected by the petitioner Nos. 1 to 9, is unsustainable for any reason whatsoever . However, such a contention too is found to be totally without any basis.

133. We have already found that the disputes under consideration were commercial disputes and not management disputes as claimed by the petitioners. Equally importantly, in such disputes only Bawri Group and Dalmia Group are parties and no one else. Being so, the petitioner Nos. 10 to 15 are not at all parties to such disputes of commercial nature. Our foregoing discussions make such position abundantly clear. Our foregoing discussion makes it clear and it needs no further re-statement here

134. However, unfortunately for the petitioner Nos. 10 to 15, such revelation, coupled with the admitted fact that the shareholding of the petitioner Nos. 10 to 15 in the company was as little as. 003 % of the issued, subscribed and paid up capital of the company, in the facts and circumstances of the case in hand, only serves to show that the petitioner Nos. 10 to 15 were made parties to the proceeding only to frustrate arbitration agreements incorporated in the SHAs.

135. The learned counsel for the petitioner Nos. 10 to 15 further submits that the applicant did not arraign the petitioner Nos. 10 to 15 as parties in Section 9 proceeding before Delhi High Court and such a state of affair is clear proof of the fact that the petitioner Nos. 10 to 15 are not the part of Bawri Group which, in turn, requires this court to dismiss the section 8 proceeding on holding that the parties before the Tribunal and the parties in the agreements are not identical.

136. I have considered such submission too having regard to the materials on record as well as the discussions I have indulged in here-in-before and found that such a contention from the side of the petitioner Nos.10 -15 are partially true. Non- impleadment of the petitioner Nos. 10 to 15 by the applicant No.2 in the proceeding U/s. 9 of the Act of 1996, certainly demonstrates that they are not the part and parcel of Bawri Group. But such fact supports the claim of petitioner Nos. 10 to 15 up to that far and no further.

137. This is because of the fact that our foregoing discussion now vividly shows that the actual parties in the company petition are the petitioner Nos. 1 to 9 on the one hand and the respondent Nos. 1 to 25 on the other hand, they being the integral part of Bawri Group or Dalmia Group respectively. Being so, the petitioners Nos. 10 to 15, who are evidently not the part and parcel of Bawri Group, are ranked outsiders and have no role, whatsoever, to play in the determination of disputes therein.

138. In other words, only Bawri Group and Dalmia Group are the necessary parties in the disputes in the company petition. Viewing from that angle, one would invariably find that the parties in the company petition and the parties in the arbitration agreements are quite identical and therefore, the proceeding under section 8 of the Act of 1996 cannot be rejected on the ground of lack of commonality of the parties in the proceeding aforesaid, as contended for by the counsel for the petitioners. In the result, this point is also answered in affirmative and in favour of the applicants.

Point No.(iv)

(whether there is violation of section 7(3) & 7(4) of the Act of 1996)

139. The counsel for the petitioners further submits that the application under consideration is liable to be rejected since the application fails to satisfy the requirement of Section 7(3) & 7(4) of the Act 1996. For ready reference, Section 7(3) & 7(4) are reproduced below: -

> *"(3) An arbitration agreement shall be in writing*
>
> *(4) An arbitration agreement is in writing if it is contained in-*
>
> *(a) a document signed by the parties;*
>
> *(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or*
>
> *(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other."*

140. Section 7(3) &7(4) of the Act 1996, thus, command that not only the arbitration agreement must be reduced to witting but it must also be signed by all the parties to such agreement. But in the case in hand, according to the counsel for the petitioners, none of the petitioners from 10 to 15 (who, according to the applicants, are part of Bawri Group) had signed the agreements aforesaid. Similarly, the respondents Nos. 3 to 25 (who, according to applicants, are part of Dalmia Group) did not sign such an agreement which are clear proof of mandatory requirements of Section 7(4) of the Act 1996 being honoured only in violation which, in turn, requires the court to turn down the application under section 8 of the Act of 1996.

141. The counsel appearing for the applicants has disputed such contention stating that whereas the petitioner Nos. 10 to 15 are integral part of Bawri Group, the respondent Nos. 3 to 25 too are part and parcel of Dalmia Group. Since the petitioner Nos. 10 to 15 or for that matter, the respondent Nos.3 to 25 are integral part of Bawri Group and Dalmia Group respectively and since Bawri Group and Dalmia Group represent the petitioner Nos. 10 to 15 and the respondent Nos. 3 to 25 respectively in the aforesaid agreements, there is hardly any necessity on the part of those petitioners and respondents to sign the said arbitration agreements on their own.

142. I have considered the submissions advanced by the parties having regard to materials on record as well as the discussions, made here-in- before. It may be stated here that while considering the point No.(II) & point No (III) above, we have already found that the disputes in the proceeding U/s.397/398 of the Companies Act were essentially and entirely between Bawri Group, on one side and Dalmia Group on the other side. While Bawri Group represents the petitioners No. 1 to 9, Dalmia Group represents R-2 to R-25. That being the position, in such disputes, the petitioner Nos. 10 to are strangers or outsiders.

143. Since the petitioner Nos. 10 to 15 are not the integral part of the Bawri Group and since they are ranked outsiders to the agreements aforesaid, the question of their signing the said agreements do not arise at all. In that view of the matter, the agreements, under consideration, in no way infringe the

mandate of Section 7(3) & 7(4) of the Act 1996 as alleged by the petitioners. The question in this point is accordingly answered.

Point No.(v)

(Whether there is violation of section 8(2) of the Act of 1996.)

144. Here, we are to decide whether the section 8 application is required to be rejected for not being filed in accordance with the prescription of section 8 (2) of the Act. We have already found that **Mr Chatterjee**, learned SR. counsel for the petitioner Nos 1-9, argues that application is bad for it being preferred in violation of prescription in section 8 (2) of the Act of 1996. In support of his contention, it is being pointed out that section 8 of the Act, amongst other things, mandates that while presenting an application under section 8, the applicant needs to file, along with the application, the original agreement or a duly certified copy thereof.

145. But in the case in hand, according to the counsel for the petitioners, such a requirement of law was honoured in violation and in that connection, it has been stated that the applicant filed the application under section 8 of the Act of 1996 on **23.06.2015**. But on 23.06.2015, the applicant did not file the original arbitration agreements or a duly certified copy thereof. Rather, a supplementary affidavit annexing the copies of SHA-I and SHA-II were filed before the court only on **29.06.2015**.

146. What is worse, even on 29.06.2015, the applicant did not file a duly certified copy of the original agreement since on 29.06.2015, the applicant filed a copy of the original agreement which was also not certified by public servant, as required under the law. Rather same was authenticated by a Notary instead which is not at all authentication as required under section 8(2) of the Act of 1996.

147. Since the original agreements or duly certified copies thereof was not filed along with section 8 application, there cannot be any escape from the conclusion that the command of section 8 (2) of the Act of 1996 was completely ignored. In support of such contention, the decision in Atul Singh(supra) was relied on. In Atul Singh (supra), Hon'ble Apex Court held that the directions in section 8(2) of the Act of 1996 are mandatory.

148. **Dr UK Choudhury**, on the other hand, contends that above argument is bereft of law and logic since the counsel for the petitioner Nos. 1-9 had wrongly interpreted the requirement of section 8(2) of the Act of 1996. This is because of the fact that the section 8(2) never requires that the original agreement or a duly certified copy thereof must be submitted along with the application under section 8 of the Act.

149. What section 8(2) of the Act ordains is that the original arbitration agreement or a duly certified copy thereof must be there with application under section 8 of the Act when such application is entertained by the court. In other words, when such application is taken up for consideration by the Tribunal, the original arbitration agreement or a duly certified copy must be with the application.

150. As a corollary to above proposition, one needs to conclude that the original arbitration agreement or a duly certified copy may be filed with the record any time before the application is taken up for entertainment. In support of such contention, the decision of the Apex Court in Ananthesh Bhakta Vs Nayana Bhakta & others, decided on 15th November, 2016 was relied on.

151. It is also the case of the applicants that the argument that copies of the arbitration agreements were not duly certified as required under the law is also equally erroneous and without any substance. The counsel for the applicant contends that the terms "duly certified", so used in section 8(2) of the Act of 1996, do not mean the certification of copy of the original agreement by the statutory authorities only. Rather, the words "duly certified" needs to be read in context of the nature of the document required to be certified, viz whether the document to be certified is private or public document.

152. When the document in question is a public document, its certification needs to be done in accordance with the prescription of section 76 of the Evidence Act. But when the document to be certified is a private document, it needs to be certified, not by public servant, but, by a person who is authorized under the law to do so or by a person who is supposed to be the natural or normal or legal custodian of such document.

153. In the case in hand, according to the counsel for the applicants, the SHA-I or for that matter SHA-II are not public documents since they are the record of the acts of private entities. In other words, SHA-I and SHA-II are private documents. Since said agreements are private documents, such documents could be certified by any person who is the normal or natural or legal custodian of such documents or by a person who is authorized under law to do so.

154. Since in the case in hand, SHA-I and SHA-II are private documents and since copies of such agreements were certified by a Notary, such certification satisfies the requirement of section 8 (2) of the Act of 1996 and therefore, one cannot validly argue that the copies of aforesaid agreements were not certified in accordance with the prescription of law---argues Advocates appearing for the applicants.

155. Above being rival contentions on the points under consideration, it needs to be seen whose claim stands to reason. Before proceeding further, let us see whether the arbitration agreements are required to be rejected for not being certified in accordance with the prescription of law. In this connection, it needs to be stated that SHAs are undoubtedly private documents Then the question--- is ----who is to certify such private documents. Is only a public servant entitled to do such job as argued by the learned counsel for the petitioners?

156. My answer to such a query is a clear "**NO**". Section 76 of the Evidence Act, which is fundamental law on the subject, firmly demonstrates that only public documents are required to be certified by public servants. For ready reference, section 76 of the Evidence Act is reproduced below: - ---

> *Certified copies of public documents.– Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such*

officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal; and such copies so certified shall be called certified copies.

Explanation. – Any officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

157. Section 76 of the Evidence Act therefore clearly shows that only the public documents are to be certified by public servants. But section 76 further shows only certain classes of the public servants, as indicated in that section itself, are allowed to do the job. . An essential corollary to such a proposition is that a public servant, in his capacity as public servant, cannot certify a document which is private one.

158. Above conclusion of mine has also been reinforced by Rule 9 of the National Company Law Tribunal Rules, 2016-which speaks about certification of copy of a document. The term 'certified' has been defined in Rule 9 as follows:

*(9) **"certified"** means in relation to a copy of a document as hereunder; -*

*(a) **certified as provided in section 76 of the Indian Evidence Act, 1872;** or*

*(b) **certified as provided in section 6 of Information Technology Act, 2000; or***

*(c) **certified copy issued by the Registrar of Companies under the Act;***

159. Then, the question is who is to certify a private document. In that connection, I have revisited the argument, advanced by the counsel for the applicant who contended that such certification of private documents can be done by any person / authority who is natural or legal custodian of such private documents or anyone who has necessary authority to do so. I have found such argument quite sound and logical and same is accordingly accepted.

160. In the present proceeding, we have found that the copies of the SHA-I-and SHA-II were notarised by one Mr. R.N. Maiti, the Notary. In Concise Oxford English Dictionary, *the word "Notary "has been defined as a person authorised to perform certain legal formalities, especially to draw up or certify contracts, deeds, etc.* In Chambers 21st Century Dictionary, *the word "Notary has been defined as a public official with legal power to draw up and witness official documents and to administer oath etc.*

161. Thus, the term "Notary "appears to be very similar to the term, such as, lawyer, solicitor, attorney, legal official, legal clerk and barrister but who is authorised to perform certain legal formalities. Being so, in view of status, attached to the post of Notary, in my firm view, the Notary has necessary authority to certify even a private document and therefore, the authentication, done by the Notary is good authentication and it satisfies the requirement of section 8 (2) of the Act of 1996.

162. So situated, let me consider what the term "entertainment", so used in section 8(2) of the Act means. Does the word "entertainment" and the term" initiation of the proceeding" carry same meaning?

The contention of the learned advocates appearing for applicants was that the term "entertainment", so used in Section 8(2) of the Act, is different from the term "initiation of proceeding".

163. According to the counsel for the applicants, the term "entertainment" means when the matter is taken up for consideration by the Court or Tribunal but the term "initiation of proceeding" means the point of time when the application etc. is filed with the judicial authority. In that view of the matter, the term "entertainment" and the term "initiation of the proceeding" do not carry similar meaning. In support of such contention, the decision of the Apex Court in Ananthesh Bhakta (supra) is relied on.

164. The relevant part of the judgment in *Ananthesh Bhakta* (supra) is reproduced below: -

18. The word "entertained" has specific meaning in P. Ramanatha Aiyar's Advanced Law Lexicon word 'entertained' has been defined as:

1.To bear in mind of consider, esp, to give judicial consideration to the court then entertained motions for continuance).

2.To amuse or please,

3.To receive (a person) as a guest or provide hospitability to (a person),

The expression 'entertain' means to admit a thing for consideration and when a suit or proceeding is not thrown out in limine but the court receives it for consideration and disposal according to law it must be regarded was entertaining the suit or proceeding, no matter whatever the ultimate decision might be,"

*The **Black's Law Dictionary** also defines this word 'entertain' as follows: "To bear in mind or consider, esp., to give judicial consideration to the court then entertained motions for continuance".*

*19. In **1971 (3) SCC 124, Hindusthan Commercial Bank Ltd Vs Punnu Sahu (Dead) through Legal Representatives,** the word 'entertained' came for consideration as occurring to order 21, Rule 90, proviso of Civil procedure Court, Para 2 of the judgment notices the amended proviso which was to the following effect:*

"2. The amended proviso with which we are concerned in this appeal reads thus:

'Provided that no application to set aside a sale shall be entertained:

(a) Upon any ground which could have been taken by the applicant on or before the date on which the sale proclamation was drawn up; and

(b) Unless the applicant deposits such amount not exceeding twelve and half percent of the sum realised by the sale or furnishes such security as the court may, in its discretion, fix except when the court for reasons to be recorded dispense with the requirements of this clause:

Provided further that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud."

The contention of the appellant was that word 'entertain' refers to initiation of the proceedings and not to the stage when the court takes up the application for consideration, The High Court had rejected the said contention. The above view of the High Court was approved by this court in paragraph 4 of the judgment. Following was stated:

"4. Before the High Court it was contended on behalf of the applicant and that contention was repeated in this court, that clause (b) of the proviso did not govern the present proceedings as the application in question had been filed several months before that clause was added to the proviso. It is the contention of the applicant that the expression 'entertain' found in the proviso refers to the initiation of the

proceedings and not to the sage when the court takes up the application for consideration. This contention was rejected by the High Court relying on the decision of that court is Kundan Lal Vs Jagen Nath Sharma, AIR 1962 All 547. The same view had been taken by the said High Court in Dhoom Chand Jain V Chamanlal Gupta, AIR 1962 All 543 and Haji Rahim Bux and Sons v. Firm Samiullah and Sons , AIR 1963 All 320 and again in Mahavir Singh V. Gauri Shankar, AIR 1964 All 289. These decisions have interpreted the expression 'entertain' as meaning 'adjudicate upon' or 'proceed to consider on merits'. This view of the High Court has been accepted as correct by this court in Lakshmiratan Engineering Works Ltd v. Asstt Comm., Sales tax, Kanpur, AIR 1968 SC 488. We are bound by that decision and as such we are unable to accept the contention of the appellant that clause (b) of the proviso did not apply to the present proceedings."

20. Another relevant judgment is 1998 (1) SCC 732, Martin and Harris Ltd. Vith Additional District Judge and others. In the above case Section 21(i) provision of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (13 of 1972) word 'entertained' came for consideration. The proviso to sec. 21 (i) was to the following effect.

"8. Provided that where the building was in the occupation of a tenant since before its purchase by the landlord, such purchase being made after the commencement of the Act, no application shall be entertained on the grounds, mentioned in clause (a) unless a period of three years has elapsed since the date of such purchase and the landlord has given a notice in that behalf to the tenant not less than six months before such application, and such notice may be given even before the expiration of the aforesaid period of three years."

In the above case, the application under section 21(1) was filed by the landlord before expiry of period of three years from the date of purchase. ***It was held by this court that word 'entertained' as employed in first proviso under Section 21(1) could not mean 'institution' of such proceedings.***

165. Thus, the decision in Ananthesh Bhakta (supra), makes it clear that the term "entertainment" and the term" initiation of the proceeding" are different and carry different meanings. In view of above disclosures I find no difficulty in concluding that while the term "entertainment" means when the matter is taken up for consideration by the Court or Tribunal , the term "initiation of proceeding" means the point of time when the application etc. is filed with the judicial authority

166. In Ananthesh Bhakta (supra), it has also been held that if the original or a duly certified copy of the agreement was not filed along with the section 8 application but same is filed any time before the consideration of such application, the judicial authority cannot reject such application on holding that submission of application in the aforesaid manner is violative of section 8 of the Act.

167. The relevant part of the judgment is produced below; -

"Section 8 (2) has to be interpreted to mean that the court shall not consider any application, filed by the party under section 8 (1) unless it is accompanied by original arbitration or certified copy thereof. The filing of the application without such original or certified copy, but bringing original agreement on record at time when the Court is considering the application shall not entail rejection of the application under section 8(2)."

168. Since facts and circumstances of the case in hand are very similar to the facts and circumstances in Ananthesh Bhakta (supra), I have no hesitation in concluding that the submitting of the section 8 application and submitting of original or duly certified copy of the agreement on different dates but well before the date of entertainment of such application do not infringe the mandates of section 8(2) of the Act, 1996.

169. The counsel for the applicant further contends that the facts and circumstances of the case in hand match completely with the facts and circumstances in Dhamu Builders & Developers (supra). In our instant case, we have already found that the petitioners themselves annexed the copies of the agreements with the company petition and they did so to support their claims in the petition u/s 397/398 of the Act of 1956. In such factual scenario, Hon'ble Rajasthan High Court in Dhamu Builders & Developers (supra), held as follows:

> *" As already noticed hereinbefore, in the present case, the plaintiff itself has produced copy of the agreement which contains the arbitration clause and thus copy of such agreement continues to be part of the record for having been produced with the plaint and both the parties has relied on the said agreement for their rival claims; the existence of the agreement dated 13.3.2013 has not been question by any of the parties and therefore seeking defendant to again file the original agreement dated 13.3.2013 or certified copy thereof would be technical approach on the part of the court to hold it against the defendant and same would be wholly against the spirit of the Act".*

170. Hon'ble Rajasthan High Court in Dhamu Builders & Developers (supra), appears to have correctly interpreted the law laid down in Section 8 of the Act since such interpretation appears to be completely in tune of law laid down in Section 8(2) of the Act, 1996 and same, therefore, in my opinion, needs to be followed.

171. The decision of Hon'ble Rajasthan High Court in Dhamu Builders (supra), becomes the last nail in the coffin of the plea, raised from the side of the petitioners, on this score. Consequently, I have no difficulty in answering the point No. (vi) in affirmative and in favour of the applicant.

172. It may be stated here that, Mr S.N. Mukherjee, Mr S. Dutta, senior counsel appearing for petitioner Nos.1-9 and Mr P. Chatterjee, senior counsel appearing for petitioner Nos 10-15 had heavily relied on the decision of Hon'ble Apex Court in the case of Atul Singh (supra). But in view of our foregoing discussion, the decision in Atul Singh (supra) is found wholly inapplicable to the case in hand.

Point No.(vi)

(Whether the reliefs, sought for in the proceeding under section 397/398 of the Act of 1956, can be granted by the Arbitrator)

173. Referring to various decisions, relied on by the petitioners, it was contended that not a single relief, prayed for by the petitioners in the proceeding under section 397/398 , can be granted by the Arbitrator for the simple reason that the disputes projected through the petition are management disputes and being so, such disputes call for adjudication of matters involving right in rem and Arbitral Tribunals , being a private forum , have no authority, whatsoever, to adjudicate such disputes inasmuch as the Arbitral Tribunal could try only those matters , the decisions on which create right in persona as against right in rem.

174. In that connection, it has been stated that the nature of reliefs, sought for in the petition, more particularly, the reliefs, sought for in article 9 (a), 9 (r) and 9(dd) are of such nature that such reliefs can be granted only by CLB, in view of its wide power conferred on it under section 402/ 403 of the Act of 1956, and not by any other authority, including Arbitral Tribunal, which are designed to try disputes of personal nature.

175. In para 9 (dd) of the petition, the petitioners prayed for deletion of clause 66(a) of the AOA which is said to be illegal and bad in law.

176. In para 9 (r), the petitioners prayed for a direction requiring the respondents in C.P.No.143/2015 to compensate the company by giving an award to the tune of 550.32 crores.

177. In para 9 (a) of the petition, the petitioners prayed for a direction for framing of a scheme for future management of the company so that the company -----which was allegedly taken out of the normal and natural course by Dalmia Group, by committing illegalities of various norms and forms---- could be brought back on its original track.

178. However, such contentions were assailed by the counsel appearing for applicants arguing that the CLB cannot grant any of the reliefs, so mentioned in the petition since those disputes are manifestly commercial disputes having their roots in the SHAs and therefore, Arbitrator, and not the CLB, has the necessary jurisdiction to try such disputes.

179. In regard to the contention, structured on para 9 (a) of the petition, the counsel for the applicants, refereeing to the clause 4.11 in of the SHA –II, submitted that the Article 66(a) in the AOA of the company was para matoria to the clause 4.11 in of the SHA –II and said clause was incorporated in the AOA with the consent of the parties to the agreements. Since clause 4.11 in of the SHA –II was incorporated in the AOA as Article 66 (a), and that too, with the consent of both the parties, it does, now, not lie in the mouth of the petitioners to say incorporation of the Article 66(a) in the AOA was illegal and void.

180. I have considered such submission in the light of materials on record. A careful perusal of record reveals that the Article 66(a) in the AOA of the company was para matoria to the clause 4.11-of the SHA-II and same was made part of the AOA with the consent of both the parties. In the face of such disclosure, in my considered opinion, the petitioners, are, now, not entitled to say that Article 66(a) is required to be deleted for same being illegal and void.

181. In regard to the contention in para 9(r) in the company petition, Dr. U. K. Chaudhary, learned Sr. counsel appearing for the applicants attacked the same on two counts. First, it has been contended that in order to get compensation under the Act of 1956 in the name of the company, an application under section 543 R/W Schedule XII of the Act of 1956 needs to be filed. But till date, no such application has been filed by the petitioners seeking such reliefs. On this count alone, the third contention, above, is required to be rejected.

182. Secondly, it has been argued that relief, sought for in para 9 (r), is nothing but relief for compensation / monetary relief against the consideration for sale shares to be paid to the Bawri Group by the Dalmia Group and such a claim by no stretch of imagination can be termed as management disputes. Being so, the appropriate reliefs in such a case would be compensation to be determined by the Arbitrator in accordance with the prescription of the Law, and, not the reliefs, so specified in section 402/403 of the Act of 1956. I have considered such arguments, and found that the materials on record support such a claim from the side of the applicants.

183. As far as the relief in para 9 (a) of the company petition is concerned, it has been contended that the petitioners are to exit from the company by 31, March, 2018 in view of various contracts contained in the SHAs. Since the petitioners are to exit from the company by 31, March, 2018, they have hardly any ground to seek the relief, so mentioned in article 9 (a).

184. The well apparent fact that in their section 9 application, the petitioners themselves admitted that they have sold their shareholding in the company to the Dalmia Group on "as-is-where-is basis "makes such a conclusion inevitable. On considering such submission in the light of the materials on record, I have found to concur with such claim of the applicants.

185. Our foregoing discussion has now established that all the disputes, projected through the company petition, are nothing but all alleged breaches of various clauses in the SHAs which are all contractual in nature. In other words, such disputes appear to be pure and chaste commercial disputes. Since those disputes are commercial disputes, the Arbitral Tribunal is well competent to grant adequate reliefs in accordance with prescription of law holding the field.

(A)

(Whether the petition in question is a dressed up petition.)

186. We have already found that the applicants quite arduously contend that the company petition under consideration is nothing but a dressed up one. Does such contention bear any truth? In order to get an answer to such query, I re-appreciate the arguments, advanced from the side of the parties, having regard to the materials on record as well as the discussion which I have indulged hereinbefore.

187. A careful reappraisal of our foregoing discussion vividly shows that there were some genuine but serious commercial disputes between Bawri Group and Dalmia Group over the alleged breach of clause 9.1 of SHA-I by Bawri Group which entails enormously serious consequences for defaulting party, as is evident from clause 9.2. The sequences of events which followed such contractual disputes gave rise to a series of disputes over the alleged violations of various clauses in the SHAs which, as stated above, are all contractual disputes for which the parties to such disputes initiated several proceedings. But then, it is well apparent that the disputes over the alleged violation of clause 9.1 of SHA-I unmistakably occupy the centre stage of all the proceedings including the company petition in question which were initiated after the service of notice dated 15.05.2015 on Bawri Group.

188. However, we have already found that there was a very determined, desperate but crafty attempt on the part of the petitioners to camouflage such contractual/commercial disputes as disputes under Section 397/398 of the Companies Act. Such clearly noticeable attempts from the side of the petitioners, unfortunately for the petitioners, become a fluent testimony to the fact that the petition under section 397/398 of the Act of 1956 is nothing but a vexatious one.

189. Close on the heels of above disclosures, come some other revelations which further fortify the above conclusion of mine. It is now found well evident that the actual players in the disputes under consideration were Bawri Group on one side and Dalmia group on the other side, and no one else. Surprisingly, in the company petition, things were arranged in such a way which shows that in the disputes in question, there are some players, other than Bawri Group who were affected adversely for the alleged illegal conduct of Dalmia Group, they being the petitioner Nos. 10 to 15.

190. Equally importantly, they also tried to show that there are some entities, other than Dalmia group, who indulged in huge illegalities in manning the affairs of the company, they being the respondent Nos. 3 to 25. However, the attempts, so made from the petitioners side, remains far from being substantiated and such unsubstantiated plea, in my firm view, go a long way to show that the petitioners have made desperate attempts to colour some commercial disputes as disputes covered by section 397/398 of the Act which, in turn, only serves to show that such a petition is a dressed up one.

191. Our foregoing discussion also shows that claim of the petitioners that Bawri Group had to hand over the management of the company under huge duress and their claim that Bawri Group had to sign the SHA-II only being coerced by Dalmia Group appear to be totally unfounded since the materials on record show that Bawri Group and Dalmia Group had voluntarily entered into SHA-II and the former quite willingly handed over the management of the Company to Dalmia Group. Such unsubstantiated plea, over a very vital point, speaks loud and clear that the petition under consideration is a dressed up one.

192. Again, the petitioners claim that only some of the clauses in the SHA-I and SHA-II were incorporated in the Articles of Association of the company. But then, record vividly discloses that the SHA-I and SHA-II were incorporated in the AOA of the company in to to. The denial of such indisputable facts, in my considered view, only advances the claim of the applicant that everything was not hunky dory in their presenting the company petition before the CLB.

193. But list of pleas from the sides of the petitioners which remained unsubstantiated does not end there. More and more are still found in the queue, for, we have found that according to the petitioners, there was an understanding between the parties that Bawri Group would be relieved of the liability of completing the project conditions, so specified in Clause 9.1 of the SHA-I. According to the petitioners, it was also agreed upon between the parties that the Clause No. 3.20 of SHA-II would be suitably amended to incorporate such understanding. Unfortunately, Dalmia Group resiled from their stand subsequently.

194. But then, such a plea too remains without being unsubstantiated which is evident from our foregoing discussion. Therefore, same calls for no further discussion. However, such a failed plea, in the

facts and circumstances of the case in hand, again demonstrates that there was a serious attempt on the part of the petitioners to color some purely commercial disputes as disputes under section 397/398.

195. The learned counsel for the petitioners submits that the plea that the company petition is a dressed up one has not been alleged in the section 8 of the application. Since such a vital plea was not incorporated in the section 8 of the application, it is no longer possible for the applicants to argue that the company petition was a dressed up one. However, such an argument too cannot be accepted in the facts and circumstances of the case under consideration.

196. This is because of the reason that stuff in company petition hardly disclose the mismanagement and oppression, as contemplated in section 397/398 of the Act of 1956. Rather, the materials therein prima facie show that disputes, so projected through the company petition, are nothing but commercial disputes and parties to such disputes are Bawri Group on one side and Dalmia Group on the other side.

197. It is worth noting here that it is a settled law that the substance in the petition determines the nature of the proceeding. In this context, one may look in to the decision rendered by the *CLB, Chennai in the case of Airtouch (supra). The relevant part is reproduced below: -*

> "In this connection, reference has been made to ITC Ltd Vs. Debts Recovery Appellate Tribunal- (1998) 2 SCC 70 to show that mere clever drafting of the pleadings does not change the dispute before the court and Nagin Mansukhlal Bagli Vs Haribhai Manibhai Patel – MANU/MH/0179/1980 : AIR 1980 Bom 123 to show that court must look at the real substance of the suit and not legal ingenuity in drafting the plaint, while determining the nature of suit."

198. In view of revelations, which I have catalogued in the preceding paragraphs, there cannot be any escape from the conclusion that the petition under Section 397/398 of the Act of 1956 is a dressed up petition and same is presented before the CLB, Kolkata with the sole object of frustrating the arbitration agreements in SHA-I & SHA-II.

(B)

(Whether it is permissible under the law to refer the parties before the Judicial authority to the Arbitrator when it is found the breaches, alleged in the company petition, appear to be the violations of the AOA of the company as well.)

199. We have already found that the various allegations, made in the company petition, are nothing but the alleged violations of various clauses in the SHAs. We have also found that the AOA of the company is the replica of the SHAs. In simple words, the allegations in the company petition appear to be the breaches of the AOA too. In re HR HARMER LTD (supra), it has been held that violation of AOA is an act of oppression and therefore, the aggrieved party is entitled to seek statutory relief(s) under the Companies Act.

200. It may be stated here that in a very similar situation in Airtouch, the CLB, Chennai was pleased to refer the parties to the Arbitrator and the CLB did so, though, it had found that there was allegation that the respondents in the company petition violated the clauses in the shareholder's agreements and although, such clauses in the shareholder's agreements were incorporated in the AOA of the company. In coming to such conclusion in **Airtouch, the CLB, Chennai** followed the decision rendered in Pinaki Das (supra).

201. In Pinaki Das (supra), the CLB, New Delhi held that even in a section 397/398 proceeding, if the party applying for referring the disputes to arbitration is able to establish that there are bonafide disputes arising out of an arbitration agreement and that arbitrator could settle the dispute by appropriate reliefs, then, the CLB will have to refer the parties to arbitration in terms of section 8 or section 45 of the Act of 1996 as the case may be.

202. In Airtouch International (supra), the CLB, Chennai, on noticing that the petitioner therein impleaded one respondent without seeking any reliefs against him, was pleased to follow the ratio laid down in Cekop v.Asian Refractoriness Ltd. 73 CWN 192 and was pleased to hold that a party to an arbitration agreement cannot frustrate arbitration by merely joining third parties to the proceeding against whom no reliefs are claimed.

203. **In** *Escorts Finance Ltd. vs. G R Solvents & Allied Industries Ltd., reported in (1999) 20 SCL 23 CLB New Delhi, E-Logistics (P) Ltd. vs. Financial Deck India Ltd. (2007) 79 SCC 424 CLB Chennai, , it was held that* If most of the allegations are related to disputes and difference between the parties, in implementation of the agreement and if the agreement contains arbitration clause, the issues must be referred to Arbitrator. *Similar view was also rendered in Kasthuri & Sons (supra)).*

204. In my firm opinion, the decisions, rendered in the aforesaid cases including the decision in Pinaki Das (supra) and the decision In Airtouch International (supra), are applicable to the case in hand since facts and circumstance in the present case are very similar to the facts and circumstances in those case , particularly in Pinaki Das (supra) and in Airtouch International (supra) and more so, when, as is evident from our foregoing discussion, section 8 application fairly and squarely, satisfies all the conditions laid down in section 7and 8 of the Act of 1996..

205. However, in our instant case, there are more compelling reasons for referring the parties here to the Arbitration. The discussions, made herein before unequivocally show that the company petition is nothing but a dressed up petition which is designed only to hide the actual colour of the disputes before the CLB and tried to paint such disputes as management disputes. Then the natural question-- is ---what would be the fate of such a dressed up petition? The answer to this query can be found in the decision, rendered in Rakesh Malhotra (supra).

206. In Rakesh Malhotra (supra), Hon'ble Bombay High Court, after surveying various decisions holding the field has concluded that that dispute in a petition "properly brought" under section397/398 read with section 402 of the Companies Act, 1956 cannot be referred to arbitration, subject to a caveat i.e. that where the company petition is malafide, vexatious or oppressive and one that is merely "dressed up" to avoid an arbitration clause, the matter can be referred to arbitration.

207. In *Ramnish kumar Sharm* (supra) the CLB , New Delhi held that a dressed up petition which seeks to avoid resolution of disputes arising out of an agreement in accordance with the prescription of the Act of 1996 is required to be rejected . The relevant part is reproduced below: -

> *It is true that the Tribunal is clothed with wide powers which are aimed at correctional mechanism to rescue an ailing company by preventing the oppression and*

mismanagement as has been held by the Hon'ble Supreme Court in case of Cosmosteels Private Ltd. v. Jairam Das Gupta & Ors (1978) 48 Com case 312 and Shanti Prasad Jain v. Kalinga Tubes Ltd. and Ors. (1965) 35 com case 351. There is a catena of judgments delivered by High Courts and we do not wish to burden this order by citing each one of those judgments. Suffice it to say that wide powers are vested with the Tribunal by virtue of the provisions of sections 397, 398, 402 & 403 of the Companies Act (now section 241, 242 & 244 of 2013 Act) as has been interpreted by courts. Notwithstanding these provisions it does not denude this Tribunal from refusing to entertain a petition which in fact is based on a breach of contract with an arbitration clause. On the excuse and pretext of 'oppression and mismanagement' the petitioner cannot be given a colour of a dispute of 'oppression and mismanagement'. Therefore we do not find any substance in the arguments of the counsel for the non-applicants-petitioners that the company petition is aimed at only preventing the 'oppression and mismanagement'.

207(a). In view of decisions in Rakesh Malhotra (supra) and in Ramnish kumar Sharm (supra), I find no difficulty, whatsoever, in concluding that section 8 application needs to be allowed and the parties in company petition are required to be referred to the arbitration to have their disputes resolved in accordance with the prescription of law.

208. Resultantly, this proceeding is allowed referring the parties to the arbitrator to have the disputes resolved in accordance with prescription of law(s) holding the field.

209. In view of above finding, interim order(s), if any, rendered in aforesaid proceeding, also stand vacated.

210. It goes without saying that observations made herein are only for the purpose of deciding issues as to whether the disputes should be referred to Arbitrator and necessarily, same cannot be made applicable to any proceeding which the parties to this proceeding have already initiated or may have initiated in future.

211. The Tribunal would, therefore, proceed to decide the matter on the basis of materials placed before it and in doing so, it would be guided by law(s) holding the field including Section 16 of the Act of 1996 which empowers the Arbitrator to rule on its own jurisdiction

212. Consequent to the decisions, arrived at herein before, the company petition too stands disposed of.

Justice P.K. Saikia Member (Judicial),
NCLT, Guwahati Bench,
Guwahati

Transcribed and typed by *nkm*