REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

ARBITRATION PETITION NO. 34 OF 2013

Swiss Timing Limited ...Petitioner

Versus

Organising Committee,
Commonwealth Games 2010, Delhi. ....Respondent

J U D G E M E N T

SURINDER SINGH NIJJAR,J.

1. This is a petition under Section 11(4) read with Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Arbitration Act"), with a prayer to appoint the nominee arbitrator of the Respondent and to further constitute the arbitral tribunal, by appointing the presiding arbitrator in order to adjudicate the disputes that have arisen between the parties.

2. The relevant facts as set out in the Arbitration Petition are

as under:-

3. The Petitioner is a company duly incorporated under the laws of Switzerland, having its registered office in Corgémont, Switzerland. The respondent is the Organising Committee, Commonwealth Games, 2010. It is a society registered under the Societies Registration Act, 1860 (hereinafter referred to as "the Organising Committee"), established for the primary purpose of planning, organising and delivering the Commonwealth Games, 2010 Delhi (hereinafter referred to as "Commonwealth Games") and having its registered office in New Delhi, India.

4. The petitioner entered into an agreement dated 11th March, 2010 with the respondent for providing timing, score and result systems ("TSR systems/services") as well as supporting services required to conduct the Commonwealth Games. According to the petitioner, Clause 11.1 of the aforesaid agreement stipulated the fees, as set out in Schedule 3, which shall be paid to the

petitioner for performance of the obligations contained in the agreement. The aforesaid Schedule 3 gives details of the amounts which were to be paid, in instalments, by the Organising Committee. The service provider/Petitioner was to submit monthly tax invoices, detailing the payments to be made by the Organising Committee. These invoices were to be paid within 30 days of the end of the month in which the tax invoices were received by the Organising Committee. All payments were to be made in Swiss Francs, unless the parties agree otherwise in writing. Clause 11.5 provides that on the date of the agreement, the service provider must provide the Performance Bank Guarantee to the Organising Committee to secure the performance of its obligations under the agreement. Certain other obligations are enumerated in the other clauses, which are not necessary to be noticed for the purposes of the decision of the present petition.

5. It is also noteworthy that in consideration of the

petitioner's services as stipulated in the agreement, the petitioner was to receive a total amount of CHF 24,990,000/-(Swiss Francs Twenty Four Million Nine Hundred and Ninety Thousand only). It was also provided in Schedule 3 that payment of the 5% of the total service fees was to be made upon completion of the Commonwealth Games. Accordingly, the petitioner sent the invoice No. 33574 dated 27th October, 2010 for the payment of CHF 1,249,500 (Swiss Francs One Million Two Hundred Forty Nine Thousand Five Hundred only). This represents the remaining 5% which was to be paid upon completion of the Commonwealth Games on 27th October, 2010. The petitioner had also paid to the Organising Committee a sum of Rs. 15,00,000/- (INR 1.5 million) as Earnest Money Deposit (EMD), for successfully completing the TSR services as provided in the agreement.

6. According to the petitioner, the respondent defaulted in making the payment without any justifiable reasons. Not

only the amount was not paid to the petitioner, the respondent sent a letter dated 15th December, 2010 asking the petitioner to extend the Bank Guarantee till 31st January, 2011. The petitioner informed the respondent that the Bank Guarantee had already been terminated and released on completion of the Commonwealth Games in October, 2010. It is also the case of the petitioner that there is no provision in the service agreement for extension of the Bank Guarantee. The petitioner reiterated its claim for the aforesaid amount. Through letter dated 26th January, 2011, the petitioner demanded repayment of Rs. 15 lakhs deposited as EMD. Instead of making the payment to the petitioner and other companies, the respondent issued a Press Communiqué on 2nd February, 2011 declaring that part payments to nine foreign vendors, including the petitioner, have been withheld for "non-performance of the contract". The petitioner is said to have protested against the aforesaid communiqué through letter dated 4th February, 2011. It was reiterated that the petitioner had

satisfactorily performed the obligations in the service agreement of 11th March, 2010. Since the respondent was disputing its liability to pay the amounts, the petitioner served a formal Dispute Notification on the respondent under Clause 38 of the agreement.

7. The petitioner further points out that on 7th February, 2011, the respondent called upon the petitioner to fulfil its alleged outstanding obligations under the agreement including handing over of the Legacy Boards, completion of the formalities of the material, which were required to be shipped out and to fulfil certain other requirements as set out in its earlier e-mails in order to prepare the "agreement closure report". The respondent also stated that they were not addressing the issue of invoking the Dispute Resolution Clause as they were interested in settling the dispute amicably. The petitioner pleads that the respondent failed in its commitment for payments towards services rendered, not only towards the petitioner but also towards other international companies

from Australia, Belgium, England, France, Germany, Italy, the Netherlands and Switzerland, which had provided various services to the respondent at the Commonwealth Games. It also appears that collective letters were written on behalf of various companies by the ambassadors of the concerned countries, to the Finance Minister of India indicating the default in payments of the amounts due. The petitioners, therefore, claim that they were left with no alternative but to invoke arbitration as provided under Clause 38.6 of the agreement. The petitioners have nominated the arbitrator on its behalf namely Justice S.N. Variava, former Judge of the Supreme Court of India. A notice to this effect was served on the respondent through a communication dated 22nd April, 2013. Since no response was received a reminder was issued on 29th May, 2013. Upon such failure, the petitioners have filed the present petition.

8. In the counter affidavit all the averments made by the petitioners have been denied, as being incorrect in facts

and in law. The respondents have raised two preliminary objections, which are as follows:-

(i) The petitioner has not followed the dispute resolution mechanism as expressly provided in the agreement dated 11th March, 2010. No efforts have been made by the petitioner to seek resolution of the dispute as provided under Clause 38. On the other hand, the respondent through numerous communications invited the petitioner for amicable resolution of the dispute. The respondent relies on communications dated 3rd January, 2011, 9th January, 2011, 10th January, 2011, 1st February, 2011 and 2nd February, 2011.

(ii) The contract stands vitated and is *void ab initio* in view of Clauses 29, 30 and 34 of the Agreement dated 11th March, 2010. Hence, the petitioner is not entitled to any payment whatsoever in respect of the contract and is liable to reimburse the

payments already made. Therefore, there is no basis to invoke arbitration clause.

The respondent points out that a combined reading of Clause 29 and Clause 34 would show that the petitioner had warranted that it will never engage in corrupt, fraudulent, collusive or coercive practices in connection with the agreement. The petitioner would be liable to indemnify the Respondent against all losses suffered or incurred as a result of any breach of the agreement or any negligence, unlawful conduct or wilful misconduct. The respondent may terminate the agreement whenever it determines that the petitioner had engaged in any corrupt, fraudulent, collusive or coercive practice in connection with the agreement. The respondent seeks to establish the aforesaid non-liability clause on the basis of registration of Criminal Case being CC No. 22 of 2011 under Section 120-B, read with Sections 420, 427, 488 and 477 IPC and Section 13(2) read with

Section 13(1)(d) of the Prevention of Corruption Act against Suresh Kalmadi, the then Chairman of the Organising Committee and other officials of the respondent alongwith some officials of the petitioner, namely Mr. S. Chianese, Sales & Marketing Manager, Mr. Christophe Bertaud, General Manager and Mr. J. Spiri, Multi Sports Events & Sales Manager.

9. It is further the case of the respondent that due to the pendency of the criminal proceedings in the trial court, the present petition ought not to be entertained. In case the arbitration proceeding continues simultaneously with the criminal trial, there is real danger of conflicting conclusions by the two fora, leading to unnecessary confusion.

10. I have heard the learned counsel for the parties.

11. The submissions made in the petition as well as in the

counter affidavit have been reiterated before me by the learned counsel. I have given due consideration to the submissions made by the learned counsel for the parties.

12. The learned counsel for the petitioners has relied on an unreported Order of this Court dated 11th April, 2012 in **M/s Nussli (Swtizerland) Ltd.** Vs. **Organizing Commit. Commonwealth Game. 2010**, wherein the dispute in almost identical circumstances have been referred to arbitration.

13. On the other hand, learned counsel for the respondent has relied on a judgment of this Court in **N. Radhakrishnan** Vs. **Maestro Engineers & Ors.**[1] He has also relied upon **Guru Granth Saheb Sthan Meerghat Vanaras** Vs. **Ved Prakash & Ors**.[2] Reliance is also placed on **India Household and Healthcare Ltd. Vs. LG Household and Healthcare Ltd.**[3]

[1] (2010) 1 SCC 72
[2] (2013) 7 SCC 622
[3] 2007 (5) SCC 510

14. The procedure for Dispute Resolution has been provided in Clause 38 of the agreement, which is as under:-

> **"38. Dispute Resolution**
>
> 38.1 If a dispute arises between the parties out of or relating to this Agreement (a "**Dispute**"), any party seeking to resolve the Dispute must do so strictly in accordance with the provisions of this clause. Compliance with the provisions of this clause is a condition precedent to seeking a resolution of the Dispute at the arbitral tribunal constituted in accordance with this clause 38.
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> 38.2 During a Dispute, each party must continue to perform its obligations under this Agreement.
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> 38.3 A party seeking to resolve the Dispute must notify the existence and nature of the Dispute to the other party (**"the Notification**"). Upon receipt of the Notification the Parties must use their respective reasonable endeavours to negotiate to resolve the Dispute by discussions between Delhi 2010 (or a person it nominates) and the Service Provider (or a person it nominates). If the Dispute has not been resolved within 10 Business Days of receipt of the Notification (or such other period as agreed in writing by the parties) then the parties must refer the Dispute to the Chairman of Delhi 2010 and the Chief Executive Officer or its equivalent) of the Service Provider.
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> 38.4 If the Dispute has not been settled within 5 Business Days of referral under Clause 38.3, the Dispute shall be settled by arbitration in

accordance with the following clauses.

38.5 For any dispute arising after 31 July, 2010, the relevant period in clause 38.3 is 48 hours and the relevant period in clause 38.4 is 24 hours.

38.6 The Dispute shall be referred to a tribunal consisting of three Arbitrators, one to be nominated by each party, with the presiding Arbitrator to be nominated by the two arbitrators nominated by the parties. The Arbitrators shall be retired judges of the Supreme Court or High Courts of India. However, the Presiding Arbitrator shall be a retired Supreme Court Judge.

38.7 The place of arbitration shall be New Delhi. All arbitration proceedings shall be conducted in English in accordance with the provisions of the Arbitration and Conciliation Act, 1996 as amended from time to time.

38.8 The arbitration award will be final and binding upon the parties, and each party will bear its own costs of arbitration and equally share the fees of the arbitral tribunal unless the arbitral tribunal decides otherwise.

38.9 This clause 38 will not affect each party's rights to seek interlocutory relief in a court of competent jurisdiction."

15. I am unable to agree with the submission made by the learned counsel for the respondent that the petitioner has not satisfied the condition precedent under Clause 38.3. A perusal of the correspondence placed on the record of

the petition clearly shows that not only the petitioner but even the ambassadors of the various governments had made considerable efforts to resolve the issue without having to take recourse to formal arbitration. It is only when all these efforts failed, that the petitioner communicated to the respondent its intention to commence arbitration by letter /notice dated 22nd April, 2013. This was preceded by letters dated 4th February, 2011, 14th March, 2011 and 20th April, 2011 which clearly reflect the efforts made by the petitioner to resolve disputes through discussions and negotiations before sending the notice invoking arbitration clause.

16. It is evident from the counter affidavit filed by the respondents that the disputes have arisen between the parties *out of* or *relating to* the agreement dated 11th March, 2010. On the one hand, the respondent disputes the claims made by the petitioner and on the other, it takes the plea that efforts were made to amicably put a "*closure to the agreement*". I, therefore, do not

find any merit in the submission of the respondent that the petition is not maintainable for non-compliance with Clause 38.3 of the Dispute Resolution Clause.

17. The second preliminary objection raised by the respondent is on the ground that the contract stands vitiated and is void-ab-initio in view of Clauses 29, 30 and 34 of the agreement dated 11th March, 2010. I am of the considered opinion that the aforesaid preliminary objection is without any substance. Under Clause 29, both sides have given a warranty not to indulge in corrupt practices to induce execution of the Agreement. Clause 34 empowers the Organising Committee to terminate the contract after deciding that the contract was executed in breach of the undertaking given in Clause 29 of the Contract. These are allegations which will have to be established in a proper forum on the basis of the oral and documentary evidence, produced by the parties, in support of their respective claims. The objection taken is to the manner in which the grant of the contract was

manipulated in favour of the petitioner. The second ground is that the rates charged by the petitioner were exorbitant. Both these issues can be taken care of in the award. Certainly if the respondent is able to produce sufficient evidence to show that the similar services could have been procured for a lesser price, the arbitral tribunal would take the same into account whilst computing the amounts payable to the petitioner. As a pure question of law, I am unable to accept the very broad proposition that whenever a contract is said to be *void-ab-initio*, the Courts exercising jurisdiction under Section 8 and Section 11 of the Arbitration Act, 1996 are rendered powerless to refer the disputes to arbitration.

18. However, the respondent has placed strong reliance on the judgment of this Court in **N. Radhakrishnan (supra)**. In that case, disputes had arisen between the appellant and the respondent, who were partners in a firm known as Maestro Engineers. The appellant had retired from the firm. Subsequently, the appellant alleged that

he continued to be a partner. The respondent filed a Civil Suit seeking a declaration that the appellant is not a partner of the firm. In this suit, the appellant filed an application under Section 8 of the Arbitration Act seeking reference of the dispute to the arbitration. The plea was rejected by the trial court and the High Court in Civil Revision. This Court also rejected the prayer of the appellant for reference of the dispute to arbitration. This Court found that subject matter of the dispute was within the ambit of the arbitration clause. It was held as under :

> "14. The learned counsel for the respondents further argued that the subject-matter of the suit being OS No. 526 of 2006 was a different one and it was not within the ambit of the arbitration clause of the partnership deed dated 7-4-2003 and that the partnership deed had ceased to exist after the firm was reconstituted due to the alleged retirement of the appellant. Therefore, the trial court was justified in not referring the matter to the arbitrator.
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> 15. The appellant had on the other hand contended that the subject-matter of the suit was within the ambit of the arbitration clause since according to him the dispute related to his retirement and the settlement of his dues after he was deemed to have retired according

to the respondents. Further, it was his contention that the partnership deed dated 6-12-2005 was not a valid one as it was not framed in compliance with the requirements under the Partnership Act, 1932. Therefore, the argument of the respondents that the subject-matter of the suit did not fall within the ambit of the arbitration clause of the original partnership deed dated 7-4-2003 cannot be sustained. We are in agreement with the contention of the appellant to this effect.

16. It is clear from a perusal of the documents that there was a clear dispute regarding the reconstitution of the partnership firm and the subsequent deed framed to that effect. The dispute was relating to the continuation of the appellant as a partner of the firm, and especially when the respondents prayed for a declaration to the effect that the appellant had ceased to be a partner of the firm after his retirement, there is no doubt in our mind that the dispute squarely fell within the purview of the arbitration clause of the partnership deed dated 7-4-2003. Therefore, the arbitrator was competent to decide the matter relating to the existence of the original deed and its validity to that effect. Thus, the contention that the subject-matter of the suit before the Ist Additional District Munsiff Court at Coimbatore was beyond the purview of the arbitration clause, cannot be accepted."

19. Having found that the subject matter of the suit was within the jurisdiction of the arbitration, it was held that

the disputes can not be referred to arbitration. This Court approved the finding of the High Court that since the case relates to allegations of fraud and serious malpractices on the part of the respondents, such a situation can only be settled in court through furtherance of detailed evidence by either parties and such a situation can not be properly gone into by the arbitrator. In my opinion, the aforesaid observations runs counter to the ratio of the law laid down by this Court in **Hindustan Petroleum Corpn. Ltd.** Vs. **Pinkcity Midway Petroleums**[4], wherein this Court in Paragraph 14 observed as follows:

> "If in an agreement between the parties before the civil court, there is a clause for arbitration, it is mandatory for the civil court to refer the dispute to an arbitrator. In the instant case the existence of an arbitral clause in the agreement is accepted by both the parties as also by the courts below. Therefore, in view of the mandatory language of Section 8 of the Act, the courts below ought to have referred the dispute to arbitration."

20. In my opinion, the observations in **Hindustan Petroleum Corpn. Ltd. (supra)** lays down the correct law. Although, reference has been made to the aforesaid

[4] (2003) 6 SCC 503

observations in **N. Radhakrishnan (supra)** but the same have not been distinguished. A Two Judge Bench of this Court in **P. Anand Gajapathi Raju & Ors.** Vs. **P.V.G. Raju (Dead) & Ors.**[5], had earlier considered the scope of the provisions contained in Section 8 and observed as follows:-

> "**8.** In the matter before us, the arbitration agreement covers all the disputes between the parties in the proceedings before us and even more than that. As already noted, the arbitration agreement satisfies the requirements of Section 7 of the new Act. The language of Section 8 is peremptory. It is, therefore, obligatory for the Court to refer the parties to arbitration in terms [illegible]543of their arbitration agreement. Nothing remains to be decided in the original action or the appeal arising therefrom. There is no question of stay of the proceedings till the arbitration proceedings conclude and the award becomes final in terms of the provisions of the new Act. All the rights, obligations and remedies of the parties would now be governed by the new Act including the right to challenge the award. The court to which the party shall have recourse to challenge the award would be the court as defined in clause (e) of Section 2 of the new Act and not the court to which an application under Section 8 of the new Act is made. An application before a court under Section 8 merely brings to the court's notice that the subject-matter of the action before it is the subject-matter of an arbitration agreement. This

[5] (2000) 4 SCC 539

would not be such an application as contemplated under Section 42 of the Act as the court trying the action may or may not have had jurisdiction to try the suit to start with or be the competent court within the meaning of Section 2(e) of the new Act."

21. This judgment was not even brought to the notice of the Court in **N. Radhakrishnan (supra)**. In my opinion, judgment in **N. Radhakrishnan (supra)** is *per incuriam* on two grounds: Firstly, the judgment in **Hindustan Petroleum Corpn. Ltd. (supra)** though referred has not been distinguished but at the same time is not followed also. The judgment in **P. Anand Gajapathi Raju & Ors. (supra)** was not even brought to the notice of this Court. Therefore, the same has neither been followed nor considered. Secondly, the provision contained in Section 16 of the Arbitration Act, 1996 were also not brought to the notice by this Court. Therefore, in my opinion, the judgment in **N. Radhakrishnan (supra)** does not lay down the correct law and can not be relied upon.

22. As noticed above, the attention of this Court was not

drawn to the provision contained in Section 16 of the Arbitration Act, 1996 in the case of **N. Radhakrishnan (supra).** Section 16 provides that the Arbitral Tribunal would be competent to rule on its own jurisdiction including ruling on any objection with regard to existence or validity of the arbitration agreement. The Arbitration Act emphasises that an arbitration clause which forms part of a contract shall be treated as an agreement *independent* of the other terms of the contract. It further provides that a decision by the Arbitral Tribunal that the contract is *null and void* shall not entail *ipso jure* the invalidity of the arbitration clause. The aforesaid provision came up for consideration by this Court in **Today Homes & Infrastructure Pvt. Ltd.** Vs. **Ludhiana Improvement Trust & Anr.**[6]

23. In the aforesaid case, the designated Judge of the Punjab & Haryana High Court had refused to refer the disputes to arbitration. The High Court had accepted the

[6] 2013 (7) SCALE 327: 2013 (2) Arb. LR 241 (SC)

plea that since the underlying contract was void, the arbitration clause perished with it. The judgment of the High Court was challenged in this Court, by filing a Special Leave Petition. Before this Court it was submitted by the appellant that the High Court treated the application under Section 11(6) of the Arbitration Act as if it was deciding a suit but without adducing evidence. Relying on **SBP & Co.** Vs. **Patel Engineering Ltd.**, it was submitted that the High Court was only required to conduct a preliminary enquiry as to whether there was a valid arbitration agreement; or whether it was a stale claim. On the other hand, it was submitted by the respondents that once the High Court had found the main agreement to be void, the contents thereof including the arbitration clause are also rendered void.

24. This Court rejected the aforesaid submission of the respondents with the following observations :

> "13. We have carefully considered the submissions made on behalf of the respective parties and we are of the view that the learned designated Judge

exceeded the bounds of his jurisdiction, as envisaged in SBP & Co. (supra). In our view, the learned designated Judge was not required to undertake a detailed scrutiny of the merits and de-merits of the case, almost as if he was deciding a suit. The learned Judge was only required to decide such preliminary issues such as jurisdiction to entertain the application, the existence of a valid arbitration agreement, whether a live claim existed or not, for the purpose of appointment of an arbitrator. By the impugned order, much more than what is contemplated under Section 11(6) of the 1996 Act was sought to be decided, without any evidence being adduced by the parties. The issue
regarding the continued existence of the arbitration agreement, notwithstanding the main agreement itself being declared void, was considered by the 7-Judge Bench in SBP & Co. (supra) and it was held that an arbitration agreement could stand independent of the main agreement and did not necessarily become otiose, even if the main agreement, of which it is a part, is declared void.

14. The same reasoning was adopted by a member of this Bench (S.S. Nijjar, J.), while deciding the case of Reva Electric Car Company Private Limited Vs. Green Mobil [(2012) 2 SCC 93], wherein the provisions of Section 16(1) in the backdrop of the doctrine of kompetenz kompetenz were considered and it was inter alia held that under Section 16(1), the legislature makes it clear that while considering any objection with regard to the existence or validity of the arbitration agreement, the arbitration clause, which formed part of the contract, had to be treated as an agreement independent of the other terms of the

> contract. Reference was made in the said judgment to the provisions of Section 16(1)(b) of the 1996 Act, which provides that even if the arbitral tribunal concludes that the contract is null and void, it should not result, as a matter of law, in an automatic invalidation of the arbitration clause. It was also held that Section 16(1)(a) of the 1996 Act presumes the existence of a valid arbitration clause and mandates the same to be treated as an agreement independent of the other terms of the contract. By virtue of Section 16(1)(b) of the 1996 Act, the arbitration clause continues to be enforceable, notwithstanding a declaration that the contract was null and void.

25. Keeping in view the aforesaid observations made by this Court, I see no reason to accept the submission made by the learned counsel for the respondents that since a criminal case has been registered against the Chairman of the Organising Committee and some other officials of the petitioner, this Court would have no jurisdiction to make a reference to arbitration.

26. As noticed above, the concept of separability of the arbitration clause/agreement from the underlying contract has been statutorily recognised by this country under Section 16 of the Arbitration Act, 1996. Having provided

for resolution of disputes through arbitration, parties can not be permitted to avoid arbitration, without satisfying the Court that it will be *just and in the interest of all the parties* not to proceed with the arbitration. Section 5 of the Arbitration Act provides that the Court shall not intervene in the arbitration process except in accordance with the provisions contained in Part I of the Arbitration Act. This policy of *least interference* in arbitration proceedings recognises the general principle that the function of Courts in matters relating to arbitration is *to support arbitration process*. A conjoint reading of Section 5 and Section 16 would make it clear that all matters including the issue as to whether the main contract was *void/voidable* can be referred to arbitration. Otherwise, it would be a handy tool available to the unscrupulous parties to avoid arbitration, *by raising the bogey of the underlying contract being void*.

27. I am of the opinion that whenever a plea is taken to avoid arbitration on the ground that the underlying

contract is void, the Court is required to ascertain the true nature of the defence. Often, the terms "*void*" and "*voidable*" are confused and used *loosely* and *interchangeably* with each other. Therefore, the Court ought to examine the plea by keeping in mind the relevant statutory provisions in the Indian Contract Act, 1872, defining the terms "*void*" and "*voidable*". Section 2, the interpretation clause defines some of the relevant terms as follows:-

> "2(g) An agreement not enforceable by law is said to be void;
>
> 2(h) An agreement enforceable by law is a contract;
>
> 2(i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract;
>
> 2(j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable."

The aforesaid clauses clearly delineate and differentiate between term "*void*" and "*voidable*". Section 2(j) clearly

provides as to when a *voidable* contract would reach the stage of being *void*. Undoubtedly, in cases, where the Court can come to a conclusion that the contract is void without receiving any evidence, it would be justified in declining reference to arbitration but such cases would be few and isolated. These would be cases where the Court can readily conclude that the contract is *void* upon a meaningful reading of the contract document itself. Some examples of where a contract may fall in this category would be :-

(a) Where a contract is entered into by a person, who has not attained the age of majority (Section 11);

(b) Where both the parties are under a mistake as to a matter of fact essential to the agreement (Section 19);

(c) Where the consideration or object of the contract is forbidden by law or is of such a nature that, if permitted, it would defeat the provisions of any law or where the object of the contract is to indulge in any immoral activity or would be opposed to public policy. Glaring examples of this

would be where a contract is entered into between the parties for running a prostitution racket, smuggling drugs, human trafficking and any other activities falling in that category.

(d) Similarly, Section 30 renders wagering contracts as void. The only exception to this is betting on horse racing. In the circumstances noted above, it may not be necessary for the Court to take any further evidence apart from reading the contract document itself. Therefore, whilst exercising jurisdiction under Section 11(6) of the Arbitration Act, the Court could decline to make a reference to arbitration as the contract would be *patently void*.

28. However, it would not be possible to shut out arbitration even in cases where the defence taken is that the contract is *voidable*. These would be cases which are covered under the circumstances narrated in Section 12 – unsoundness of mind; Section 14 – absence of free

consent, i.e. where the consent is said to be vitiated as it was obtained by Coercion (Section 15), Undue Influence (Section 16), Fraud (Section 17) or Misrepresentation (Section 18). Such a contract will only become *void* when the party claiming lack of free consent is able to prove the same and thus rendering contract *void*. This indeed is the provision contained in Section 2(j) of the Indian Contract Act. In exercising powers under Section 11(6) of the Arbitration Act, the Court has to keep in view the provisions contained in Section 8 of the Arbitration Act, which provides that a reference to arbitration *shall* be made if a party applies not later than when submitting his first statement on the substance of the dispute. In contrast, Section 45 of the aforesaid Act *permits* the Court to decline reference to arbitration in case the Court finds that the agreement is *null and void, inoperative or incapable of being performed*.

29. To shut out arbitration at the initial stage would destroy the very purpose for which the parties had

entered into arbitration. Furthermore, there is no inherent risk of prejudice to any of the parties in permitting arbitration to proceed simultaneously to the criminal proceedings. In an eventuality where ultimately an award is rendered by arbitral tribunal, and the criminal proceedings result in conviction rendering the underlying contract *void*, necessary plea can be taken on the basis of the conviction to resist the *execution/enforcement* of the award. Conversely, if the matter is not referred to arbitration and the criminal proceedings result in an acquittal and thus leaving little or no ground for claiming that the underlying contract is *void* or *voidable*, it would have the wholly undesirable result of delaying the arbitration. Therefore, I am of the opinion that the Court ought to act with caution and circumspection whilst examining the plea that the main contract is *void* or *voidable*. The Court ought to decline reference to arbitration only where the Court can reach the conclusion that the contract is *void* on a meaningful reading of the contract document itself without the requirement of any

further proof.

30. In the present case, it is pleaded that the manner in which the contract was made between the petitioner and the respondent was investigated by the CBI. As a part of the investigation, the CBI had seized all the original documents and the record from the office of the respondent. After investigation, the criminal case CC No.22 of 2011 has been registered, as noticed earlier. It is claimed that in the event the Chairman of the Organising Committee and the other officials who manipulated the grant of contract in favour of the respondent are found guilty in the criminal trial, no amount would be payable to the petitioner. Therefore, it would be appropriate to await the decision of the criminal proceedings before the arbitral tribunal is constituted to go into the alleged disputes between the parties. I am unable to accept the aforesaid submission made by the learned counsel for the respondents, for the reasons stated in the previous paragraphs. The balance of convenience is tilted more in

favour of permitting the arbitration proceedings to continue rather than to bring the same to a grinding halt.

31. I must also notice here that the defence of the contract being *void* is now-a-days taken routinely along with the other usual grounds, to avoid/delay reference to arbitration. In my opinion, such ground needs to be summarily rejected unless there is clear indication that the defence has a reasonable chance of success. In the present case, the plea was never taken till the present petition was filed in this Court. Earlier, the respondents were only impressing upon the petitioners to supply certain information. Therefore, it would be appropriate, let the Arbitral Tribunal examine whether there is any substance in the plea of fraud now sought to be raised by the respondents.

32. The Respondent also relied on the judgment of this Court in **India Household and Healthcare Ltd.** (supra), wherein the application under section 11 (6) of the

Arbitration Act was dismissed. This case, however, will not come in the way of referring the matter to arbitration since it is clearly distinguishable from the present case. In **India Household and Healthcare Ltd.** (supra), the substantive/underlying contract containing the arbitration clause was entered into by the parties on 08.05.2004. This agreement, however, was preceded by a Memorandum of Understanding ("MoU") dated 1.11.2003. It was contended by the Respondent that both the Agreement and the MoU are vitiated by fraud which was fructified by a criminal conspiracy hatched between officials representing the Petitioner and Respondent therein. This Court also noticed that the concerned officials of the Respondent had been convicted and sentenced to undergo imprisonment by the Korean Criminal Court. The said MoU was also contended by the Respondent to be in contravention of the laws of Korea. It was further noticed that the Respondent filed a suit in the Madras High Court against the Petitioner, whereby the High Court vide interim order dated 06.10.2005 issued an injunction and thereby restrained

the Petitioner therein to act directly or indirectly on the basis of MoU and the Agreement dated 08.05.2004, and to derive any other benefit based upon the said MoU and the license agreement in any manner whatsoever. This interim order, the court noticed, was confirmed by an order dated 21.01.2006; against which no appeal was filed by the Petitioner. The Court, relying upon *A Treatise on Law Governing Injunctions* by Spelling and Lewis, concluded that this injunction order having not been challenged by the Petitioner has become final and also that this order restrains the invocation of the arbitration agreement contained in Agreement dated 08.05.2004. Therefore, the Court declined to refer the matter to arbitration. Another factor that weighed with Court in dismissing the Petition, it appears, is that the Petitioner did not conform to the procedure concerning appointment of the Arbitrator before filing the Petition under Section 11 (6).

33. This case is clearly distinguishable and hence is not

applicable into the facts and circumstances of the present case because of the following reasons: Firstly, there has been no conviction in the present case, though the trial has been going on against the officials of both the parties. Secondly, there is no injunction or any other order restraining the Petitioner from invoking the Arbitration Clause. Lastly, all the conditions precedent for invoking the arbitration clause have been satisfied by the Petitioner, as observed earlier.

34. The respondent had relied on the judgment of this Court in **Guru Granth Saheb Sthan Meerghat Vanaras** Vs. **Ved Prakash & Ors**.[7] This judgment reiterates the normal rule which was stated by the Constitution Bench of this Court in **M.S.Sheriff** Vs. **State of Madras** in relation to the simultaneous prosecution of the criminal proceeding with the civil suit. In the aforesaid case, the Constitution Bench had observed as follows:-

> "14. ... It was said that the simultaneous prosecution of these matters will embarrass the accused. ... but we can see that the simultaneous prosecution of the present criminal proceedings

[7] (2013) 7 SCC 622

out of which this appeal arises and the civil suits will embarrass the accused. We have therefore to determine which should be stayed.

15. As between the civil and the criminal proceedings we are of the opinion that the criminal matters should be given precedence. There is some difference of opinion in the High Courts of India on this point. No hard-and-fast rule can be laid down but we do not consider that the possibility of conflicting decisions in the civil and criminal courts is a relevant consideration. The law envisages such an eventuality when it expressly refrains from making the decision of one court binding on the other, or even relevant, except for certain limited purposes, such as sentence or damages. The only relevant consideration here is the likelihood of embarrassment.

16. Another factor which weighs with us is that a civil suit often drags on for years and it is undesirable that a criminal prosecution should wait till everybody concerned has forgotten all about the crime. The public interests demand that criminal justice should be swift and sure; that the guilty should be punished while the events are still fresh in the public mind and that the innocent should be absolved as early as is consistent with a fair and impartial trial. Another reason is that it is undesirable to let things slide till memories have grown too dim to trust.

This, however, is not a hard-and-fast rule. Special considerations obtaining in any particular case might make some other course more expedient and just. For example, the civil case or the other criminal proceeding may be so near its end as to make it inexpedient to stay it in order to give precedence to a prosecution ordered under

> Section 476. But in this case we are of the view that the civil suits should be stayed till the criminal proceedings have finished."

35. The purpose of the aforesaid solitary rule is to avoid embarrassment to the accused. In contrast, the findings recorded by the arbitral tribunal in its award would not be binding in criminal proceedings. Even otherwise, the Constitution Bench in the aforesaid case has clearly held that no hard and fast rule can be laid down that civil proceedings in all matters ought to be stayed when criminal proceedings are also pending. As I have indicated earlier in case the award is made in favour of the petitioner herein, the respondents will be at liberty to resist the enforcement of the same on the ground of subsequent conviction of either the Chairman or the officials of the contracting parties.

36. It must also notice here that the Petitioners relied upon an earlier order of this court in the case of **M/s Nussli (Switzerland) Ltd. (supra)**. The aforesaid order,

however, seems to have been passed on a consensus between the learned counsel for the parties. This is evident from the following observations in the aforesaid order:

> "In view of the aforesaid order, learned senior counsel for both the parties have agreed that the parties have agreed that the matter ought to be referred to Arbitration. However, Mr. Gopal Subramaniam, learned senior counsel appearing for the Respondent, submits that serious issued would arise which are currently under investigation of the CBI, which may ultimately culminate into certain conclusions which could result in the invalidation of the contract from inception.
>
> He has, however, very fairly stated that there would be no impediment for the arbitral Tribunal to look into all the issues including the allegations which are pending with the CBI in investigation.
>
> I am of the opinion that the submission made by the learned senior counsel is in accordance with the law settled, not only by this Court, but in other jurisdictions also concerning the international commercial arbitrations."

The aforesaid excerpt clearly shows that Mr. Gopal Subramaniam, had very fairly agreed to proceed with arbitration. The decision of this Court in **M/s Nussli (Switzerland) Ltd.** (supra) has not laid down any law.

37. As noticed earlier, the petitioners have already nominated Hon'ble Mr. Justice S.N. Variava, Former Judge of this Court, having his office at Readymoney Mansion, 2nd floor, Next to Akbarallys, Veer Nariman Road, Fort, Mumbai – 400 001, as their arbitrator. I hereby nominate. Hon'ble Mr. Justice B.P. Singh, Former Judge of this Court, R/o A-7, Neeti Bagh, 3rd Floor, New Delhi – 110 049, as the second Arbitrator and Hon'be Mr. Justice Kuldip Singh, Former Judge of this Court, R/o H.No. 88, Sector 10A, Chandigarh – 160 010, as the Chairman of the Arbitral Tribunal, to adjudicate the disputes that have arisen between the parties, on such terms and conditions as they deem fit and proper.

38. The Registry is directed to communicate this order to the Chairman of the Arbitral Tribunal, as well as, to the Second Arbitrator to enable them to enter upon the reference and decide the matter as expeditiously as possible.

39. The Arbitration Petition is accordingly allowed with no order as to costs.

.....J.
[Surinder Singh Nijjar]

New Delhi;
May 28, 2014