IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 30 OF 2011
IN
ARBITRATION PETITION NO. 978 OF 2010

World Sport Group (India) Private Limited,)
a company registered under the provisions of)
the Companies Act, 1956, having its registered office)
at #4-01, Corinthian, 370, Linking Road,)
Khar Road, Mumbai-400 052)..Appellant
(Orig. Petitioner)

vs.

The Board of Control for Cricket in India,)
a Society registered under the Tamil Nadu Societies)
Registration Act, and having its office at Cricket Center,)
Wankhede Stadium, Mumbai-400 020)..Respondent

Mr. Aspi Chinoy, Senior Advocate, along with Mr. Sunip Sen, Zal Andhyarujina, Mr. Suhas Tulzapurkar, Mr. Nishad Nadkarni, Mr. Yogesh Chawak, Mr. Ashutosh Sampat and Mr. Vineet Shrivastava, instructed by M/s. Legasis Partners, for the appellant.

Mr. R.A. Dada, Senior Advocate, Mr. T.N. Subramanium, Senior Advocate, along with Mr. P.R. Raman, Ms. Akila Kaushik, Ms. Aarti S.P., Mr. Hetal Thakore, Ms. Jyoti Ghag and Mr. Nikhil Mengde, instructed by M/s. Thakore Jariwala & Associates, for the respondent.

CORAM: P.B. MAJMUDAR &
A.A. SAYED, JJ.

Judgment reserved on : January 28, 2011
Judgment pronounced on: February 23, 2011

JUDGMENT : (Per P.B. Majmudar, J.):

This appeal is directed against the judgment and order dated December 20, 2010, passed by the learned single Judge in Arbitration Petition No. 978 of 2010 by which the learned single Judge dismissed the Arbitration Petition filed by the appellant under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") by holding that the appellant (hereinafter referred to as "the petitioner") has failed to make out a case for interim relief.

2. The petitioner is a Company registered under the provisions of the Companies Act, 1956, having its registered office in Mumbai. The respondent is a Society registered under the Tamil Nadu Societies Registration Act.

3. In order to organize 20:20 over cricket matches, a Sub-Committee is constituted by the respondent known as "Indian Premier League" (IPL). The said IPL consists of Chairman and Commissioner and other members. At the relevant time, one Mr. Lalit Modi was appointed by the respondent as the Chairman and Commissioner of the IPL. So far as commercial rights in respect of IPL matches are concerned, the same vest with the respondent-Board.

4. Initially at the first event of IPL(April-May, 2008), the respondent invited tenders in November, 2007 for the purpose of granting exploitation of

various media rights in relation to IPL matches for a period of 10 years (2008 to 2017). The petitioner required a broadcaster for the purpose of uploading signals from or to India. For the said purpose, the petitioner entered into a pre-bid agreement on 14th January, 2008 with MSM Satellite (Singapore) Pte. Ltd. (hereinafter referred to as "MSM"). It is the case of the petitioner that MSM, however, was insisting that it wanted rights directly from the respondent and not as a sub-licensee of the petitioner. Ultimately the bid of the petitioner was found to be favourable and the tender was awarded to the petitioner by the respondent in connection with entire global rights in respect of the IPL for a total value of more than 1 billion US $. It is also the case of the petitioner that by the pre-bid agreement entered into by the petitioner with MSM, IPL media rights were distributed between them and two agreements were entered into both dated 21st January, 2008, one between the petitioner and the respondent and the other between MSM and the respondent. Another Option Deed was also arrived at on the same day between the petitioner and MSM. As indicated above, on 21st January, 2008, three separate agreements were entered into between the parties. As per the agreement between the respondent and the MSM, MSM was granted certain media rights regarding IPL events for the Indian sub-continent for the period 2008-2012. As per the said agreement, a rights fee of US $ 275,400,000 was payable by MSM to the respondent in varying instalments each year. Out of this amount, a sum of various amounts each year aggregating to US $ 46 million was payable contingent upon the

average TAM rating of the season being greater than 5 GRP. The agreement between the petitioner and MSM conferred upon MSM the option to acquire the Indian sub-continent rights for the period 2013 to 2017 through the petitioner for additional consideration.

5. By an agreement between the petitioner and the respondent, the petitioner was granted all other media rights i.e. Indian sub-continent rights for the period 2013 to 2017 and the rest of the World rights for the period 2008 to 2017. The agreement also provides that if the contract between the MSM and the respondent is terminated for any reason, the respondent would negotiate the reversion of the Indian sub-continent rights for the unexpired part of the period 2008-2017 with the petitioner in good faith.

6. The first IPL tournament took place in April-May, 2008. It is also the case of the petitioner in the Arbitration Petition that on account of certain breaches alleged by the respondent on the part of MSM, the respondent, on 14th March, 2009, gave a written notice to MSM regarding termination of the first BCCI-MSM agreement. It is stated, inter alia, in the said notice that MSM had committed material breaches of the first BCCI-MSM agreement which MSM had failed to remedy and/or which were irremedial.

7. Pursuant to the terms of the first agreement which was executed between the petitioner and the respondent, the petitioner and the respondent had entered into good faith negotiations and thereafter reached an agreement early in the morning of 15th March, 2009. The petitioner, respondent and the World Sport Group(Mauritius) Ltd. (hereinafter "WSGM") accordingly entered into a deed of mutually agreed termination dated 15th March, 2009. It is the case of the petitioner that in order to facilitate this process, respondent approached petitioner to agree to a mutual termination of the first BCCI-petitioner agreement. By the said agreement, the petitioner's media rights thereunder including certain television and mobile rights in the Indian sub-continent for the period 2013-2017 reverted back to respondent and the parties agreed to such mutual termination in order to enable the respondent and the petitioner or WSGM to enter into the new World Sport Group media rights agreement. It is the further case of the petitioner that in view of the same, the contract between WSGM and the respondent was entered into on 15th March, 2009 granting WSGM television rights for the Indian sub-continent from 2009 to 2017 and the deed of termination was executed. Clause 13.5 of the agreement dated 15th March, 2009 between respondent and WSGM for India media rights required WSGM to enter into a Sub-License Agreement (SLA) within 72 hours failing which all rights under the said agreement would be automatically terminated. It is further the case of the petitioner that another agreement dated 25th March, 2009 was executed between the petitioner and the respondent

pursuant to the termination with effect from 15th March, 2009 for the other world rights, which is the subject matter of the arbitration petition.

8. In the meanwhile, MSM instituted Arbitration Petition No. 215 of 2009 challenging the termination by the respondent of the first BCCI-MSM agreement. Initially, ad-interim ex-parte order was granted on 15th March, 2009 upto 17th March, 2009. It is the case of the petitioner that during the pendency of the said petition, on or about 15th March, 2009 in the evening, WSGM was approached by MSM's senior staff including its Chief Executive Officer Mr. Manjit Singh along with Chief Operating Officer N.P. Singh and its Executive Vice-President Sneha Rajani. At that time MSM was aware of the 15th March, 2009 agreement which granted WSGM the Indian media rights from 2009 to 2017. MSM wanted to discuss the possibility of once again acquiring the Indian media rights.

9. On 16th March, 2009, MSM's application for ad-interim relief in Arbitration Petition No. 215 of 2009 was heard when the respondent informed the Court that certain broadcasters had been approved. It is further the case of the petitioner that by 19th March, 2009 terms had been finalised between WSGM and MSM whereunder MSM again wanted a direct contract with the respondent and that the parties, therefore, agreed in principle that MSM would pay WSGM Rs. 4,500,000,000 (which was subsequently reduced to Rs.

4,250,000,000) for, inter alia, WSGM facilitating and ensuring that the Indian media rights were licensed directly to MSM by the respondent for the same rights fee as set out in the 15th March, 2009 agreement. Subsequently, on 23rd March, 2009, this Court passed an order in the said Arbitration Petition No. 215 of 2009 refusing to grant any interim relief to MSM. As per the averments in the Arbitration Petition No. 978 of 2010, under the terms of 15th March, 2009 agreement, it would not have been possible for MSM to have a direct contract with the respondent in connection with the Indian sub-continent rights especially since WSGM could not have assigned the contract. Accordingly, on 24th March, 2009, the day after the order was passed in Arbitration Petition No. 215 of 2009, 72 hours period was not extended and a letter dated 25th March, 2009 was executed by WSGM and the respondent recording that the 15th March, 2009 agreement had lapsed. Simultaneously, on 25th March, 2009, MSM and the respondent executed an agreement whereby MSM was granted the Indian media rights from 2009 to 2016 with an option for an extension upto 2017. On the same day i.e. 25th March, 2009, MSM and WSGM also executed an agreement (Facilitation Deed) with a view to give effect to the in-principle agreement of 19th March, 2009 which provided, inter alia, that MSM would pay WSGM Rs. 4,250,000,000 in instalments in return for the entire facilitation services which had already been performed by WSGM. It is the case of the petitioner that the petitioner and the respondent executed the agreement (Facilitation Deed) with retrospective effect from 15th March, 2009 which agreement is the subject

matter of the present proceedings.

10. Thereafter the second and the third seasons of the IPL were successfully conducted during the years 2009 and 2010. MSM has also made payments to WSGM amounting to Rs. 1,250,000,000 as per clause 3.1 (a), (b) and (c) of the Facilitation Deed.

11. It is also the case of the petitioner that during the course of third IPL season, press reports were published which suggested that there were differences between the members of the respondent Board, the IPL Committee and the Chairman and Commissioner of the IPL Division of the respondent. According to the petitioner, the petitioner commenced preparations for complying with its obligations under the Agreement for Season Four of IPL as the petitioner is authorised to act in this behalf. The petitioner has in fact granted sub-licenses in pursuance of the agreement in relation to the exploitation of the Other World Rights to third parties which include rights in relation to the fourth season of the IPL On 25th June, 2010, WSGM received a rescission notice in relation to the facilitation deed from the Advocates for MSM on the ground that the facilitation deed is purportedly voidable agreement by virtue of alleged misrepresentation and fraud. WSGM has invoked arbitration clause to challenge the rescission in accordance with the agreed procedure.

12. MSM thereafter instituted a suit before this Court being Suit No. 1869 of 2010 against WSGM, the petitioner and the respondent-Board, seeking a declaration, inter alia, that clause 27.5 of the agreement dated 25th March, 2009 entered into between respondent and petitioner is null, void, invalid and not binding. The respondent made a statement before this Court on 28th June, 2010 that they have no intention to terminate the new MSM-BCCI agreement. The petitioner also received a letter dated 28th June, 2010 from the respondent purporting to rescind the agreement on the ground of misrepresentation and fraud. The petitioner subsequently filed the Arbitration Petition No. 978 of 2010 for interim measures under Section 9 of the Act. In the said petition, the petitioner has prayed that pending the initiation, hearing and final disposal of the arbitration proceedings and making of the Award and the implementation thereof, this Court may pass an order of injunction restraining the respondent (i) from creating any third party rights in respect of any or all of the rights conferred upon the petitioner under the agreement dated 25th March, 2009 or purporting to transfer, alienate or otherwise affect any right granted to the petitioner under the Agreement dated 25th March, 2009 executed between the parties, (ii) from interfering in any manner with the implementation of the operations by the petitioner pursuant to the agreement dated 25th March, 2009 or (iii) from causing any disruptions to its operations in pursuance thereof or directly or indirectly causing any interference or hindrance in exercising or enjoying any of the rights and privileges of the petitioner under the agreement

dated 25th March, 2009 executed between the parties. During the pendency of the petition before the learned single Judge, a statement was recorded of the respondent to the effect that the respondent would not create any third party interest till the Arbitration Petition is decided.

13. The learned single Judge by the impugned order came to the conclusion that the petitioner has failed to make out its case. The learned single Judge also held that this is not an open and shut case. The trial would unfold a clear picture. The learned single judge held that the grant of an injunction would virtually grant the petitioner specific performance of the agreement making restitution difficult in the extreme if not virtually impossible in the event of the agreement not being ultimately upheld by a court or arbitral tribunal. The learned single Judge also held that there is nothing on the record which indicates any arrangement between the respondent and the petitioner or WSGM nor is there anything on record that indicates the participation of the respondent in the formation or execution of the agreement dated 25th March, 2009. The learned single Judge also held that the petitioner is required to establish by leading evidence that the agreement was bona fide and genuinely entered into not merely that Mr. Lalit Modi in his personal capacity but as acting with authority for and on behalf of the respondent. Accordingly, the learned single Judge dismissed the arbitration petition which gave rise to this appeal.

14. Mr. Aspi Chinoy, learned senior counsel appearing for the petitioner, vehemently submitted that the learned single Judge has committed an error in holding that unless the petitioner make out a foolproof case, they are not entitled to interim protection under Section 9 of the Act. Mr. Chinoy further submits that looking to the documents on record it is clear that the agreement which was executed on 25th March, 2009 was acted upon for two IPL seasons without any objection raised by the respondent about the due performance of obligations thereunder. Mr. Chinoy further submitted that the impugned notice had been issued to the petitioner on the ground that WSGM had allegedly misrepresented to MSM in the facilitation deed that it had a new Media Rights Licence Agreement (MRL Agreement) with respondent and on that basis persuaded MSM into paying Rs. 425 crores as facilitation fees to WSGM. The purported rescission is ex facie for reasons dehors the said MRL Agreement and the terms thereof. Mr. Chinoy submits that the Agreements of 25th March, 2009 did not involve any loss or prejudice to the respondent. Mr. Chinoy further submits that the amount of Rs. 425 crores agreed to be paid by MSM to WSGM under the facilitation deed was not an amount due to respondent or to which respondent was in any way entitled to. Mr.Chinoy further submits that the respondent was fully aware of the clauses in the MRL Agreement and the Facilitation deed and in view thereof, he submits that a very strong prima facie case has been made out that the purported rescission of the MRL Agreement dated 25th March, 2009 by respondent's letter dated 28th June, 2010 on the

alleged ground of fraud is totally baseless, untenable and arbitrary and is also ex facie untenable in law. Mr. Chinoy further submits that in law a contract may be rescinded only if the party affected alleges and proves that the fraud/misrepresentation had materially induced him to give his consent to enter into the contract. In the instant case, it is not even the respondent's case that their consent to the MRL agreement was induced by any fraud or misrepresentation made by the petitioner. Mr. Chinoy further submits that the facilitation deed merely recorded the facilitation services rendered by WSGM to MSM and provided for the consideration to be paid for the same as per the agreed schedule. The press statement issued by MSM conclusively establishes that MSM had not acted on the basis that WSGM's MRL Agreement with BCCI dated 15th March, 2009 had been terminated/had come to an end or that respondent had executed a new MRL agreement dated 23rd March, 2009 in favour of WSGM and that MSM had not been misled into paying facilitation fee of Rs. 425 crores to WSGM on the basis of any misrepresentation. The respondent has not dealt with the said press statement or offered any explanation to the said statement. Mr.Chinoy further submits that the findings arrived at by the learned single are ex facie incorrect and unsustainable and the press statement destroys the alleged case of fraud /misrepresentation to MSM. Mr. Chinoy further submits that the press statement was issued to clarify matters regarding acquisition of media rights and the payment of facilitation fees to WSGM and could accordingly be presumed to be complete. He submits

that since the press statement establishes that it had not acted on the basis of any alleged MRL Agreement and that it had not been deceived or defrauded by WSGM that necessarily concludes the matter not only vis-a-vis MSM but also vis-a-vis the respondent. The learned counsel further submits that it is established that after 15th March, 2009, a number of broadcasters had shown interest in acquiring the India broadcast rights that had been licensed to WSGM and that there took place commercial negotiations. MSM was very keen once again to secure the India media rights which had been licensed to WSGM and was willing to match the figures of Rs. 4791 crores agreed to by WSGM and was also willing to pay an additional Rs. 425 crores to acquire the broadcast rights, but MSM was insistent on having a direct contract with the respondent and not being a sub-licensee of WSGM under the MRL Agreement. After tripartite negotiations between the respondent, WSGM and MSM, MSM agreed to pay the facilitation fee of Rs. 425 crores to WSGM. In view of the above, the learned counsel submits that the said agreement/arrangement of 25th March, 2009 did not involve any loss or prejudice to the respondent. In fact, the respondent received an additional Rs. 1791 crores, of which Rs. 1165 crores pertained to India rights for the period 2013-2017 (which WSGM had agreed to give up) and as against this WSGM received Rs. 425 crores for giving up its right to exploit India rights for the period 2013-2017. He submits that clause 10.4 of the MRL Agreement between the respondent and MSM and clause 27.5 of the agreement between the respondent and the petitioner, do not constitute a guarantee

provided by the respondent to WSGM for payment of amounts due by MSM and are not unusual or onerous. Mr. Chinoy further submits that once the above clauses are noted, there is no substance to the allegation that these clauses were beyond the authority of Mr. Lalit Modi as Chairman and Commissioner of the PIL. According to the learned counsel, the record establishes that the respondent and its office-bearers were fully aware of the said clauses, the facilitation deed and facilitation fee. In view of the above, it is submitted that the conclusion reached by the learned Judge is ex facie incorrect and unsustainable and in the teeth of the documentary material on record. The Division Bench judgment dated 17th September, 2010 in the case of MSM vs. WSGM does not hold even *prima facie* that there was substance in MSM's case that the facilitation deed dated 25th March, 2009 was fraudulent and/or vitiated by misrepresentation. It is the submission of the learned counsel that as a matter of law, no case has been alleged for rescission of the MRL agreement dated 25th March, 2009. The learned counsel submits that a very strong *prima facie* case has been made out that the purported rescission of the agreement dated 25th March, 2009 by respondent's letter dated 28th June, 2010 on the alleged ground of fraud is totally baseless, untenable and arbitrary, and is also ex facie untenable in law. Mr. Chinoy further submits that merely because the earlier management is replaced by a new management is no ground for cancellation of its contracts with the petitioner and the petitioner should not be allowed to suffer on this ground. It is submitted that it is impossible to believe

that the respondent was not aware about the contract executed between the petitioner and the respondent in the past. Mr. Chinoy has strongly relied upon the affidavit filed by the Secretary of the respondent before the Delhi High Court, which we will discuss later on. Mr. Chinoy further submits that since bald allegations have been made in the termination notice and the affidavit in reply that the petitioner's MRL agreement was fraudulent, no particulars whatsoever have been alleged to support any such charge and allegations. It is well settled that such bald, general and unsubstantiated allegations of fraud cannot be taken cognizance of. Mr. Chinoy further submits that it is a contract of a special nature and it cannot be compensated in terms of money. The petitioner is dealing internationally in various sports events and if the petitioner is labelled as a fraudulent broadcaster it will tarnish the image of the petitioner totally in the field in which they are dealing. It is, therefore, submitted that since the petitioner has made out a *prima facie* case and the respondent has failed to disclose the case of the petitioner, the interim protection deserves to be granted to the petitioner. Mr. Chinoy submits that as per the provisions of the Civil Procedure Code, particulars of fraud is required to be given and simply by saying that it is fraudulent it cannot be said that the contract was vitiated by fraud. The contract was entered into with the Board with full understanding and simply because the Secretary of the Board had already taken appropriate steps and such contract is drafted through the lawyers/advocates of the Board , it is submitted that it is impossible to believe that except Mr. Lalit Modi nobody

in the Board had a knowledge of the agreement of such a magnitude. It is submitted that the dispute is arbitrable and none of the factors on the basis of which the Court has restrained MSM and WSGM is applicable to the facts of the present case. It is submitted that the allegations of the respondent of misrepresentation and/or fraud are ex facie untenable and contrary to the documents and material on record.

15. Per contra, Mr. R.A. Dada, Senior Counsel, submitted that in the proceedings undertaken by MSM against WSGM, a Division Bench of this Court has held that the agreement between MSM and WSGM was vitiated by fraud. Mr. Dada submits that the petitioner without the knowledge of the respondent executed another agreement which is vitiated by fraud. It is submitted that if the agreement is found to be vitiated by fraud, the rescission at the hands of the respondent is just and proper. Mr. Dada submits that on 25th March, 2009 three agreements were entered into between (i) MSM and WSGM, (ii) respondent and MSM and (iii) respondent and the petitioner. All these three agreements are interconnected. The interconnection is that WSGM may issue notice to the respondent stating that it has not been paid the facilitation fee by MSM. In view of this the respondent is required to terminate the agreement between BCCI and MSM, if MSM does not pay WSGM or provide a bank guarantee. However, if petitioner gives a notice to the respondent that MSM has not made payment to WSGM of the facilitation fee, the respondent must either terminate the

agreement with MSM or make the payment itself to the petitioner or provide the bank guarantee. Mr. Dada submits that there is no reason as to why the respondent is required to pay the facilitation fee if not paid by MSM to WSGM. Mr. Dada further submits that the submission of the learned counsel for the petitioner cannot be accepted on the ground that (i) if WSGM was seeking a profit from MSM, there is no reason why the respondent should be made liable to make good that profit or terminate its agreement with MSM, (ii) if MSM wanted a direct contract with the respondent, there was no reason why WSGM should have agreed to this if it is felt that any payment was recoverable by it from MSM and (iii) there is no basis or justification for the respondent to make the payment to WSGM as the petitioner is entitled to insist under clause 27.5 to receive the payment from the respondent. Mr. Dada further submits that there are serious allegations of fraud levelled by MSM against WSGM in respect of the facilitation fee and as held by a Division Bench of this Hon'ble Court, the three agreements are interconnected. Mr. Dada has invited our attention to the said Division Bench judgment and submits that the disputes are not arbitrable between the respondent and the petitioner since the agreement between the respondent and the petitioner are interconnected with the agreements between BCCI and MSM and MSM and WSGM. Mr. Dada further submits that in view of the above Division Bench judgment, it is accepted that where there is a serious allegation of fraud as in the present case, the appropriate forum would be a Court and not an Arbitral Tribunal. Mr. Dada further submits that the

petitioner is in fact seeking specific performance of the terminated contract by seeking a mandatory interim injunction. He submits that at this stage no specific performance can be granted in respect of the said terminated agreement which would require the respondent to act in terms of clause 27.5 of the agreement, if the petitioner gives notice to the respondent. He submits that MSM has clearly repudiated its agreement with WSGM and obviously has repudiated its obligations to make payment to WSGM. He submits that granting an interim mandatory injunction would amount to the Court directing a specific performance of an agreement with clause 27.5 and requiring the respondent to pay an amount which is based on what is characterised by the Division Bench as a serious allegation of fraud. The pleadings before the Division Bench would show that there is a serious allegation of fraud between three interconnected agreements. Mr. Dada submits that specific performance cannot be granted at the interim stage or even finally in view of Sections 10 and 14 of the Specific Relief Act. He submits that the balance of convenience is in favour of the respondent. According to the learned counsel, the present dispute is not arbitrable and in view of that no order under Section 9 of the Act can be passed in favour of the petitioner. It is submitted that WSGM is having shareholding of one dollar and only with a view to get the amount under the agreement (Facilitation Deed), which they are not entitled to, that the agreement is entered into. Mr. Dada also submitted that at the relevant time the rights were reverted to the respondents as the 72 hours time expired finally at 3.00 a.m. On 21st

March, 2009 and, therefore, the agreement dated 21st March, 2009 (Facilitation Deed) could not have been executed. It is submitted that MSM has acted against the interest of the respondent and an enquiry is also going on against MSM in this behalf. It is submitted by Mr. Dada that such type of contracts cannot be specifically enforced and in any case the respondent has already stated that the sub-contract given by the petitioner will be honoured. It is submitted that it is true that the Board has continued the contract with MSM. It is because of the higher offer price as against that the petitioner has not come forward with any such request by approaching the Board, otherwise the respondent would have considered the request of the petitioner appropriately. Mr. Dada submits that the press note issued by MSM on which the case has been sought to be made out by the petitioner cannot be relied upon. Mr. Dada further submits that it has been held by a catena of judgments that where a discretionary order is passed by a trial Judge at an interlocutory stage, the Appeal Court should not interfere even if it has a different opinion on the same facts unless the Appeal Court comes to the conclusion that the discretion has been exercised arbitrarily, capriciously or perversely or where the Court has ignored the settled principles of law regulating grant of refusal of injunction. Mr. Dada submits that the respondent would honour all the contracts entered into by the petitioner with third parties. Mr. Dada submits that the principal issue is with regard to the question as to whether the facilitation fee payable by MSM to WSGM and the guaranteeing thereof by the respondent was fraudulent

in nature and vitiates the agreement, which is subject matter of the dispute. It is submitted that in any case the order in question being a discretionary one, this Court in Appeal may not entertain such an appeal.

16. We have considered the arguments advanced at the Bar by the learned counsel appearing for the parties. We have also perused the judgment impugned in this appeal and the records and proceedings. We have also gone through the written submissions tendered by the parties.

17. Reliance has been placed by both sides to a Division Bench judgment of this Court in the case of *MSM Satellite (Singapore) Pte Ltd. vs. World Sport Group (Mauritius) Limited* decided on 17th September, 2010. In the aforesaid case, MSM Satellite (Singapore) Pte Ltd. instituted a suit against World Sport Group (Mauritius) Limited for an injunction restraining the defendant therein from referring the dispute between the parties to the suit to arbitration. The interim injunction as prayed for by the plaintiff therein was declined by the learned single Judge against which the plaintiff therein preferred an appeal. A Division Bench of this Court held that since the dispute between MSM and WSGM was linked with the dispute between BCCI on the one hand and Mr. Lalit Modi and WSGM on the other hand and the larger dispute was pending decision in Suit (Lodging) No. 1901 of 2010, the dispute between MSM and WSGM cannot be referred to arbitration. It is pointed out to the Court that the said

decision is challenged before the Supreme Court by way of Special Leave Petition and the same is pending. So far as the present matter is concerned, it is in connection with Section 9 proceedings and this Court is required to consider as to whether the petitioner is entitled to interim protection under Section 9 of the Act.

18. The learned single Judge has also found that *prima facie* when the agreements dated 25th March, 2009 were entered into, neither the petitioner nor WSGM had any right which they could have surrendered as at the relevant time the 72 hours deadline had expired. The petitioner would have to establish its case on the basis of an oral arrangement having been arrived at on 19th March, 2009. The learned single Judge also held that a relief of the nature sought in the petition cannot be granted in such a case. The learned single Judge has also observed as under in paragraphs 70 and 71 of the judgment.

> "70. In view of the affidavit filed by the said N. Srinivasan in Delhi High Court, I may have been inclined to grant an injunction if it was merely a question of preserving the property in dispute, such as in the case of a suit for specific performance of an agreement to sell property. An injunction in such a matter however, would not drastically alter the status-quo during the pendency of the proceedings.
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> 71. However, in the present case, the injunction, if granted, would virtually amount to granting specific performance with the Court being unable to restore the status quo ante in the event of the petitioner being unable to establish the agreement."

The learned single Judge also observed that even if it is found that the scales tilt in favour of petitioner, then also interim relief is required to be refused as this is not an open and shut case. The learned single Judge further observed that the trial would unfold a clearer picture and the grant of an injunction would virtually grant the petitioner specific performance of the agreement making restitution difficult in the extreme if not virtually impossible in the event of the agreement not being ultimately upheld by a court or arbitral tribunal.

19. At this stage reference is required to be made to the affidavit dated 11th April, 2009 filed by the Secretary of the Board Mr. N. Srinivasan in a suit filed by MSM in the Delhi High Court being C.S. (O.S.) No. 633 of 2009 against a third party to restrain it from infringing the rights granted to MSM under the agreement dated 25th March, 2009. An interim application was taken out in the said suit. Paragraphs 2 and 3 of the said affidavit have also been incorporated by the learned single Judge in the said judgment. The said paragraphs 2 and 3 read thus:

> "2. I say that I am aware of the agreement entered into between the Plaintiff herein and the Board of Control for Cricket in India dated March 25, 2009 and have read and perused the contents thereof.
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> 3. I say and confirm that as per the said agreement, Plaintiff has been granted the sole and exclusive rights to produce and communicate the public by way of broadcast, the cinematograph

> films carrying the cricket matches to be played as part of the Indian Premier League cricket tournament. Thus, the plaintiff is the exclusive licensee in respect of the rights of reproduction and communication to the public of the said cinematograph film works in terms of the said agreement"

20. It is not the say of the respondent that the said affidavit was false or incorrect. The learned single Judge, however, found that the onus is heavily upon the said Mr. Srinivasan to explain the said affidavit. The question which requires consideration is as to whether, in view of the said stand taken by the Secretary of the respondent Board before the Delhi High Court in his affidavit, coupled with other documents, the petitioner can be said to have made out a *prima facie* case for interim protection. The question which also requires consideration is as to whether the respondent-Board with the full knowledge of the facts entered into agreement with the present petitioner and if that be so, whether the arbitration agreement is required to be enforced. Apart from the affidavit of Mr. Srinivasan before the Delhi High Court, a meeting of the IPL's Governing Council dated 11th August, 2009 was chaired by Mr. Lalit Modi and other 10 members of the Governing Council including the President, Hon. Secretary, Hon. Joint Secretary, Hon. Treasurer of the respondent and the Vice Chairman and three members of the Governing Council of the IPL were attended. Item No. 6 was in connection with accounts for the year 2009. Sub-item (f) was in connection with approval of all vendor contracts for 2009 season. Annexure-C contained 15 items. Item No. 14 pertains to MSM Satellite and BCCI and item No. 15 relates to IPL-BCCI and WSG. *Prima facie*, therefore,

it is not possible for us to believe that the respondent was not aware of the same. Even if Mr. Modi had entered into agreement on his own, subsequently his action is ratified by the Governing Council of IPL in its meeting dated 11th August, 2009. Under these circumstances, *prima facie*, it cannot be said that the agreement was entered into between the petitioner and WSGM by playing a fraud and, therefore, the same is not binding to respondent. In fact, on the basis of the said agreement, the petitioner conducted successfully two IPL seasons. If a person in charge such as Commissioner and the Chairman of a particular Board is replaced, and if it is *prima facie* found that the agreement which he had entered into was within the knowledge of the members of the respondent, simply by change or replacement of the said person, all the contracts signed by such person cannot be rescinded especially when the same are acted upon and nobody had objected for about two years IPL seasons. It is not possible for us to believe that the other members who have signed the minutes have signed the same without understanding the same or that they solely relied upon by Mr. Modi. In any event, the stand taken by the Secretary of the Board before the Delhi High Court in his affidavit cannot easily be brushed aside. As pointed out earlier, assuming that the grievance of MSM against WSGM regarding fraud has any substance, then also the respondent cannot take advantage of the same so far as their contract and agreement with the petitioner is concerned. The question which requires consideration is as to whether the respondent was subjected to any fraud by the petitioner in connection with the agreements

entered into between the petitioner and respondent Board. At this stage, the press statement dated 23rd April, 2010 issued by MSM is required to be considered. The said press note has been incorporated by the learned single Judge and we also incorporate the same which reads thus:

> "A quick summary
>
> 2. MSM immediately initiated legal action against the BCCI in the Bombay High Court to stay the termination. However, BCCI had vested the Indian subcontinent broadcasting rights with WSG Mauritius, for a nine year period (2009-2017) under an agreement dated 15 March 2009.
>
> 4. MSM's goals in the commercial negotiation were two-fold:
>
> (i) to secure the rights that had been unilaterally terminated and for the entire 9 year period keeping BCCI unaffected by paying the same amount to BCCI as contracted by WSG Mauritius, and ii) It was MSM's clear position that to secure its business interests, the broadcasting rights agreement should be a direct contract with the BCCI, rather than as a sub-license under an agreement with WSG Mauritius, which had these rights, as per the agreement with BCCI dated March 15, 2009. To facilitate MSM's condition for a direct contract with BCCI, WSG Mauritius agreed to give up its broadcast rights for the Indian subcontinent in favour of MSM, thus paving the way for BCCI & MSM to enter into a contract directly. In consideration for this, MSM agreed to pay WSG Mauritius a facilitation fee.
>
> 5. MSM wishes to re-emphasize here that the 'Facilitation Fee' of Rs.425 crores to WSG Mauritius is for :
>
> a. the original option fee of $25million (Rs.115 crores approximately) to extend the rights to years 6 till 10,
>
> b. an additional fee over the 9 years of the contract of Rs. 310 crores. These fees were to compensate WSG Mauritius for returning its rights for IPL season 2 – 10 to BCCI in favour of MSM and were necessary if MSM was to secure the rights to IPL season 2–10. However, the potential rating incentive at the end of year 5 of $35 million (Rs.160 crores) under the agreement

dated 21 January 2008 was eliminated, and

c. as a consequence of these commercial negotiations the net incremental amount attributable to WSG Mauritius giving up its IPL Indian subcontinent rights is Rs.150 crores.

March 2009 – Renegotiation of IPL Broadcasting Rights

2. MSM immediately initiated legal action against the BCCI in the Bombay High Court to stay the termination. However, BCCI had vested the Indian subcontinent broadcasting rights with WSG Mauritius, for a nine year period (2009-2017) under an agreement dated 15 March 2009.

5. Intense commercial negotiations ensued with other broadcasters also expressing interest making the situation extremely competitive. After protracted negotiations between MSM, WSG Mauritius and BCCI, MSM entered into a renegotiated agreement on the IPL broadcasting rights with the BCCI at the same consideration offered by WSG Mauritius and for the same duration (9 years), in lieu of WSG Mauritius relinquishing its rights, thereby achieving both its goals."

21. It is also required to be noted that the agreements were already there on the record of the respondent Board. Section 17 of the Indian Contract Act, 1872 defines fraud. Section 19 deals with voidability of agreement without free consent. The said Section further provides for exception and it provides that if such consent was caused by misrepresentation or by silence fraudulent within the meaning of Section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the mean of discovering the truth with ordinary diligence. As pointed out earlier, the said contract continued for

about two IPL seasons and all necessary documents were within the control of the Board. It is not the case of respondent that anybody tried to discover the truth with ordinary diligence during the course of that period. When Governing Council had given powers to Mr. Modi to finalise the contract and when in the subsequent meeting the same has been approved or rectified, *prima facie*, it is not possible for us to believe that any fraud was committed by the petitioner so far as the present respondent Board was concerned. A party who enters into contract of such a nature cannot easily try to back out from the same unless a proper case has been made out in this behalf. Considering the material on record, in our view, the petitioner has made out a *prima facie* case regarding interim protection. It is also required to be noted that considering the nature of the agreement, *prima facie* one can presume that it must have been drafted after obtaining legal advice.

22. At this stage, reference is also required to be made to clause 27.5 of the agreement dated 27th March, 2009 entered into between the respondent and the respondent and the same reads thus:

> 27.5 Upon receipt of the MSM Notice by Licensor, if MSM both:(a) fails to provide Licensor with a confirmation notice; and (b) MSM fails to remedy the breach within 21 days after receiving written notice from Licensor calling upon MSM to remedy such breach specifying the amount if any to be paid and/or the bank guarantee, if any, to be provided by Licensee to WSG (it being agreed that Licensee's (as relevant) payment of amount then overdue or provision of the bank guarantee then overdue within such 21 day period shall be deemed as amounting to adequate remedy), Licensor must (in its

discretion) either :

(i) immediately terminate the Licensor MSM Agreement (without prejudice to any other rights or remedies licensor may have against MSM); or

(ii) within a further 21 days after the expiry of the cure period above, pay Licensee the money or provide the Bank guarantee owing to it from MSM that caused Licensee to issue the MSM Notice....."

22. Mr. Chinoy has relied upon the decision of the Supreme Court in the case of *Bishundeo vs. Seogeni Rani*[1] regarding giving particulars of fraud as per Order 6 Rule 4 of the Civil Procedure Code. In paragraph 25 it has been observed as under:

"25. It is also to be observed that no proper particulars have been furnished. Now if there is one rule which is better established than any other, it is that in cases of fraud, undue influence and coercion, the parties pleading it must set forth full particulars and the case can only be decided on the particulars as laid. There can be no departure from them in evidence. General allegations are insufficient even to amount to an averment of fraud of which any Court ought to take notice, however strong the language in which they are couched may be and the same applies to undue influence and coercion...."

22.1 Mr. Chinoy has also relied upon the decision in the case of *Bal Gangadhar Tilak and others vs. Shriniwas Pandir and another*[2]. In the said judgment, the Court observed as under:

1 AIR 1951 SC 280
2 XLII (1915) IA 135

> " What remains is the attack which was made upon the transaction of the adoption itself, an attack in which the various grounds of rescission applicable to contracts in general were alluded to. Their Lordships hold that it is impossible to discover what it is that is really put forward by the defendants. Under the contract law of India, as well as by ordinary principles, coercion, undue influence, fraud, and misrepresentation are all separate and separable categories in law. It is true that they may overlap or may be combined. But in the present case it is impossible to discover what ground or grounds are really taken up. There is a well-known rule of pleading expressed in the frequently quoted language of Lord Selborne[1] that "With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice". The law of India is in no way different from this, and it has been decided over and over again...."

22.2 Mr. Chinoy placed reliance upon the decision in the case of *Abdool Hoosein Zenail Abadin and another vs. Charles Agnew Turner*[2]. It has been observed in the said decision that the charge of fraud is required to be made in the plaint and that the High Court committed an error in deciding the case upon a charge which was not made by the Plaintiff in his original plaint, nor in the plaint as erroneously amended at the close of the case, and which does not appear to have been made at the trial. It has been further held that a charge of fraud must be substantially proved as laid, and that when one kind of fraud is charged another kind of fraud cannot, upon failure of proof, be substituted for it.

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1 See Wallingford v. Mutual Society (1990) 5 App. Cas. 685, at p. 697
2 XIV IA 111

22.3 Mr. Chinoy has further relied upon a decision of the Supreme Court in the case of *Bijendranath Srivastava (dead) through LRs vs. Mayank Srivastava and others*[1] and submits that under Order 6 Rule 4 of Civil Procedure Code particulars have to be furnished of the plea of fraud or misconduct raised in accordance with Order 6 Rule 2 of C.P.C. and it is not permissible to introduce by way of particulars a plea of fraud or misconduct other than that raised in the pleadings.

22.4 Mr. Chinoy further relied upon the decision of the Calcutta High Court in the case of *G.M. Birla & Co. vs. Johurmal Premsukh*[2]. The Calcutta High Court has observed as under:

> " The question is whether the plaintiffs in this suit can be said to be impeaching the contract upon an equitable ground, such as that the plaintiffs were induced to enter into the contract by fraudulent misrepresentation. A statement of the alleged misrepresentation is found in the letter of M/s. Fox and Mandal at p. 19 where it is said:
>
> "The contract was on the face of it with a mill whose name was not disclosed and if your clients chose to pass a so-called contract without having secured a mill as their principal, they were guilty of misrepresentation, as soon as this became obvious to our clients, viz. when your clients asked for delivery to themselves, our clients were perfectly justified in repudiation of the so-called contract."
>
> When I turn to the plaint which was filed in this case, I find that

1 (1994) 6 SCC 117
2 AIR 1920n Cal. 908

> it is in para 4 that the ground upon which reliance is now placed is dealt with. There I find this:
>
> "Inasmuch as the defendant firm had failed to disclose the name of their principals, and inasmuch as the defendant firm had in fact no principal, the plaintiff firm treated the said contract as void and inoperative."
>
> To my mind, if the plaintiffs desired to impeach this contract on the ground that the defendants had made a fraudulent misrepresentation which induced them to enter into the contract, then they ought to have so pleaded. There is no such allegation in the plaint. It is clear that the misrepresentation must have in fact materially induced the contract in order to give the right of avoidance. There is no allegation in this plaint that the plaintiffs were deceived or that the alleged misrepresentation induced the plaintiffs to enter into the contract. I think this is one answer to the argument which was put forward by the learned counsel for the plaintiffs."

22.5 It is argued by Mr. Chinoy that the contract in question can be specifically enforced and in the instant case damages may not be the adequate remedy as the petitioner will lose its goodwill totally as under the contract, the petitioner is entitled to have broadcasting rights for particular years. In this connection, Mr. Chinoy has relied upon the decision of this Court in the case of *Board of Control for Cricket in India vs. KPH Dream Cricket Pvt. Ltd*., decided on 15th December, 2010 (Coram Dr. D.Y. Chandrachud & Anoop V. Mohta, JJ.) wherein the Division Bench has observed as under.

> "28. We are of the view that sufficient grounds were made out on behalf of the Respondent for establishing that damages would not provide an adequate remedy and that an interim order staying the termination was warranted. Such an order

> falls within the contemplation and purview of Section 9. The Arbitrator has power to grant specific performance. The Arbitrator, if appointed again, will decide finally all the issues after taking note of material and submissions. During this period, the Court is empowered to pass a protective order in order to preserve the subject matter of the Arbitration and to safeguard the rights in adjudication before the arbitral tribunal from being frustrated. In view of the nature of the transaction, the conduct of the parties, to avoid irreparable loss, injury and harm to goodwill and reputation, and in the interest of justice as a strong *prima facie* case is made out, we are included to maintain the order passed by the learned single Judge. We are also of the view that the balance of convenience lies in favour of the Respondent. It was just and convenient to pass an order to protect and preserve the subject matter of the dispute, to avoid further complications in the matter, particularly when the action of an abrupt termination of the contract which had a life coextensive with the duration of IPL is unjust, unfair and illegal. Damages will hence not provide adequate or sufficient recompense. Therefore, clause 21.6 does not affect the power and jurisdiction of the Court under Section 9 to pass such an order, at the interim stage, till the award of the arbitral tribunal. However, this is subject to the conditions set out in the order of the learned single Judge."

22.6 Mr. Chinoy has also referred to the decision of the single Judge of the Madhya Pradesh High Court in the case of *Jabalpur Cable Network Pvt. Ltd. vs. E.S.P.N. Software India Pvt. Ltd. and others*[1]. In paragraph 26 of the said decision, the learned single Judge has observed as under:

> " 26. This takes us to the arguments advanced by the learned counsel for the respondents that the claim by way of mandatory injunction in order to prevent breach of contract should not be granted in favour of the appellant. It was argued that Section 41 (e) of the Specific Relief Act provides that an

1 AIR 1999 M.P. 271

> injunction will be refused in respect of a breach of a contract, the performance of which would not be specifically enforced. Section 39 of the Specific Relief Act provides for permanent mandatory injunction and Section 40 thereof provides for damages in lieu of or in addition to injunction under Section 39 of that Act. The same principles will be applicable to grant a temporary injunction which are applicable to grant of permanent injunction exercise of the powers under Section 9 (ii) (d) and (e) of the Act. The learned counsel for the appellant, however, argues that this Court is granting temporary injunction in the shape of the mandatory injunction and as such was really enforcing a specific performance of contract. The contract was not specifically enforceable. It was argued that it is implied that this Court should not grant temporary mandatory injunction if the specific performance of the contract *prima facie* could not be granted. In this connection, the learned counsel for the appellant referred to Section 10 of the Specific Relief Act and argued that the compensation in money for non-performance would afford relief to the appellant. It was also argued that there was no standard for ascertaining the actual damages."

22.7 Mr. Chinoy submits that though it is impossible to calculate the damages, it is a fit case in which the petitioner may be allowed to continue the contractual obligations by continuing the contract. On the question as to whether discretionary order passed by the learned single Judge while deciding the interim application such as the one under Order 39 of the CPC, whether the appellate Court should interfere with such a discretionary order in Appeal, Mr. Chinoy has relied upon the decision of this Court in the case of *Iridium India Telecom Ltd. vs. Motorola INC and others*[1]. In paragraphs 84 and 85, this Court observed as under:

1 2004 (Supp.2) Bom. C.R. 808

"84. We quite see the force of this submission. The function of the Appellate Court is to correct the error when brought to its notice, since any refusal to correct such error would lead to continuation of a wrong and the effect thereof would not be capable of being undone at a later stage. The distinction between discretion and adjudication has been brought out in a Division Bench judgment in para 21 of the case of (Hiralal v. Ganesh, AIR 1994 Bom. 218).

"It must be remembered that the concept of discretion is distinct from that of adjudication. When the Deputy Registrar rejected the appellants application for rectification on the ground that the two marks are not deceptively similar, she did not use any discretion but adjudicated upon the rival contentions of the parties. It would be trite to say that exercise of discretion can arise in favour of a party when adjudication by the Registrar is against that party. In the present case, the Deputy Registrar's adjudication was in fact in favour of the respondents, with the result that there was no occasion for the directions and others".

85. Having dealt with these three points, which arise for our determination in this matter, we are of the view that the learned single Judge has clearly erred in holding that the appellant did not have a *prima facie* case and that the balance of convenience was not in its favour and that no such irreparable injury will be caused to the appellant if interim order was not granted. The learned Judge has also erred in holding that he could not pass the order that was sought by invoking section 151 of the C.P.C. In the circumstances, we reverse the finding of the learned single Judge on both these counts. As far as any impediment on the powers of this Court in passing appropriate interim orders in appeal is concerned, we overrule such submission, and hold that this Court can interfere with an order of an adjudicatory nature, where found erroneous. No exercising this power would in fact result into irreparable injustice. In the circumstances, we allow this appeal and set aside the order passed by the learned single Judge."

23. Mr. Rafiq Dada, learned senior counsel, has placed strong reliance on the decision of the Supreme Court in the case of *Hindustan Petroleum Corporation Ltd. vs. Sriman Narayan and another*[1] wherein the Supreme Court has observed that the Court is not required to deal with the matter as if it decides the suit finally, while considering the interim injunction. Considering the nature of the dispute which was in connection with permission for sale of petroleum products, the Supreme Court has observed as under:-

> " 11. Coming to the case on hand, it is to be kept in mind that the controversy raised in the case relates to a commercial contract entered between the appellant and Respondent 1 for sale of petroleum products manufactured by the appellant Corporation. Permission for sale of such products was granted by the appellant on the terms and conditions set out in the agreement. In the said agreement, it was clearly stipulated that Respondent 1 shall not change the structure of the firm without the permission of the appellant. Concededly, Respondent 1 had changed the structure of the firm from a proprietary firm to a partnership firm. The consequence of violation of any condition of the agreement by Respondent 1 was provided under clause 45 in which it was stated that the grantor/licensor will be entitled to revoke the agreement on the happening of such event. Therefore, *prima facie* the appellant was entitled to take action for revoking the agreement entered into with Respondent 1. Validity or otherwise of the order of revocation can be considered at the stage of interim injunction only for the limited purpose of ascertaining whether there is *prima facie* case in favour of the plaintiff-petitioner and not for determination of the question finally. From the discussions in the impugned order it appears that the High Court has dealt with the matter as if it was deciding the suit."

1 (2002) 5 SCC 760

In the said case, the Supreme Court has also held that on consideration of the entire matter, the order passed by the High Court granting the prayer for interim injunction, in the context of the facts and circumstances of the case, was unsustainable.

23.1 Mr. Dada has has relied upon the decision of the Patna High Court in the case of *Life Insurance Corporation of India vs. Baidyanath Singh and others*[1] wherein it has been held that the word 'fraudulent' mentioned in the exception to Section 19 of the Contract Act only qualifies 'silence' and not misrepresentation. In other words, if the consent has been obtained by misrepresentation or by silence, which is fraudulent within the meaning of Section 17 then only exception comes into play. It shall not apply to misrepresentations which are fraudulent within the meaning of Section 17 of the Contract Act. All misrepresentations are not necessarily fraudulent.

23.2 Referring to the meaning of fraud as defined in Section 17 of the Contract Act, Mr. Dada has also relied upon the decision of the Calcutta High Court in the case of *John Minas Apcar vs. Louis Caird Malchus*[2] and submits that exception to Section 19 applies to cases of misrepresentation as distinguished from fraud and cannot be interpreted as being meant to apply to misrepresentation which is fraudulent within the meaning of Section 17 of the

1 AIR 1978 Patna 334
2 AIR 1939 Calcutta 473

Contract Act. He submits that the phrase 'fraudulent within the meaning of S. 17" applies to the preceding word 'silence' exclusively, and not to the word 'misrepresentation'.

23.3. Mr. Dada has also referred to the decision of the Allahabad High Court in the case of *Niaz Ahmad Khan and another vs. Parsottam Chandra and another*[1] wherein it has been held that the difference between fraud and misrepresentation is that in the one case the person making the suggestion does not believe it to be true and in the other he believes it to be true, though in both cases it is a misstatement of fact which misleads the promisor. It has also been held that in the case of an active misrepresentation knowing the fact to be false, as distinct from mere silence or concealment, it is not incumbent upon the party defrauded to establish that he had no means of discovering the truth with ordinary diligence.

23.4 Mr. Dada submits that where a discretionary order is passed by a trial Judge at an interlocutory stage, the Appeal Court should not interfere even if it has a different opinion on the same facts unless the Appeal Court comes to the conclusion that the discretion has been exercised arbitrarily, capriciously or perversely or where the court has ignored the settled principles of law regulating grant of refusal of injunction. To buttress the aforesaid submission, Mr. Dada has relied upon a decision of this Court in the case of *Colgate Palmolive Company and*

1 AIR 1931 Allahabad 154

another vs. Anchor Health and Beauty Care Pvt. Ltd.[1] The Division Bench in the said case has held that the Appeal Court cannot find fault with and interfere with the discretionary order of the trial Judge by relying upon the material placed in appeal which was not under consideration by the trial Judge.

23.5 Mr. Dada has relied upon the decision of the Supreme Court in the case of *Wander Ltd. and another vs. Antox India P. Ltd*.[2] wherein it is held that interference by the Appellate Court with the exercise of discretion of Court of first instance may not be justified under certain circumstances. In paragraph 14 it has been observed as under:

> "14. The appeals before the Division Bench were against the exercise of discretion by the single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the Court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial Court's exercise of discretion. After referring to these principles,

1 2005 (1) Mh.L.J. 613.
2 1990 (Supp) SCC 727

> Gajendragadkar, J. in *Printers (Mysore) Private Ltd. vs. Pothan Joseph*[1] held:
>
> " ..These principles are well established, but as has been observed by *Viscount Simon in Charles Osenton & Co. v. Jhanaton*[2] .. the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case."
>
> The appellate judgment does not seem to defer to this principle."

24. It is, however, required to be noted that it cannot be said that in no case the Appellate Court can interfere with the order of the single Judge in connection with interim injunction. In a given case, the discretion exercised by the Court of first instance is not required to be interfered with by the Appellate Court. However, in a given case if the Court of first instance has committed an error in reaching the conclusion about *prima facie* case, the Appellate Court in such an eventuality can always find out as to whether there was any error on the part of the court of first instance. If the Appellate Court agrees with the *prima facie* finding of the court of first instance on the issue, then naturally the discretion exercised by the learned single Judge would normally be not interfered with by the Appellate Court. It is required to be noted that when *prima facie* there is material to show that the Board has ultimately ratified the contract entered into between the petitioner and the respondent through Mr. Modi, the matter is required to be considered from different angles so far as interim protection

1 (1960) 3 SCR 713
2 1942 AC 130

aspect is concerned.

25. Considering the facts and circumstances of the case, we are of the opinion that it cannot be said that the petitioner has no *prima facie* case worth the name or that there is *prima facie* evidence on record to come to the conclusion that the petitioner had practiced fraud upon the respondent in connection with the agreements in question. As pointed out earlier, pursuant to the agreements the second and the third seasons of the PIL were successfully conducted. The contracts were in fact brought to the notice of other members of the Board. They signed the minutes also and simply because the person who was the signatory to the contract is replaced or removed, it would not be proper to terminate all the agreements or contracts entered by the earlier Chairman and Commissioner of IPL. At this stage, it is not possible for us to come to the conclusion that the petitioner has committed any fraud upon the respondent, at the time of entering into the contract. As pointed out earlier, the petitioner's case is required to be examined on its own merit. Considering the totality of the facts and circumstances of the case and evidence on record, in our view, the interim protection granted by the learned single Judge during the pendency of the Arbitration Petition that no third party interest will be created is required to be continued till the Arbitrator is appointed. In our view, looking to the nature of the contract, damages cannot be said to be the adequate remedy as held by the Division Bench of this Court in the case of Board of Control for Cricket in India

(supra) as well as considering the fact that it may not be possible to even calculate such damages in such type of breach. It is also required to be noted that Section 9 of the Act provides for interim protection. The disputes in most of the cases arise out of the breach of arbitration agreement. When the Act itself provides for interim protection, the Court can, in a given case, grant interim protection in connection with the breach of agreement and to see that the proceedings may not become infructuous especially when the Legislature itself has provided interim measures during the pendency of the arbitration proceedings. Normally If no protection worth the name is given, the petitioner naturally cannot seek enforcement of the agreement before the Arbitrator.

26. Considering the aforesaid aspect in our view, till the Arbitrator is appointed, the respondent is restrained from giving the contract in question to anyone. During the pendency of this appeal, a statement was made by the respondent that they will not create any third party interest. The said protection, in our view, is required to be continued for a limited period. However, the interim protection as aforesaid shall continue, provided the petitioner takes appropriate steps within a period of one month for the purpose of appointing the Arbitrator. If such proceedings are initiated within one month, such interim protection shall continue to operate till one week after the decision is taken by the concerned Court for appointment of Arbitrator. In case the application under Section 11 of the Act is rejected, this interim protection shall automatically cease

to operate. However, in case, Arbitrator is appointed, the parties may apply to the Arbitrator, within two weeks of such appointment for interim relief and till then the interim relief will continue to operate. If any such application is preferred, the Arbitrator is free to decide the said application, after hearing both sides on its own merits. It is for the Arbitrator to decide whether interim protection which is continued is required to be continued or the prayer for interim protection is required to be rejected or whether any additional interim protection is required to be granted. All these aspects are left to the Arbitrator who shall decide the same in accordance with law, after hearing both the sides and the observations made in this order shall have no effect as the said application is required to be decided *de novo* on its own merits. The above observations are made only in connection with Section 9 Application and the same will have no bearing in case any application under Section 11 of the Act is preferred by the petitioner.

27. The Appeal is allowed to the aforesaid extent with no order as to costs.

P. B. MAJMUDAR, J.

A.A. SAYED, J.