Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.8164 OF 2016
(ARISING OUT OF SLP(C) No. 13369 of 2013)

Shri Vimal Kishor Shah & Ors. Appellant(s)

VERSUS

Mr. Jayesh Dinesh Shah & Ors. Respondent(s)

J U D G M E N T

Abhay Manohar Sapre, J.

1) Leave granted.

2) This appeal is filed against the final judgment and order dated 06.03.2013 of the High Court of

Judicature at Bombay in Arbitration Application No. 278 of 2012 whereby the High Court allowed the arbitration application under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") filed by respondent Nos. 1 to 3 herein and appointed Shri S.R. Shah, former Judge of the Bombay City Civil Court, as sole Arbitrator to arbitrate the disputes between the parties.

3) In order to appreciate the issue involved in this appeal, which lies in a narrow compass, it is necessary to set out the relevant facts in brief infra.

4) One Shri Dwarkadas Laxmichand Modi executed a family Trust Deed called "Deed of Kaydee Family Trust" on 06.04.1983 as author of the Trust hereinafter called as "settlor" in relation to his properties. The settlor formed this Trust out of love and affection in favour of six minors (now major),

namely, 1) Master Vimal Kishor Shah, 2) Master Nainesh Kishor Shah, 3) Kumar Grishma Kishor Shah, 4) Master Jayesh Dinesh Shah, 5) Master Utpal Dinesh Shah and 6) Master Monil Dinesh Shah, (hereinafter referred to as the "beneficiaries") in the Trust Deed. To manage the affairs of the Trust and its properties, the settlor appointed two persons - Shri Dinesh Nandlal Shah and Smt. Saryu Kishor Shah as Managing Trustees.

5) Clause 20 of the Trust Deed, which is relevant for the disposal of this case, provides that every dispute or differences regarding the interpretation of any of the clauses or provisions or the contents of the Trust Deed or any dispute *inter se* trustees or disputes between the trustees and beneficiaries or disputes between beneficiaries *inter se* as and when arise, the same would be resolved in pursuance of the provisions of

the Indian Arbitration Act, 1940 and the decision of arbitrator(s) shall be final and binding on the parties to the arbitration.

6) Unfortunately, as it appears from the record of the case and from the conduct of the parties, the wish of the settlor could not be fulfilled in letter and spirit for which he had formed the Trust and soon after its formation somewhere from 1989-90 onwards, the differences cropped up *inter se* beneficiaries with respect to the manner in which the affairs and the business of the Trust were being carried on. This led to tendering of the resignation by one trustee from Trusteeship. It was followed by exchange of legal notices *inter se* beneficiaries through their lawyers making therein allegations and counter allegations against each other about the manner of functioning of the Trust, its affairs and demanding accounts of the

Trust etc. A demand was also made in the notice that since parties have not been able to amicably resolve their disputes/differences, therefore, all such disputes/differences be referred to the arbitrator for his decision as per clause 20 of the Trust deed.

7) Since the parties could not settle the disputes/differences and nor could they agree for the appointment of the arbitrator amicably, respondent Nos. 1 to 3 (one set of beneficiaries) filed an application under Section 11 of the Act being Arbitration Application No. 278/2012 in the High Court of Bombay against the appellants (other set of beneficiaries) praying for referring all disputes/differences, which had arisen between the parties, to the arbitrator in terms of clause 20 of the Trust Deed. The application was founded on the aforementioned facts for claiming the reliefs.

8) The appellants herein (respondents before the High Court) contested the application. Apart from other grounds, the main legal ground of contest was that the application filed under Section 11 of the Act is not maintainable. It was contended that when admittedly the appellants and the respondents are neither parties to the Trust Deed and nor its signatories having signed the Trust Deed, they cannot be termed as "party" to such Trust Deed and nor can such Trust Deed be termed as an "agreement" much less an "arbitration agreement" within the meaning of Section 2(b) and 2(h) read with Section 7 of the Act. It was contended that the *sine qua non* for invoking the jurisdiction under Section 11 of the Act is existence of a valid and enforceable arbitration agreement, which is lacking in this case, and hence the application filed

under Section 11 of the Act is not maintainable and is liable to be dismissed on this ground alone.

9) The learned designated Judge, by impugned judgment, allowed the application. He held that since parties to the application were minors at the time of execution of the Trust Deed, they were incapable of signing the Trust Deed. He further held that now all the parties have become major and have taken benefit of the Trust Deed as beneficiaries throughout their minority and then on attaining the majority, they should be held as "party" to the Trust Deed within the meaning of Section 2(h) of the Act. He also held that once the beneficiaries are held parties to the Trust Deed, they have a right to take recourse to proceedings under Section 11 of the Act for appointment of arbitrator by invoking clause 20 of the

Trust Deed for deciding the disputes arising between them relating to the affairs of the Trust.

10) With these findings, the learned Judge proceeded to invoke clause 20 of the Trust Deed and appointed Shri S.R.Shah - former Mumbai City Civil Judge as a sole arbitrator for deciding the disputes/differences which had arisen between the parties to the application. It is against this order, the respondents, who as stated above, are other group of beneficiaries, have felt aggrieved and filed this appeal by way of special leave before this Court.

11) Heard Mr. Shekhar Naphade, learned senior counsel for the appellants and Mr. Gaurav Agrawal, learned counsel for the respondents.

12) Mr. Shekhar Naphade, learned senior counsel appearing for the appellants while assailing the

legality and correctness of the impugned order has made three-fold submissions.

13) In the first place, learned senior counsel submitted that the learned designated Judge erred in allowing the application filed under Section 11 of the Act. In his submission, the application was liable to be dismissed as not maintainable.

14) In the second place, learned senior counsel submitted that when admittedly parties to the application, who are beneficiaries of the Trust, did not sign the Trust Deed, they could not be held parties to such Trust Deed. Learned counsel urged that the first and foremost requirement for filing an application under Section 11 of the Act is that there has to be in existence a valid and enforceable arbitration agreement and such agreement, according to him, should be reduced in writing and lastly, it must be

signed by the parties to the application as provided under Section 2(h) read with Section 7(4) of the Act. It was urged that since the respondents have not been able to prove this basic requirement of law, the application filed by the respondents under Section 11 of the Act was liable to be dismissed for want of non-compliance of the requirement of Section 2(b) and 2(h) read with Section 7 of the Act.

15) In the third place, learned senior counsel submitted that apart from what is urged above, since the creation, affairs of the Trust, rights, obligations, removal, duties and legal remedies to seek redressal of grievances by the Settlor, Trustees and beneficiaries are governed by the Indian Trust Act, 1882 (hereinafter referred to as "the Trust Act"), which is a complete code in itself to deal with the aforementioned matters, the provisions of the Arbitration Act for

deciding any dispute relating to affairs of the Trust including dispute *inter se* the stakeholders mentioned above are not applicable and the remedy of the stakeholders would be to take recourse to the provisions of the Trust Act for ventilating their grievances in an appropriate forum specified in the Trust Act.

16) It is these submissions, which were elaborated by the learned senior counsel in his argument, with reference to the Scheme of the Trust Act and its various provisions and the decisions, which dealt with these issues.

17) In reply, Mr. Gaurav Agrawal, learned counsel for the respondents, supported the reasoning and the conclusion arrived at by the designated Judge and prayed for its upholding calling no interference therein

in this appeal. He also elaborated his submissions by referring to some provisions of the Act and case law.

18) Having heard learned counsel for the parties and on perusal of the record of the case, we find force in the submissions of Mr. Shekhar Naphade, learned senior counsel for the appellants.

19) The basic question, which arises for consideration in this appeal, is whether a clause in a Trust Deed, which provides for resolving the disputes arising between the beneficiaries of the Trust through arbitration, can constitute an "arbitration agreement" within the meaning of Section 2(b) and 2(h) read with Section 7 of the Act and whether the application filed by the respondents under Section 11 of the Act can be held as maintainable?

20) Section 2(b) and 2(h) and Section 7 of the Act are relevant to examine the question involved in the case. These Sections read as under:

2. Definitions.-(1).....
(a).....

(b) "arbitration agreement" means an agreement referred to in section7;

(h) "party" means a party to an arbitration agreement.

7. Arbitration agreement.-(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.
(4) An arbitration agreement is in writing if it is contained in-

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

21) Section 2(b) defines "arbitration agreement" and stipulates that arbitration agreement means arbitration agreement referred to in Section 7 whereas Section 2(h) defines the word "party" to mean a party to an arbitration agreement.

22) Section 7 defines "arbitration agreement". It has five sub-sections. Sub Section (1) provides that arbitration agreement means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not. Sub-section (2) provides that an

arbitration agreement may be in the form of an arbitration clause in a contract or it may be in the form of a separate agreement. Sub-section (3) says that an arbitration agreement shall be in writing. Sub- section (4) which has three clauses (a), (b) and (c) says that a document which contains an arbitration agreement is to be signed by the parties. Clause (b) recognizes an arbitration agreement by exchange of letters, telex, telegrams or other means of telecommunication which provide a record of such agreement and clause (c) also recognizes an arbitration agreement by an exchange of statements of claim and defence in which existence of the agreement is alleged by one party and not denied by the other.

23) A reading of the aforementioned sections in *juxtaposition* goes to show that in order to constitute a valid, binding and enforceable arbitration agreement,

the requirements contained in Section 7 have to be satisfied strictly. These requirements, apart from others, are (1) there has to be an agreement (2) it has to be in writing (3) parties must sign such agreement or in other words, the agreement must bear the signatures of the parties concerned and (4) such agreement must contain an arbitration clause.

24) In other words, aforementioned four conditions are *sine qua non* for constituting a valid and enforceable arbitration agreement. Failure to satisfy any of the four conditions would render the arbitration agreement invalid and unenforceable and, in consequence, would result in dismissal of the application filed under Section 11 of the Act at its threshold.

25) The question as to what are the conditions which are necessary for constituting a valid and enforceable

arbitration agreement came up for consideration before this Court in **Vijay Kumar Sharma Alias Manju vs. Raghunandan Sharma Alias Baburam & Ors.,** 2010 (2) SCC 486. In this case, a question arose in the context as to whether a clause in a Will, which provides that in the event of any dispute arising in relation to the properties bequeathed by the testator would be settled by named arbitrator, can such a clause or/and the Will be considered as an arbitration agreement within the meaning of Section 2(b) read with Section 7 of the Act for the purpose of invoking the jurisdiction of the High Court under Section 11 for appointment of an arbitrator for resolving the disputes. This question arose on the following facts.

26) The father executed a Will in favour of his one son whereby he bequeathed to him his one house. He had another son to whom he did not give any share in

the said house. In the Will, father appointed two executors and expressed that if any dispute arises in relation to the bequeathed property, one named arbitrator will decide such dispute. On the death of the father, one son filed a suit for declaration of his 1/6th share in the bequeathed property and also demanded partition whereas the other son filed a suit on the strength of the Will and claimed his exclusive ownership to the exclusion of all his brothers and sisters. The suits were clubbed for trial.

27) The two executors, who were also made parties to the suits, filed an application under Section 8 of the Act contending therein that the testator had declared in the Will as also in one separate declaration that in the event of any dispute arising in relation to the bequeathed house, the same will be referred to a named arbitrator for his decision. It was, therefore,

contended that in the light of this, the two civil suits filed by the parties are liable to be dismissed as being not maintainable with a liberty to be granted to the parties to submit themselves to the jurisdiction of the named arbitrator so as to enable the arbitrator to decide the disputes as per arbitration clause contained in the Will/declaration.

28) The Trial Court allowed the application filed by the executors under Section 8 of the Act and, in consequence, dismissed the suits with a liberty granted to the parties to approach the named arbitrator. One party, accordingly, submitted himself to the jurisdiction of the named arbitrator and filed his claim whereas the other party objected to the jurisdiction of the arbitrator. He contended that there was neither any arbitration agreement between the parties for appointment of any arbitrator and nor he

ever signed the Will or any declaration, if made, by his late father and nor gave his consent for appointment of any named arbitrator. He, therefore, challenged the very initiation of arbitration proceedings before the arbitrator as being without jurisdiction.

29) This led to named arbitrator withdrawing from the arbitral proceedings which, in turn, gave rise to the filing of the application by one son under Section 11 of the Act before the High Court of Rajasthan. He prayed therein for appointment of new arbitrator in place of earlier named arbitrator. The application was contested by other son reiterating the same objection, which he had raised earlier, namely, that there is no valid and enforceable arbitration agreement between the parties and neither the Will and nor the declaration constitute any arbitration agreement for

deciding any dispute between them in relation to the house in suit.

30) The learned designate of Chief Justice overruled the objection and allowed the application and appointed new arbitrator for deciding the disputes arising between the parties to the application in relation to the house. It is this order, which was impugned in the special leave to appeal before this Court. Allowing the appeal and setting aside of the order of the High Court, this Court held that firstly, the Will did not contain any such clause; Secondly, even assuming that it had any such clause then also it was merely an expression of the wish by the testator that the disputes relating to bequeathed property should be settled by the arbitrator and nothing more. It was held that in no case the Will could be considered as constituting an arbitration agreement;

Thirdly, even if there was some declaration made by the testator subsequent to the execution of Will to this effect yet since it was a unilateral declaration made by the father and hence by no stretch of imagination such declaration could be considered as an arbitration agreement among his children. It was further held that at best such declaration could be taken as an expression of a fond hope of a father that his children should get the disputes settled in case if they arise between them by means of arbitration but certainly it did not partake the nature of an arbitration agreement within the meaning of Section 2(b) read with Section 7 of the Act. Justice Raveendran, speaking for the Bench, succinctly dealt with this issue in paras 18 to 22 and held as under:

> **"18. In this case, admittedly, there is no document signed by the parties to the dispute, nor any exchange of letters, telex, telegrams (or other means of**

telecommunication) referring to or recording an arbitration agreement between the parties. It is also not in dispute that there is no exchange of statement of claims or defence where the allegation of existence of an arbitration agreement by one party is not denied by the other. In other words, there is no arbitration agreement as defined in Section 7 between the parties.

19. In *Jagdish Chander* v. *Ramesh Chander, (2007) 5 SCC 719,* this Court held: (SCC p. 726, para 11)

"*11.* The existence of an arbitration agreement as defined under Section 7 of the Act is a condition precedent for exercise of power to appoint an arbitrator/Arbitral Tribunal, under Section 11 of the Act by the Chief Justice or his designate. It is not permissible to appoint an arbitrator to adjudicate the disputes between the parties, in the absence of an arbitration agreement or mutual consent."

20. While the respondents rely upon the will, the appellant denies the existence of any such will. The validity of the will is pending consideration in the two civil suits filed by the appellant and the first respondent, referred to above. The alleged will, admittedly, does not contain any provision for arbitration, though the learned designate has proceeded on an erroneous assumption that the will provides for arbitration. Even if the will had provided for reference of disputes to arbitration, it would be merely an expression of a wish by the testator that the disputes should be settled by arbitration and

cannot be considered as an arbitration agreement among the legatees.

21. In this case, according to the respondents, the provision for arbitration is not in the will but in a subsequent declaration allegedly made by Durganarayan Sharma, stating that if there is any dispute in regard to his will dated 28-12-2003, it shall be referred to his friend, U.N. Bhandari, Advocate, as the sole arbitrator whose decision shall be final and binding on the parties. A unilateral declaration by a father that any future disputes among the sons should be settled by an arbitrator named by him, can by no stretch of imagination be considered as an arbitration agreement among his children, or such of his children who become parties to a dispute. At best, such a declaration can be an expression of a fond hope by a father that his children, in the event of a dispute, should get the same settled by arbitration. It is for the children, if and when they become parties to a dispute, to decide whether they would heed to the advice of their father or not. Such a wish expressed in a declaration by a father, even if proved, cannot be construed as an agreement in writing between the parties to the dispute agreeing to refer their disputes to arbitration.

22. We are therefore of the view that there is no arbitration agreement between the parties and the learned designate committed a serious error in allowing the application under Sections 11 and 15(2) of the Act and holding that there is an arbitration agreement between the parties to the dispute and appointing an arbitrator."

31) When we examine the facts of the case at hand keeping in view the facts and the law laid down in the case of **Vijay Kumar Sharma** (supra), we find similarity on facts and law.

32) Though case of **Vijay Kumar Sharma** dealt with a case relating to execution of a "Will" whereas the case at hand deals with execution of the "Trust Deed" yet, in our considered view, it does not make any significant difference so far as the applicability of the principle of law laid down in **Vijay Kumar Sharma** to the facts of the case at hand is concerned.

33) The reasons are not far to seek. In the case of a Will, the testator executes the Will in favour of legatee(s) whereas in the case of a Trust, the settlor executes the deed in favour of the beneficiaries. In both the cases, it is the testator/settlor who signs the document alone. That apart, both the deeds convey

the interest in the estate in favour of the legatees or/and beneficiaries. However, since legatee/beneficiaries do not sign the document or we may say are not required to sign such document, they are not regarded as party to such deed despite legatee/beneficiaries/trustees accepting the deed. Such deed, therefore, in our opinion, does not partake the nature of an agreement between such parties.

34) We are, therefore, of the view that if the Will is held not to constitute an arbitration agreement despite containing an arbitration clause therein - *a fortiori*, the Trust Deed can also not be held to constitute an agreement much less an arbitration agreement despite containing an arbitration clause therein.

35) In the light of foregoing discussion, we hold that the Trust Deed including the arbitration clause (clause

20) does not satisfy the requirements of Section 2(b) and 2(h) read with Section 7 of the Act and hence, the Trust Deed cannot be construed as an "arbitration agreement" within the meaning of Section 7 of the Act.

36) The aforesaid issue can be examined from yet another angle as was examined by the High Court of Calcutta in **Bijoy Ballav Kundu & Anr. Vs. Tapeti Ranjan Kundu,** AIR 1965 Calcutta 628.

37) The facts of the **Bijoy Ballav Kundu's case** (supra) were that One Dhananjay Kundu, a resident of Calcutta was the owner of a house. He executed a trust/settlement deed wherein he nominated two trustees to manage the affairs of the Trust. He conveyed his house together with Rs.500/- to the trustees as the corpus of the Trust to carry on its activities for the benefit of the beneficiaries. The Trust Deed had several clauses providing therein as to how

trustee and beneficiaries should carry out the activities of the Trust, how they should manage the Trust affairs and maintain its accounts etc. Clause 12 provided that in the event of any dispute/differences arising between the trustees concerning management and the affairs of the Trust, the same shall be referred to named arbitrator who would decide the disputes in accordance with the provisions of Indian Arbitration Act, 1940.

38) After some time, the disputes arose between the trustees concerning the affairs and the management of the Trust. They were accordingly referred to the arbitrator in terms of clause 12 for his decision. One trustee, however, objected to making of the reference to the arbitrator. The arbitrator, however, delivered the award. One trustee, who had objected to making of the reference to the arbitrator, challenged the legality

of the award in the civil Court *inter alia* on the ground that since there was no arbitration agreement between the parties (trustees) to make reference to the arbitrator and hence the award passed by the arbitrator is rendered without jurisdiction and is, therefore, liable to be set aside. The Court upheld the objection and set aside the award. The aggrieved trustee appealed to the Calcutta High Court.

39) The Division Bench of the High Court, by their well-reasoned judgment, examined the issue thread bear in the context of the provisions of the Trust Act and the Arbitration Act 1940 and while upholding the order of the Trial Court dismissed the appeal. It is apposite to mention the reasoning of Their Lordships hereinbelow:

> **"5. ..... The question however in this case is, as to whether the trustees can be said to be a party to any agreement at all for referring their disputes to arbitration. The way Mr. Basak argues is this: He says that**

the deed of settlement directs that there shall be such a reference to arbitration and the trustees by their conduct in accepting the trusteeship and agreeing to act as trustees must be said to be parties to that agreement or to have become parties to the agreement by their conduct. In other words, once they accept the trust, they must be deemed to be parties to the agreement for reference to arbitration, which according to the learned counsel is contained in the arbitration clause. In my opinion, this contention is not sound. In order to become an agreement there must be a proposal and an acceptance. If we are to hold that the arbitration clause constitutes the written agreement, then we must hold that each trustee has, at some point of time, made a proposal to the other trustee or trustees as to whether the disputes should be referred to arbitration and each of them has accepted the same. In the circumstances of this case, it can never be said that any such incident has ever happened. By accepting a trust, a trustee merely undertakes to carry out the terms of the trust, in so far as the same may be in accordance with law. The reference to arbitration is only one of the many terms of the deed of settlement. There are other directions, for example, directions as to the amount that should be expended upon diverse matters or diverse acts done. It can never be said that in accepting the trust there is any question of the trustees agreeing among themselves that such amount should be expended or such acts done. Being trustees, they are bound to carry out the provisions of the deed of settlement. There can be no question of any agreement amongst themselves; otherwise we are faced

with this absurd situation that with regard to every provisions in the deed of trust we have to visualize the trustees agreeing among themselves to carry it out by making a proposal and an acceptance. The learned Judge has pointed out that in order to accept a trust it is not necessary to signify to the other trustees any willingness to do so or to enter into any agreement to do or abstain from doing anything. In other words, no question of any proposal by one trustee or acceptance of the same by another arises. It may be an attractive argument to say that trustees having consented to accept trusteeship under a deed of trust must have agreed to carry out each and every term contained in it. That however is quite different from saying that they have entered into a written agreement amongst themselves to do so. The provision as to reference of disputes to arbitration is a matter that concerns the jurisdiction of courts. Ordinarily, the Courts are zealous of their jurisdiction and can only allow it to be curtailed by some provision of law. The provisions of the Indian Arbitration Act constitute such a law, but the provision must be strictly construed. In order that there may be a reference to arbitration which ousts the jurisdiction of Courts, the parties must enter into an arbitration agreement. That is a matter that must be governed by the law and in a given case it must be shown that the parties have lawfully entered into such an agreement and there is in existence a lawful agreement. Nothing short of it can support such an agreement and any reference to arbitration or an award consequent thereon, in contravention of the provisions of the law cannot be supported and must be declared

> **invalid. In our opinion, the conclusions reached by the learned Judge are correct on that point and must be upheld. In the facts of this case it must be held that there was no arbitration agreement and no valid reference to arbitration……."**

40) We find that the facts of the case at hand and the one involved in the case of **Bijoy Ballav Kundu** (supra) are identical. We are in agreement with the aforesaid reasoning of Their Lordships which, in our opinion, lays down the correct principle of law on the subject. Indeed, Their Lordships examined the issue in the context of definition of "arbitration agreement" as defined in Section 2(a) of Arbitration Act, 1940 whereas the case at hand is required to be examined in the context of definition of "arbitration agreement" as defined in Section 2(b) and 2(h) read with Section 7 of the Act 1996, which is quite different from the earlier definition.

41) As rightly held by the Calcutta High Court in the case of **Bijoy Ballav Kundu** (supra), there is always a proposal and then its acceptance in the case of every agreement, which is not required in the case of creation of the Trust because in the case of a Trust, the trustee and beneficiary though accept its creation but by such acceptance, they merely undertake to carry out the terms of the Trust Deed in so far as the same may be in accordance with law. The clause relating to arbitration in the Trust Deed is one of the several clauses. The other clauses which deal with several types of directions to the trustees and beneficiaries such as how the Trust should be managed, how the amount of the Trust should be spent etc. are not in the nature of agreement between the trustees or/and beneficiaries. In other words, by accepting the Trust Deed, it cannot be said that the

trustees or beneficiaries have agreed amongst themselves as to how they should spend the money or how they should manage the affairs of the Trust or receive any benefit.

42) Indeed, in such case, the trustees or/and beneficiaries are only required to carry out the provisions of the Trust Deed. There cannot, therefore, be any agreement *inter se* trustees or beneficiaries to carry out any such activity. If that were to be so then the trustees/beneficiaries would have to give proposal and acceptance in respect of each clause of the Trust Deed *inter se*. It would be then a sheer absurdity and hence such situation, in our view, cannot be countenanced.

43) As rightly held in **Bijoy Ballav Kundu** (supra) to which we agree that the clause in an agreement, which provides for deciding the disputes arising out of such

agreement through private arbitration, affects the jurisdiction of the Civil Court and the ouster of jurisdiction of Courts cannot be inferred readily. The Arbitration Act is one such law, which provides for ouster of jurisdiction of the Civil Courts. The Act, *inter alia,* provides a forum for deciding the disputes *inter se* parties to an agreement through arbitration. Such clause, in our opinion, requires strict rule of interpretation to find out whether it provides an ouster of jurisdiction and, if so, to which Court/Tribunal/Authority as the case may be. In the case at hand, when we apply this principle of interpretation, we do not find that clause 20 enables the arbitrator to assume the jurisdiction to decide the disputes arising between the beneficiaries. In other words, clause 20 does not satisfy the rigour of Sections 2(b), 2(h) and 7 of the Act.

44) In the light of what we have discussed above, we are of the considered opinion that clause 20 in the Trust Deed, which provides for settlement of disputes/differences arising between the beneficiaries of the Trust, does not constitute an arbitration agreement *inter se* beneficiaries within the meaning of Section 7 of the Act.

45) This takes us to consider the third argument of Mr. Shekhar Naphade, learned senior counsel for the appellants. Though in view of what we have held above, it may not be necessary to consider this argument yet we feel that since it arises out of this case and being a pure legal question, the same can be decided in this appeal.

46) The argument of learned counsel was that any dispute relating to the management and affairs of the

Trust including the disputes *inter se* trustees and the beneficiaries in relation to the Trust, its affairs, management and properties cannot be decided by the arbitrator under the Act even though there may be a clause to that effect in the Deed. It was his submission that the remedy to get such disputes decided through arbitration is impliedly barred, if not, expressly by virtue of the scheme and the elaborate provisions of the Trust Act. Learned counsel pointed out that the Trust Act is a complete Code in itself and provides a comprehensive machinery to deal with all issues relating to Trust, the trustees and the beneficiaries including providing adequate forum (Civil Court) for adjudication of all such disputes arising between them and the Trust, and hence, the jurisdiction of the Civil Court should be given overriding effect to the exclusion of jurisdiction of private arbitration under

the Act by applying implied bar of jurisdiction recognized in law.

47) Though learned counsel for the respondents countered the aforesaid submission of learned senior counsel for the appellants but we find merit in the submission of the learned counsel for the appellants for the reasons mentioned infra.

48) Before we examine the Scheme of the Trust Act, we consider it apposite to take note of the case law, which has bearing on this issue. The question came up for consideration before this Court in the case of **Booz Allen & Hamilton Inc. vs. SBI Home Finance Ltd. & Ors.** (2011) 5 SCC 532 as to what is the meaning of the term "arbitrability" and secondly, which type of disputes are capable of settlement by arbitration under the Act. Their Lordships framed three questions to answer the question viz., - (1)

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

49) This Court speaking through Justice Raveendran answered the questions. While answering question No. 1 with which we are concerned here, Their Lordships carved out six categories of cases. These six categories of cases were held as not capable for being decided by private arbitration under the Arbitration Act even though parties agreed for their settlement through private arbitration. This is what Their Lordships held in Paras 35 and 36:

> **"35. The Arbitral Tribunals are private fora chosen voluntarily by the parties to the**

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

36. The well-recognised examples of non-arbitrable disputes are: (*i*) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (*ii*) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (*iii*) guardianship matters; (*iv*) insolvency and winding-up matters; (*v*) testamentary matters (grant of probate, letters of administration and succession certificate); and (*vi*) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes."

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

51) Keeping in view the aforesaid principle of law, let us now examine the Scheme of the Trust Act. The Trust Act was enacted much prior to independence with an object to define and amend the law relating to private Trusts and the trustees. The Act consists of 93 Sections, which are divided, in IX chapters.

52) Chapter I deals with short title, commencement, repeal of enactments and interpretation of words (Sections 1 to 3). Chapter II deals with the creation of a Trust (Sections 4 to 10). Chapter III deals with the duties and liabilities of the Trustees (Sections 11 to 30). Chapter IV deals with the rights and powers of the Trustees (Sections 31 to 45). Chapter V deals with the disabilities of the Trustees (Sections 46 to 54). Chapter VI deals with the rights and liabilities of the beneficiaries (Sections 55 to 69). Chapter VII deals with vacating the office of the Trustee (Sections 70 to 76). Chapter VIII deals with extinction of the Trusts (Sections 77 to 79) and Chapter IX deals with certain obligations in the nature of Trust (Sections 80 to 93).

53) Even cursory perusal of the headings of each Chapter including what is provided in the Sections would go to show that the legislature has dealt with

and taken care of each subject comprehensively and adequately. It starts from the creation of the Trust, how it is required to be created (deed), who can create (author of the Trust/settlor), who can manage(trustees), for whose benefit it can be created (beneficiaries), their qualifications for appointment, grounds for removal, rights and duties, restrictions on their exercise of powers, obligations and legal remedies available to get the grievances settled etc. are all specified in the Trust Act.

54) So far as legal remedies available to the author of the Trust/settlor, Trustees and the beneficiaries for ventilating their several grievances in respect of their rights duties, removal and obligations under the Trust Deed and the Trust Act are concerned, they are specifically provided in Sections 7, 11, 34, 36, 41, 45, 46, 49, 53, 71, 72, 73 and 74 of the Trust Act. These

sections, in specific terms, confer jurisdiction on Civil Court and provides that an aggrieved person may approach the principal Civil Court of Original Jurisdiction for adjudication of his grievances. This clearly shows the intention of the legislature that the legislature intended to confer jurisdiction only on Civil Court for deciding the disputes arising under the Trust Act.

55) The Constitution Bench of this Court in a leading case of **Dhulabhai etc. vs. State of Madhya Pradesh & Anr.**, AIR 1969 SC 78 examined the question as to how the exclusion of jurisdiction of Civil Court in the context of express or implied bar created in any special law should be decided. Their Lordships examined the question in the context of Section 9 of the Code of Civil Procedure, 1908 and the bar created in special law.

56) Justice Hidayatullah, the learned Chief Justice speaking for the Bench laid down 7 conditions for determining the question of bar for prosecuting the remedies in the Civil Court or judicial Tribunals/authorities constituted under any special law. Though the issue examined in **Dhulabhai's case** (supra) pertained to bar created in special law vis-a-vis filing of the civil suit by an aggrieved party, yet the decision, in our view, lays down the general principle as to how the courts should decide the issue of express or/and implied bar in the context of the remedies available in law.

57) So far as the question involved in the case at hand is concerned, it is governed by condition No. 2 of **Dhulabhai's case** (supra) which reads as under:

> **"(*2*) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies**

provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the Tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not."

58) When we examine the Scheme of the Trust Act in the light of the principle laid down in condition No. 2, we find no difficulty in concluding that though the Trust Act do not provide any express bar in relation to applicability of other Acts for deciding the disputes arising under the Trust Act yet, in our considered view, there exists an implied bar of exclusion of applicability of the Arbitration Act for deciding the disputes relating to Trust, trustees and beneficiaries

through private arbitration. In other words, when the Trust Act exhaustively deals with the Trust, Trustees and beneficiaries and provides for adequate and sufficient remedies to all aggrieved persons by giving them a right to approach the Civil Court of principal original jurisdiction for redressal of their disputes arising out of Trust Deed and the Trust Act then, in our opinion, any such dispute pertaining to affairs of the Trust including the dispute *inter se* Trustee and beneficiary in relation to their right, duties, obligations, removal etc. can not decided by the arbitrator by taking recourse to the provisions of the Act. Such disputes have to be decided by the Civil Court as specified under the Trust Act.

59) The principle of interpretation that where a specific remedy is given, it thereby deprives the person who insists upon a remedy of any other form of

remedy than that given by the statute, is one which is very familiar, and which runs through the law, was adopted by this Court in the case of **The Premier Automobiles Ltd. vs. Kamlakar Shantaram Wadke & Ors.**, AIR 1975 SC 2238 while examining the question of bar in filing Civil suit in the context of remedies provided under the Industrial Disputes Act (See **G.P. Singh, Principles of Statutory Interpretation, 12th Edition, Pages 763-764).** We apply this principle here because, as held above, the Trust Act creates an obligation and further specifies the rights and duties of the settlor, Trustees and the beneficiaries apart from several conditions specified in the Trust Deed and further provides a specific remedy for its enforcement by filing applications in Civil Court. It is for this reason, we are of the view that since sufficient and adequate remedy is provided under the

Trust Act for deciding the disputes in relation to Trust Deed, Trustees and beneficiaries, the remedy provided under the Arbitration Act for deciding such disputes is barred by implication.

60) Though learned counsel for the respondents made attempt to support the reasoning and the conclusion arrived at by the High Court by making some submissions but we find no merit in them especially in the light of what we have held above. We, therefore, do not consider it necessary to give our detailed reasoning for rejection of his submission and nor consider it necessary to deal with the decision cited by him (**M.C. Chacko vs State Bank of Travancore Trivandrum,** (1970) 1 SCC 658) which is distinguishable on facts.

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

62) We thus add one more category of cases, i.e., category (vii), namely, cases arising out of Trust Deed

and the Trust Act, in the list of (vi) categories of cases specified by this Court in Para 36 at page 547 of the decision rendered in the case of **Booz Allen & Hamilton Inc.** (supra) which as held above can not be decided by the arbitrator(s).

63) In the light of foregoing discussion, we are unable to agree with the reasoning and the conclusion arrived at by the learned designated arbitrator.

64) Before parting with the case, we consider it apposite to mention that we have not examined the merits of the case set up by the parties in these proceedings and hence parties would be at liberty to take recourse to any legal remedies, as may be available to them, for adjudication of their rights.

65) The appeal thus succeeds and is hereby allowed. The impugned order is set aside. As a result, the

application filed by the respondents under Section 11 of the Act is dismissed as not maintainable.

.....J.
[J. CHELAMESWAR]

.....J.
[ABHAY MANOHAR SAPRE]

New Delhi,
August 17, 2016.