And Anr vs Jagrati Trade Services Private Limited ... on 13 November, 2026

Author: Arijit Banerjee

Bench: Arijit Banerjee

IN THE HIGH COURT AT CALCUTTA
COMMERCIAL APPELLATE JURISDICTION
(ORIGINAL SIDE)

AO-COM/2/2026
IA NO: GA-COM/1/2025

STARLIGHT REAL ESTATE (ASCOT) MAURITIUS LIMITED
AND ANR.
VS
JAGRATI TRADE SERVICES PRIVATE LIMITED AND ANR.

Before: The Hon'ble Justice Arijit Banerjee
&
The Hon'ble Justice Apurba Sinha Ray

For the Appellant : Dr. Aman Hingorani, Sr. Adv.,
Mr. Parikshit Lakhotia, Adv.
Mr. Dibesh Kumar Dwivedi, Adv.
:
For the Respondent No. 1 : Mr. Mainak Bose, Sr. Adv.,
Mr. Dhruv Surana, Adv.
Mr. Jai Kumar Surana, Adv.

Judgment on 13.11.2026
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:

Arijit Banerjee, J. :-

1. This appeal is directed against a judgment and order dated November 10, 2025, passed by a learned Judge of this Court, whereby the application

of the appellants filed under Order XXI Rule 58 of the Code of Civil Procedure read with Section 151 thereof and Section 36 of the Arbitration and Conciliation Act, 1996, was dismissed. The application was filed objecting to execution of an arbitral award. At this juncture, we may note the provisions of law mentioned above.

2. Order XXI Rule 58 of the C.P.C reads as follows:

> "58. Adjudication of claims to or objections to attachment of property –
>
> (1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to adjudicate upon the claim or objection in accordance with the provisions herein contained: Provided that no such, claim or objection shall be entertained––
>
> (a) where, before the claim is preferred or objection is made, the property attached has already been sold; or
>
> (b) where the Court considers that the claim or objection was designedly or unnecessarily delayed.
>
> (2) All questions (including questions relating to right, title or interest in the property attached) arising between the parties to a proceeding or their representatives under this rule and relevant to the adjudication of the claim or objection, shall be determined by the Court dealing with the claim or objection and not by a separate

suit.

(3) Upon the determination of the questions referred to in sub-rule (2), the Court shall, in accordance with such determination --

(a) allow the claim or objection and release the property from attachment either wholly or to such extent as it thinks fit; or

(b) disallow the claim or objection; or

(c) continue the attachment subject to any mortgage, charge or other interest in favour of any person; or

(d) pass such order as in the circumstances of the case it deems fit.

(4) Where any claim or objection has been adjudicated upon under this rule, order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(5) Where a claim or an objection is preferred and the Court, under the proviso to sub-rule (1), refuses to entertain it, the party against whom such order is made may institute a suit to establish the right which he claims to the property in dispute; but, subject to the result of such suit, if any, an order so refusing to entertain the claim or objection shall be conclusive."

3. Section 151 of C.P.C reads as follows:

"151. Saving of inherent powers of Court -

Nothing in this Code shall be deemed to limit or otherwise affect

the inherent power of the Court to make such orders as may be necessary for the ends of justice, or to prevent abuse of the process of the Court."

4. Section 36 of the Arbitration Act, 1996, (herein after referred to as the 1996 Act), reads as follows:

"36. Enforcement –

(1) Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were a decree of the court.

(2) Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.

(3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:

Provided that the Court shall, while considering the application for

grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908).]

[Provided further that where the Court is satisfied that a prima facie case is made out that, –

(a) the arbitration agreement or contract which is the basis of the award; or

(b) the making of the award, was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award.

Explanation – For the removal of doubts, it is hereby clarified that the above proviso shall apply to all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016).]"

5. The brief facts of the case material for the present purpose are as follows:

6. The appellants are both limited companies incorporated under the laws of Mauritius. Following the relaxation of the norms regarding foreign investment in the real estate business in our country, the appellants wanted to set up business in this country. With that purpose, the appellants caused

to be incorporated a limited company under the laws of India with paid up capital or reserves equivalent to US Dollars 10 million. That company was named Augustus Avani Land Developers Private Limited (in short "Augustus"). It is not in dispute that the entire shareholding of Augustus is held by the appellants.

7. The appellants entered into discussion with the respondent no. 1 herein (hereinafter referred to as "Jagrati"). It was decided that Augustus and Jagrati as the Indian collaborators, would promote a joint venture company by the name of Ascot Realty Private Limited, to take up real estate projects in India.

8. A joint venture agreement dated June 6, 2007, was entered into by and between Augustus on one hand and Jagrati and three of its associate companies namely S.B. Overseas Limited, Acne Consultants Private Limited and Beltas Merchants Private Limited, on the other hand. In the said agreement, Jagrati, SBO, Acne and Beltas were collectively referred to as "Sarda Companies" since, Jagrati, Acne and Beltas were companies fully owned and controlled by one Mr. Jagdish Sarda and his family members while SBO is a company whose shares are listed on stock exchanges and is controlled by Mr. Jagdish Sarda and his family members. The agreement further mentioned that Augustus is a company fully owned and controlled by Starlight Real Estate (Ascot) Mauritius Ltd. being the first appellant herein.

9. The joint venture agreement contained an arbitration clause. That

clause, being clause 16, reads as follows:

"16. ARBITRATION

16.1 In the event a dispute arises between the Parties hereto, during the subsistence of this Agreement or thereafter in connection with the validity, interpretation, implementation or alleged breach of any provision of this Agreement, the Parties, shall attempt in the first instance to resolve such dispute through friendly consultations. If the dispute is not resolved through friendly consultations within thirty (30) days after commencement of discussions or such longer period as the Parties agree mutually in writing then the either Party may refer the dispute for resolution by binding arbitration.

16.2 All disputes, differences and questions whatsoever arising either during the continuance of this Agreement or afterwards between the Parties hereto or their respective representatives touching these presents or the construction or application thereof or as to any act, deed or omission of any of the parties hereto in any way relating to these presents shall be referred to a Sole Arbitrator to be appointed as per ICC Rules of Arbitration in case the Parties agree upon one otherwise two, three Arbitrators. Such arbitration shall be held in Singapore and shall be in accordance with the said Arbitration rules of the international chamber of commerce.

16.3 The proceeding of Arbitration shall be conducted in the English language."

10. Jagrati invoked the said arbitration clause against Augustus and filed a claim against Augustus. The matter was referred to the sole arbitration of a retired Judge of the Hon'ble Supreme Court of India.

11. The crux of Jagrati's case in the arbitration was that as per the terms of the joint venture agreement and the relevant provisions of the circulars issued by the department of industry, Government of India, an amount of Rupees twenty crore by way of investment was overdue, from by Augustus to the joint venture company, i.e. Ascot. An Award was passed by the learned Arbitrator on May 16, 2013, directing Augustus to pay Ascot an amount of Rupees twenty crore along with interest at the rate of nine percent per annum. It appears from the Award that the same was passed on concession

made on behalf of Augustus. The relevant portion of the Award reads as follows:

"From the aforesaid facts it is clear that the Respondent Company is admitting its liability of investing the said amount of Rs. 20,00,00,000 (Rupees Twenty Crores) in the joint venture company and its stand is that it has carried out the said obligation by investing the said amount by those 2 (two) cheques. The stand of the Respondent Company is that the said 2 (two) cheques were not encashed for reasons beyond their control. However, the fact remains that the Respondent Company accepts it liability of

investing an amount of Rs. 20,00,00,000 in the Claimant Company in furtherance of its obligation under the joint venture agreement dated 12.07.2007 in terms of Press Note – 2 of 2025.

In the instant Case, the Claimant Company has claimed Liquidated Damages for Rs. 5,00,00,000 (Rupees Five Crores). This Tribunal is unable to accept the said claim as no particulars of such damage have either been pleaded or argued before this Tribunal.

In the facts and circumstance of the Case, I award that the Respondent Company must pay the Ascot Realty Private Limited, the joint venture company by way of Bank Draft or Banker's Cheque, an amount of Rs. 20,00,00,000 (Rupees Twenty Crores) along with interest at the rate of 9 percent per annum within 6 (six) weeks from date to be calculated from 13.10.2010, the first day of presentation of the cheques till the date of payment failing which

the Respondent Company will have to pay twelve percent interest per annum from 13.10.2010 till the date of actual payment.

There will be, however, no order as to costs."

12. Jagrati put into execution the said Arbitral Award. Since the appellants were not parties to the arbitration agreement and therefore not parties to the proceedings before the Arbitrator, they say that they had no notice of the award. They also had no notice of the execution proceeding till they received notice from the concerned bank regarding orders passed on the execution proceeding for attachment of bank account of Augustus. The

appellants contend that the award was fraudulently obtained by Jagrati in collusion with the directors of Augustus. In particular, one Sri. Neeraj Kumar Pandey, one of the directors of Augustus has been pointed out by the appellants as also two other directors namely Sri. Rajendra Gajanan Deshpandey and Sri. Rajen Krishan Sikka who were apparently appointed by Sri. Neeraj Kumar Pandey.

13. Upon receiving notice of the execution proceeding, the appellants appeared before the learned Single Judge of this Court who was in seisin of such execution application. It was submitted that the appellants would file an appropriate application opposing execution of the arbitral award. However, the appellants instead, filed a suit in this Court being CS no. 284 of 2014. The reliefs claimed in the suit were as hereunder:

> "(a) Declaration that the purported award dated 16th May, 2013 made and published by the sole Arbitrator in the purported arbitration proceedings between the defendant no. 1 (Jagrati) and pro forma defendant (Augustus) is non-est and illegal;

(b) Declaration that the purported award dated 16th May, 2013 made and published by the sole Arbitrator in the purported arbitration proceedings initiated by the defendant no. 1 (Jagrati) against the pro forma defendant (Augustus) is not binding on the plaintiffs and the pro forma defendant and be delivered up and cancelled.

(c) Declaration that the defendant nos. 3,4 and 5 and each one of

them had or has no authority to represent the pro forma defendant or to take any step for and on behalf of the pro forma defendant;

(d) Decree setting aside the purported award dated 16th May 2013 made and published by the sole Arbitrator in the purported arbitration proceedings initiated by the defendant no. 1 (Jagrati) against the pro forma defendant (Augustus);

(e) Decree for perpetual injunction restraining the defendant nos. 1 and 2 and each one of them, their respective servants, agents and assigns from realizing and/or recovering any money from the pro forma defendant on the basis of the purported award dated 16th May, 2013 made and published by the sole Arbitrator in the purported Arbitration proceedings initiated by the defendant no. 1 against the pro forma defendant and on the basis of the orders passed in Execution Case No. 212 of 2014 filed in this Hon'ble court.

(f) In the alternative and in the event it is held that the defendant nos. 1 and 2 have or either of them has already received and/or realized any money from the pro forma defendant on the basis of

the purported award dated 16th May, 2013 made and published by the sole Arbitrator in the purported arbitration proceedings initiated by the defendant no. 1 against the pro forma defendant and on the basis of the orders passed in Execution Case No. 212 of 2014 filed in this Hon'ble court, a decree for mandatory injunction

be passed, commanding the defendant nos. 1 and 2 and each one of them to forthwith refund the money so realized by them to the pro forma defendant;

(g) Perpetual injunction restraining the defendant nos. 1 and 2 and each one of them from using and/or utilizing any money received by them or any of them on the basis of the purported award dated 16th May, 2013 made and published by the sole Arbitrator in the purported arbitration proceedings initiated by the defendant no. 1 against the pro forma defendant and on the basis of the orders passed in Execution Case No. 212 of 2014 filed in this Hon'ble court."

14. The defendant no. 1 in the suit, viz namely Jagrati, made an application before the learned Interlocutory Judge for rejection of the plaint. By a judgment and order dated May 14, 2015, the learned Judge held that in so far as the prayer for setting aside of the award is concerned, the same is barred by law and therefore the suit, in so far as it related to setting aside of the award against the defendant no. 1 (Jagrati), is not maintainable. It was further observed that as regards the other reliefs, the same were required to be adjudicated at the trial and the suit cannot be dismissed as

against the other defendants. Hence, the plaint was partly rejected as against the defendant no. 1.

15. The appellants herein, i.e., the plaintiffs in the suit, preferred an appeal being APO No. 261 of 2015. The defendant no. 1 in the suit viz.

Jagrati filed a cross objection being OCO 2 of 2015 contending that the entire plaint was liable to be rejected.

16. By a judgment and order dated November 27, 2019, a Division Bench of this Court allowed the cross objection of Jagrati and dismissed the appeal of the present appellants. Resultantly, the plaint of the suit stood rejected in its entirety.

17. The appellants herein carried the order of the Division Bench to the Hon'ble Supreme Court by filing SLP (Civil) Nos. 297–298 of 2019. By an interim order dated January 24, 2020, the Hon'ble Apex Court directed "stay of further execution proceedings."

18. During the pendency of the Special Leave Petition, the present appellants filed an application before the learned Judge of this Court who was in seisin of the execution application.

19. On February 6, 2024, the Hon'ble Supreme Court dismissed the Special Leave Petitions with the following observations:

> "2. We are not inclined to interfere with the decision of the High Court. We, however, make it clear that any other remedy that the petitioners would have invoked either in the proceedings for execution of the award or before any other forum are kept open. All contentions that are available to them in law can be raised and argued."

20. The application that was filed before the learned Single Judge is the one under Order XXI Rule 58/Section 151 of the CPC and Section 36 of the

1996 Act which I have referred to in the first paragraph of this judgment. By the judgment and order impugned in this appeal, that application of the present appellants was dismissed by the learned Single Judge. Hence this appeal.

21. Before we consider the arguments advanced on behalf of the parties, we may note that the learned Single Judge dismissed the application of the present appellants solely on the ground that the same is barred by res judicata. The observations of the learned Judge in this regard will be found in the following paragraphs of the impugned judgment:

> "28. The grounds on which the appellants have filed the suit are one and the same of the present application. It is true that the suit is dismissed on an application filed under Order VII Rule 11 of the Code of Civil Procedure, 1908 but the appellate Court while deciding the appeal has decided the suit on merit in its entirety. The first contention of the applicants that the first directors of the respondent were Mehar Karan Singh and Manoj Chandramohan and Vinchoo who were inducted as directors of the respondent on 3rd May, 2007. Thereafter, Robert Keane was appointed as Additional Director on 12th September, 2007. On the same date Mehar Karan Singh ceased to be a director and Neeraj Kumar Pandey was appointed as alternate director to Robert Keane. On 12th August, 2008, Alok Sureshchandra Vajpeyi was appointed as an Additional Director. On 24th September, 2008, Neeraj Kumar

Pandey's designation was changed as Nominee Director. On 2nd April, 2009, Alok Sureshchandra Vajpeyi ceased to be a Director. On 31st March, 2009 and 23rd April, 2009, Manoj Vinchoo and Robert Keane respectively ceased to be the directors of the respondent. By virtue, thereof, Neeraj Kumar Pandey remained as the sole director of the respondent no. 1 and was authorized to operate bank account. Neeraj Kumar Pandey illegally, wrongfully and unauthorizedly held Board Meeting and appointed two new directors, namely, Rajendra Gajanan Deshpande and Rajen Krishan Sikka as Additional Directors of the respondent without taking consent of the applicants, though the applicants are the 100% shareholder of the respondent.

30. Taking into consideration of the pleadings of the suit filed by the applicant prior to filing of the present application, issue raised in the suit and in the present application, parties to the suit, claim made by the applicants in the suit and in the present application and the order passed by the appellate Court in the appeal filed by the applicant and the cross objection filed by the respondent, this Court finds that the appellate Court has decided the issue finally raised by the applicants in the suit on merit. The applicants have also preferred Special Leave Petition against the judgment of the appellate Court but the Hon'ble Supreme Court has not interfered with the judgment of the appellate Court. The Hon'ble Supreme Court had given liberty to the applicants that any other remedy

that the applicants would have invoked either in the proceeding for

execution of the award or before any other forum. The applicants chose to file the present applicant under Order XXI Rule 58 but the issues which the applicants have raised has already been decided finally by the appellate Court in its judgment dated 3rd December, 2019.

41. The award holder does not dispute that Order XXI, Rule 58, the Executing Court has the power to make inquiry. The judgments referred by the applicants are related to the settled position of law that an application under Order XXI, Rule 58 is made before the Executing Court, the Court has the duty to make necessary inquiry. The facts of the present case are distinguishable from the facts of the cases referred by the applicants. In the present case, initially on 22nd July, 2014, the applicants through their learned Advocate entered appearance in the execution proceeding and submitted that their application is ready and accordingly, this Court directed the Receiver to stay his hand for a further period of two weeks or until further orders whichever is earlier and directed that if the applicant filed their application in course of the day, the same be listed on the returnable date. Though the applicants have submitted that their application is ready but instead of filing application, the applicants have filed a separate suit challenging award as well as further

consequential reliefs. The suit filed by the applicants was dismissed by the appellate Court. In the meantime, the Receiver appointed by this Court has received amount from the bank and

paid to the Ascot Realty Private Limited and the interest part is also received from the bank and kept in separate fixed deposit as per order passed by this Court.

42. When the applicants have filed the present application at the relevant time there was no attachment and the amount of Rs. 28.51.83.561/- has already been paid by the Receiver to Ascot Realty Private Limited. The amount attached by the order of this Court is paid to the Ascot Realty Private Limited by the Receiver after receipt of the same from the bank in terms of the order passed by this Court. It is settled proposition of law that once an application under Order XXI, Rule 58 of CPC is filed, the Court has the duty to inquire into the matter, but in the present case, there is a special circumstance. The issue on the basis of which the applicants have filed the present application, the said issues have already decided by the Hon'ble appellate Court in an appeal on merit. The findings of the appellate Court are binding upon this Court and more specifically the order passed by the appellate Court is affirmed by the Hon'ble Supreme Court. Though the Hon'ble Supreme Court has given liberty to the applicants to raise issue before the appropriate proceeding but in the present

application, the grievance of the applicants cannot be decided as the same is already decided by the appellate Court by its order dated 3rd December, 2019. This Court has already held that the application filed by the applicants is barred by res-judicata."

17

Submission made on behalf of the Appellants:

22. Appearing for the appellants Dr. Hingorani made extensive submission on the merits of the case. The crux of such submission is that Augustus was under no obligation to bring in additional US dollars 5 million (approximately rupees twenty crore) as was alleged by Jagrati. The joint venture agreement or the relevant press notes issued by the Foreign Investment Promotion Board of the Department of Industries, Government of India, did not impose any such obligation on Augustus. Jagrati, in collusion with the three directors of Augustus, fraudulently made such a claim before the Arbitrator. The directors of Augustus who were obviously acting in unholy entente with Jagrati, effectively submitted to an award.

23. Since the learned Single Judge did not decide the application of the appellants under Order XXI Rule 58 of the CPC on merits, but dismissed the application as being hit by res-judicata in view of the judgment of the Division Bench in the earlier round of litigation, we requested learned Senior Counsel to restrict his argument on the point of res-judicata.

24. Dr. Hingorani submitted that where a Court had no jurisdiction over the subject matter of the suit, it could not decide any question on merits. It

could simply decide on the question of jurisdiction and come to the conclusion that it had no jurisdiction over the matter and therefore had to return the plaint. He argued that any finding on merits in a proceeding which is ultimately dismissed on the ground of being not maintainable would not constitute res-judicata. The doctrine of res-judicata cannot be applied when the Court held that the earlier suit was not maintainable.

25. Learned Senior Counsel then submitted that once it is found that the Court lacked jurisdiction to entertain the earlier suit, any further adjudication upon merits of other issues by it would be without jurisdiction and a nullity. If the plaint is returned for want of jurisdiction and the same Court also records findings on merits, such findings are without jurisdiction and null and void and are of no consequence.

26. It was then submitted that rejection of a plaint under Order VII Rule 11 CPC does not amount to dismissal of the suit. If a suit is dismissed, a fresh suit will be barred by the principles of res-judicata. However, in the case of rejection of a plaint, a fresh suit is maintainable.

27. The next submission was that in order that a matter may be said to have been heard and finally decided, the decision in the former suit must have been on the merits. Where, for example, the former suit was dismissed by the Trial Court for want of jurisdiction, or on the ground that the suit was badly framed or on similar grounds, the decision not being on the merits would not be res-judicata in a subsequent suit.

28. It was then submitted that in order that a matter may be said to have

been heard and finally decided, the decision in the former suit must have been on the merits. Where, for example, the former suit was dismissed by the Trial Court for want of jurisdiction or on a technical ground or for want of cause of action or on the ground that it is premature, the decision not being on the merits would not be res-judicata in a subsequent suit.

29. In connection with the above submissions, learned Senior Counsel referred to the following decisions:

(i) Sri Athmanathaswami Devasthanam v. K. Gopalaswami Ayyangar, reported at 1963 SCC OnLine SC 251.

(ii) Phonographic Performance Ltd. & Ors v. Union of India & Ors, reported at 2015 SCC OnLine Del 8511.

(iii) Karnail Singh & Ors v. Bhajan Singh & Ors, reported at 2005 (2) ILR (P&H) 1.

(iv) Ganesh Prasad Badrinarayan Lahoti v. Sanjeev Prasad Jamnaprasad Chourasiya and Anr, reported at (2004) 7 SCC 482.

(v) Ravi Singhal and Ors v. Rajeev Goyal and Ors, reported at 2015 SCC OnLine All 9249.

(vi) Allahabad Bank v. Shanks Steel Fab (P) Ltd., reported at 2008 SCC OnLine Cal 113.

(vii) Sheodan Singh v. Daryao Kunwar, reported at 1996 SCC OnLine SC 98.

(viii) Srihari Hanumandas Totala v. Hemant Vithal Kamat and

Ors, reported at (2021) 9 SCC 99.

30. Dr. Hingorani then submitted that it is immaterial that the Hon'ble Supreme Court dismissed the Special Leave Petition preferred against the judgment and order of the earlier Division Bench whereby the plaint of the suit filed by the appellants herein, was rejected. An order of the Hon'ble Supreme Court under Article 136 of the Constitution refusing special leave to appeal without giving reasons does not attract the doctrine of res-judicata, nor does it stand substituted in place of the order under challenge. While hearing a Special Leave Petition, the Hon'ble Supreme Court is not

exercising its appellate jurisdiction; rather, the Hon'ble Court is merely exercising its discretionary jurisdiction to grant or not to grant leave to appeal. In this connection the learned Counsel relied on the decision of the Hon'ble Supreme Court in Kunhayammed and Ors v. State of Kerala and Anr, reported at (2000) 6 SCC 359.

31. It was then submitted that an arbitral award which is obtained by fraud is a nullity and non-enforceable in law. Such a ground can be taken at any stage and even at the stage of execution. In this connection reliance was placed on the following decisions:

(i) Delhi Development Authority v. Skipper Construction Co. (P) Ltd. and Anr, reported at (1996) 4 SCC 622.

(ii) State of Uttar Pradesh and Anr v. R.K. Pandey and Anr, reported at 2025 SCC OnLine SC 52.

(iii) A.V. Papayya Sastry and Ors v. Government of A.P and

Ors., reported at (2007) 4 SCC 221.

(iv) Saraswat Trading Agency v. Union of India and Ors, reported at 2004 SCC OnLine Cal 141.

(v) Cholamandalam Investment and Finance Co. Ltd. v. Amrapali Enterprises and Anr, reported at 2023 SCC OnLine Cal 605.

(vi) Cholamandalam Investment and Finance Co. Ltd. v. Amrapali Enterprises and Anr, reported at 2023 SCC OnLine Cal 665.

(vii) Darjeeling Municipality v. Chadmaku Construction (P) Ltd., reported at (2000) 1 CLT 361.

(viii) Union of India v. M/S. Jagat Ram Trehan, reported at (1996) 36 DRJ 466 (DB).

(ix) India Cements Capital Ltd. v. William and Ors, reported at 2015 SCC OnLine Ker 24805.

(x) Kiran Devi Chouraria v. Jhumar Mal Singh and Ors, reported at 2023 SCC OnLine Sikkim 84.

32. Dr. Hingorani then submitted that the provisions of Order XXI Rule 58 of the CPC cast a duty upon the Executing Court to adjudicate all the questions relating to the rights of the parties and as such, the Court is obliged to adjudicate upon the objection of the objector that the decree of which execution is sought is a collusive one, merely meant to defeat the rights of the objector. The application under Order XXI Rule 58

contemplates a full inquiry into all questions including questions relating to right, title or interest in the property attached which arise between the parties to the proceeding and mandates that the Court inquiring into such a claim petition shall determine such questions. The claim submitted under Order XXI Rule 58 of the CPC by a third party to a decree is similar to a suit. A claim or objection under Order XXI Rule 58 shall be adjudicated upon as if it were a suit and the final order shall have the force of a decree within the meaning of Section 2(2) of the CPC. In this connection, reliance was placed on the following decisions:

(i) Kancharla Lakshminarayana v. Mattaparthi Shyamala and Ors, reported at (2008) 14 SCC 258, paragraphs 10-12, 16, 20 and 26.

(ii) Southern Steelmet and Alloys Ltd. v. B.M. Steel, Madras, reported at (1991) MAD LW 243, paragraph 2.

(iii) Gopana Subba Rayudu v. Pasupuleti Venkata Ramana and Ors, reported at 2009 (6) ALD, paragraphs 8,9.

(iv) State of Madhya Pradesh v. Megma Leasing Ltd., reported at 2008 LawSuit (MP) 132.

(v) Ghasi Sahu and Anr v. Himachal Sahu and Anr, reported at AIR 1986 Ori 1, paragraph 6.

(vi) K. Venkatarayappa v. Ellen Industries, Coimbatore, reported at (1985) 2 APLJ 106, paragraph 3.

(vii) Dr. M. Ramachandra Rao v. Papayya Sastry and Anr,

reported at (1973) 1 APLJ 243, at pages 252, 256.

(viii) Tara Logitech (P) Ltd. v. Religare Finvest Ltd. and Anr, reported at 2014 SCC OnLine Del 7528, paragraphs 12-14.

33. Learned Senior Counsel then submitted that even where the objector lacks locus standi, the Court must invoke its inherent power when fraud stares at the Court so as to ensure that the benefits of fraud do not accrue to the fraudulent party. The inherent power under Section 151 of the Code of Civil Procedure can be successfully invoked by the objector to prevent fraud or collusion being practiced. In this connection, the following cases were referred to:

(i) Raghavan and Ors v. Sivakumar and Ors, reported at 2023 SCC OnLine Mad 6677, paragraphs 24, 26-29.

(ii) Punjab Merchantile Bank Ltd. v. Kishan Singh and Anr, reported at ILR (1963) 1 P&H 201, at pages 288-291.

(iii) Smt. Tahera Syed v. M. Shanmugam, reported at (1986) 2 APLJ 348, paragraph 10.

34. Finally, relying on the decision of the Bombay High Court in the case of Bhatia Industries and Infrastructure Limited v. Asian Natural Resources (India) Limited and Anr, reported at 2016 SCC OnLine Bom 10695, paragraphs 11, 13, 14, 17, 27, it was submitted that the doctrine of piercing or removing the corporate veil is applicable also in execution proceedings and the Executing Court can apply this doctrine to prevent fraud or illegality.

Submission made on behalf of the Respondent No.1

35. Appearing for Jagrati, Mr. Mainak Bose, learned Senior Advocate, submitted that the pleadings in the plaint of the suit that had been filed by the appellants herein challenging the arbitral award in question, contained identical or very similar pleadings as were there in the application filed before the learned Single Judge in the present round of litigation. The learned Single Judge in the earlier round of litigation rejected part of the plaint by holding that the same was barred by the provisions of the Arbitration and Conciliation Act, 1996. On appeal being preferred, a Division Bench held that the plaint does not disclose any cause of action in favor of the plaintiffs therein (the present appellants). This is because, the arbitral award imposed a financial obligation on Augustus which is a limited company and has an independent identity. It is a corporate entity separate from its shareholders. The appellants herein may own or control the entire shareholding in Augustus. Still, the appellants would have no locus standi to challenge the arbitral award. Only Augustus can challenge the award. The

appellants have no right to sue for cancellation or quashing of the award. Therefore, the entire plaint was liable to be rejected.

36. Learned Senior Counsel submitted that in view of such finding of the earlier Division Bench, which was affirmed by the Hon'ble Supreme Court, learned Single Judge in the present round of litigation, had no choice but to dismiss the application under Order XXI Rule 58 as being barred by res-judicata. Even on an application under Order VII Rule 11 of the CPC, the

Court can consider whether or not the plaintiff has any cause of action which would give him a right to sue, apart from considering the issue as to whether or not the plaint discloses any cause of action.

37. Learned Senior Counsel submitted that the appellants' challenge to the arbitral award having been thrown out by a Division Bench of this Court in the earlier round of litigation and the Special Leave Petition against such order having been dismissed, the issue of validity of the arbitral award in question has attained finality and that issue is res-judicata. In this connection learned Senior Counsel relied on the decisions in Arjun Singh v. Mahendra Kumar and Ors, reported at AIR 1964 SC 993 and Bhanu Kumar Jain v. Archana Kumar and Anr, reported at 2005 1 SCC 787 in support of the contention that the principles of res-judicata apply even to different stages of the same proceedings.

38. Learned Senior Counsel then submitted that res-judicata debars a Court from exercising its jurisdiction to determine the lis if it has attained finality between the parties. However, the doctrine of issue estoppel binds a party to the lis. If an issue has been decided against a party in an earlier proceeding, he would be estopped from raising the same in the later

proceeding. The doctrine of res-judicata creates estoppel by accord. In this connection learned Counsel relied on the Supreme Court decision in Bhanu Kumar Jain, (Supra). On the issue of res-judicata, reliance was also placed on the decision of the Hon'ble Supreme Court in the case of BS Lalitha and Ors v. Bhuvanesh and Ors reported at 2026 SCC OnLine SC 860.

39. Learned Counsel then submitted that Rule 13 of Order VII of the CPC can ordinarily be invoked only when the plaint has been rejected for non-disclosure of cause of action or curable defects. A plaint can be rejected if it fails to disclose a cause of action upon a meaningful reading. All that Rule 13 of Order VII permits is that where the right to sue survives after rejection of the plaint on the ground of non-disclosure of cause of action, a fresh plaint may be presented. However, when the suit itself is barred by law, Rule 13 cannot come to the rescue of the plaintiff. In this connection reliance was placed on the decision of the Hon'ble Supreme Court in the case of Manjula and Ors v. D.A Srinivas, reported at 2026 SCC OnLine SC 831.

40. On the issue of res-judicata, reliance was also placed on the decision of the Hon'ble Supreme Court in Meghmala and Ors v. G. Narasimha Reddy and Ors., reported at 2010 8 SCC 383, paragraphs 41,51.

41. Mr. Bose then referred to the decision of the Hon'ble Supreme Court in Ramchandra Dagdu Sonavane (Dead) by LRs & Ors v. Vithu Hira Mahar (Dead) by LRs & Ors, reported at (2009) 10 SCC 273 and relied on paragraphs 53 - 56 of the reported judgments which read as follows:

> "53. The learned Senior Counsel Shri Naphade by placing reliance on the observation made by this Court in Syed Mohd. Salie Labbai

v. Mohd. Hanifa [(1976) 4 SCC 780] , that the best method to decide the question of res judicata is first to determine the case of parties as put forward in their respective pleadings of their previous suits and then to find out as to what had been decided by

the judgments which operate as res judicata. It is the contention of the learned Senior Counsel that the pleadings of the suit of 1953 were not available to the civil court while deciding the second suit of 1979 and, therefore, the High Court was justified in holding that the finding of the civil court in the second suit of 1979 and the appellate court against that order regarding res judicata cannot be upheld.

54. In Syed Mohd. case [(1976) 4 SCC 780] , this Court has stated that before a plea of res judicata can be given effect to the four conditions are required to be proved. They are, that the litigating parties must be the same; that the subject-matter of the suit also must be identical; that the matter must be finally decided between the parties; and that the suit must be decided by a court of competent jurisdiction. This Court while analysing those conditions as matter of fact found that the parties had not even filed the pleading of the suits instituted by them. In that factual scenario, this Court had to observe that the pleadings cannot be proved merely by recitals of the allegations mentioned in the judgment.

55. It is true that if an earlier judgment has to operate as res judicata in the subsequent proceedings, then all the necessary facts including pleadings of the earlier litigation must be placed on

record in the subsequent proceedings. In the judgment and decree in OS No. 2353 of 1979, the trial Judge in extenso has referred to the pleadings of the parties in the earlier suit with reference to the copy of the judgment and decree passed in OS No. 104 of 1953 which was produced by the appellants along with the other documents and it is only thereafter it has observed that the issue regarding adoption of Vithu was one of the issues framed in the 1953 suit and the court after referring to the pleadings of both the parties and the evidence adduced has specifically answered the issue by holding that Vithu has failed to prove that he is an adopted son of the deceased watandar. Therefore, we cannot accept the contention of learned Senior Counsel Shri Shekhar Naphade.

56. In fact, the High Court while deciding on this issue had observed that the pleadings of the parties in OS No. 104 of 1953 were not available before the civil court in the subsequent suit and, therefore, there is non-compliance with mandatory and basic requirements, as laid down by this Court in Syed Mohd. [(1976) 4 SCC 780] In our view, this reasoning of the High Court is fallacious and we cannot agree. In our view, each one of the

conditions necessary to satisfy the test as to the applicability of Section 11 of the Civil Procedure Code is satisfied."

42. Learned Senior Counsel then relied on the decision of the Hon'ble

Supreme Court in the case of S. Valliammai and Ors. v. S. Ramanathan and Anr, reported at (2026) 7 SCC 482 and in particular paragraph 61 of the decision which reads as follows:

> "61. If Section 34 of the SARFAESI Act, 2002 applies in a case, then such a suit is barred in law. If on a meaningful reading of the plaint a suit is barred in law, then the plaint itself has to be rejected. In other words, the suit can be filed but the plaint has to be rejected for reasons enumerated in Order VII Rule 11 of the Code such as the suit being barred by any law. When a plaint is rejected, a fresh suit could be filed only in terms of Order VII Rule 13 which is extracted above. The said provision would however not apply, if there is absence of a cause of action, the suit is hit by limitation or on the principles of res-judicata or is otherwise barred by law."

43. The next decision relied upon by Mr. Bose is that in the case of Rishabh Chand Jain & Anr v. Ginesh Chandra Jain, reported at (2016) 6 SCC 675. Paragraphs 13 and 14 of the decision were referred to which read as follows:

> "13. In terms of Section 2(2) of the Code, in case, the court adjudicating the case, conclusively determines the rights of the parties with regard to any one or more or all of the matters in

controversy in the suit, the requirement of decree is satisfied. Such

determination can be preliminary or final. Rejection of a plaint is deemed to be a decree under Section 2(2) of the Code. Only two orders are excluded -- (i) any adjudication from which an appeal lies as an appeal from an order, and (ii) any order of dismissal for default. Order 43 of the Code has provided for appeals from orders. The impugned order does not come under Order 43. The order has conclusively determined the rights of the parties with regard to one of the matters in controversy in the suit viz. res judicata. True, it is not an order passed on framing an issue. But at the same time, there is adjudication on the controversy as to whether the suit is barred by res judicata in the sense there is a judicial determination of the controversy after referring to the materials on record and after hearing both sides.

14. The impugned order dismissing the suit on the ground of res judicata does not cease to be a decree on account of a procedural irregularity of non-framing an issue. The court ought to treat the decree as if the same has been passed after framing the issue and on adjudication thereof, in such circumstances. What is to be seen is the effect and not the process. Even if there is a procedural irregularity in the process of passing such order, if the order passed is a decree under law, no revision lies under Section 115 of the Code in view of the specific bar under sub-section (2) thereof. It

is only appealable under Section 96 read with Order 41 of the

Code."

44. Reference was then made to the decision of the Hon'ble Supreme Court in Sulochana Amma v. Narayanan Nair, reported at (1994) 2 SCC 14. This decision generally discusses the concept of res-judicata and the change that was brought in by the amending act of 1976 by inserting Explanation (VIII) in Section 11 of the Code of Civil Procedure. To my mind, this decision does not have much relevance to the points which fall for consideration in the present case.

45. Reference was then made to the decision of the Hon'ble Supreme Court in Satyadhyan Ghosal and others. v. Deorajin Debi (Smt) & Anr., reported at AIR 1960 SC 941 in support of the proposition that the principle of res-judicata is based on the need for giving a finality to judicial decisions. Primarily it applies as between past litigation and future litigation. When a matter – whether on a question of fact or a question of law – has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. Even where Section 11 does not apply, the principle of res-judicata has been applied by courts for the purpose of achieving finality in litigation.

46. The next decision referred to by learned Senior Counsel is that in the case of Indian Evanjalical Lutheran Church Trust Association v. Sri Bala & Co., reported at 2025 SCC OnLine SC 48. In this case, there is a

detailed discussion of several earlier Supreme Court decisions on res-judicata. At paragraph 7.4 of the judgment, the Hon'ble court noticed the earlier judgment of the Hon'ble Supreme Court in Patil Automation Private Limited v. Rakheja Engineers Private Limited, reported at 2022 10 SCC 1, and noted that it was held in Patil Automation that rejection of earlier suit under Order VII Rule 11 does not bar a fresh suit on the same cause of action provided the right of action is not barred by the laws of limitation.

47. Finally, Mr. Bose relied on the Supreme Court decision in Dahiben v. Arvindbhai Kalyanji Bhanusali (Gajra) (Dead) by LRs & Ors, reported at 2020 7 SCC 366. Reliance was placed on paragraphs 23.3, 23.6, 23.11, 23.12, 23.13,23.14 and 24.2 of the judgment which read as follows:

> "23.3. The underlying object of Order 7 Rule 11(a) is that if in a suit, no cause of action is disclosed, or the suit is barred by limitation under Rule 11(d), the court would not permit the plaintiff to unnecessarily protract the proceedings in the suit. In such a case, it would be necessary to put an end to the sham litigation, so that further judicial time is not wasted.
>
> 23.6. Under Order 7 Rule 11, a duty is cast on the court to determine whether the plaint discloses a cause of action by scrutinising the averments in the plaint [Liverpool & London S.P. & I Assn. Ltd. v. M.V. Sea Success I, (2004) 9 SCC 512] , read in

conjunction with the documents relied upon, or whether the suit is barred by any law.

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23.11. The test for exercising the power under Order 7 Rule 11 is that if the averments made in the plaint are taken in entirety, in conjunction with the documents relied upon, would the same result in a decree being passed. This test was laid down in Liverpool & London S.P. & I Assn. Ltd. v. M.V. Sea Success I [Liverpool & London S.P. & I Assn. Ltd. v. M.V. Sea Success I, (2004) 9 SCC 512] which reads as : (SCC p. 562, para 139)

> "139. Whether a plaint discloses a cause of action or not is essentially a question of fact. But whether it does or does not must be found out from reading the plaint itself. For the said purpose, the averments made in the plaint in their entirety must be held to be correct. The test is as to whether if the averments made in the plaint are taken to be correct in their entirety, a decree would be passed."

23.12. In Hardesh Ores (P) Ltd. v. Hede & Co. [Hardesh Ores (P) Ltd. v. Hede & Co., (2007) 5 SCC 614] the Court further held that it is not permissible to cull out a sentence or a passage, and to read it in isolation. It is the substance, and not merely the form, which has to be looked into. The plaint has to be construed as it stands, without addition or subtraction of words. If the allegations

in the plaint prima facie show a cause of action, the court cannot embark upon an enquiry whether the allegations are true in fact. D. Ramachandran v. R.V. Janakiraman [D. Ramachandran v. R.V.

Janakiraman, (1999) 3 SCC 267; See also Vijay Pratap Singh v. Dukh Haran Nath Singh, AIR 1962 SC 941] .

23.13. If on a meaningful reading of the plaint, it is found that the suit is manifestly vexatious and without any merit, and does not disclose a right to sue, the court would be justified in exercising the power under Order 7 Rule 11 CPC.

23.14. The power under Order 7 Rule 11 CPC may be exercised by the court at any stage of the suit, either before registering the plaint, or after issuing summons to the defendant, or before conclusion of the trial, as held by this Court in the judgment of Saleem Bhai v. State of Maharashtra [Saleem Bhai v. State of Maharashtra, (2003) 1 SCC 557]. The plea that once issues are framed, the matter must necessarily go to trial was repelled by this Court in Azhar Hussain case [Azhar Hussain v. Rajiv Gandhi, 1986 Supp SCC 315. Followed in Manvendrasinhji Ranjitsinhji Jadeja v. Vijaykunverba, 1998 SCC OnLine Guj 281 : (1998) 2 GLH 823].

24.2. In T. Arivandandam v. T.V. Satyapal [T. Arivandandam v. T.V. Satyapal, (1977) 4 SCC 467] this Court held that while considering an application under Order 7 Rule 11 CPC what is required to be

decided is whether the plaint discloses a real cause of action, or something purely illusory, in the following words : (SCC p. 470, para 5)

"5. ... The learned Munsif must remember that if on a meaningful--not formal--reading of the plaint it is manifestly

vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under Order 7 Rule 11 CPC taking care to see that the ground mentioned therein is fulfilled. And, if clever drafting has created the illusion of a cause of action, nip it in the bud at the first hearing...."

(emphasis supplied)"

Court's View:

48. The learned Single Judge has dismissed the application of the appellants under Order XXI Rule 58 of the Code of Civil Procedure as being barred by res-judicata. According to the learned Judge, the issues raised in the said application i.e. challenge to the arbitral award in question on the ground of fraud, was also the issue in the suit that was previously filed by the appellants. While rejecting the plaint of that suit, a Division Bench of this Court also decided the issues involved in the suit on merits. Therefore, the learned Judge felt that he could not re-consider those issues.

49. The principle of res-judicata is enshrined in Section 11 of the Code of

Civil Procedure. Section 11 reads as follows:

"11. Res judicata .–

No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit

in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I .–The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II .–For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III .–The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV.–Any matter which might and ought to have been made ground of defence or attack in such former suit shall be

deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI .—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

[Explanation VII .—The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII .—An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.]"

50. The doctrine in substance is that an issue or a point decided by a court of competent jurisdiction and which decision has attained finality, should not be allowed to be reopened and reagitated again. It is a doctrine applied to give finality to a "lis" in original or appellate proceedings. The literal meaning of res is everything that may fall in object of rights and includes an object, subject matter or status; res-judicata literally means; "a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment." Section 11 engrafts this doctrine with a purpose that "a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.". In this connection one may refer to

the decision of the Hon'ble Supreme Court in the case of Escorts Farms Ltd. v. Commissioner, Kumaon Division, Nainital, UP, reported at 2004 (4) SCC 281 = AIR 2004 SC 2186.

51. We may also note the observations of a four Judge bench of the Hon'ble Supreme Case in the case of Sheodan Singh v. Daryao Kunwar, (Supra). At paragraph 14 of the reported judgment, the Hon'ble Supreme Court has held that it is well settled that in order that a matter may be said to have been heard and finally decided, the decision in the former suit must have been on the merits. Where, for example, the former suit was dismissed by the Trial Court for want of jurisdiction or for default of the plaintiff's appearance, or on the ground of non-joinder of parties or mis-joinder of

parties or multifariousness, or on the ground that the suit was badly framed or on the ground of a technical mistake, or for failure on the part of the plaintiff to produce probate or letters of administration or succession certificate when the same is required by law to entitle the plaintiff to a decree, or for failure to furnish security for costs, or on the ground of improper valuation or for failure to pay additional court fee on a plaint which was undervalued or for want of cause of action or on the ground that it is premature and the dismissal is confirmed in appeal (if any), the decision not being on the merits, would not be res-judicata in a subsequent suit. In the facts of the present case, I do not find that the earlier Division Bench has decided the challenge to the arbitral award on merits dealing with the allegations of fraud made by the plaintiffs in that suit. Even if observations are being made on the other aspects of the earlier suit, by the Division Bench, going by the authorities discussed herein including the decision in

Sheodan Singh, the same would have no effect and would definitely not constitute res-judicata.

52. The essence of the judgment and order dated December 3, 2019 passed by the earlier division bench in APO No. 261 of 2015 will be found in paragraphs 35-39 of the judgment, which are reproduced hereunder:

> "35. The plaint is fashioned as a frontal attack on the arbitral award and all the reliefs from (a) to (g) pertain to the arbitral award and the arbitral award alone.
>
> 36. It is possible to imagine several scenarios where an arbitral

award or a decree of court is made against a person, but it affects another who was not a party to the arbitral reference or to the suit. Clearly, in such a scenario, such a person cannot be proceeded against in the enforcement of the arbitral award or the execution of the decree. The fallacy in the plaintiffs' case here is that they claim to be affected or prejudiced by the arbitral award or the enforcement thereof in course of the execution proceedings instituted in this court. Legally speaking, the award of May 16,2013 was not rendered against the plaintiffs or either of them. Again, the arbitral award was not enforced against the plaintiffs or either of them.

Clearly, the arbitral award was against the proforma defendant and it was also enforced against the proforma defendant and the money went out of the bank account of the proforma defendant. If at all, the plaintiffs are to blame for the circumstances in which

they find themselves. It is the plaintiffs' admission that the third defendant was appointed on the board of directors of the proforma defendant. Though the plaintiffs claim that there were other directors on such board; but, upon the resignation of such other directors, the third defendant came to be the sole surviving director of the proforma defendant. Ordinarily, there cannot be a single-member board of directors of any company and when a director finds himself to be the lone member of the board of a

company, usually, such director has the power and authority to induct another and, thereafter, for the two together to co-opt or induct further directors as the articles of association of the relevant company may provide.

37. Without being overly critical, it is plain to see that there is no legal basis to the claim in the plaint. For instance, the plaintiffs claim that the plaintiffs held a meeting on December 15, 2009 and revoked the authority of the third and fourth defendants as the signatories of the bank account of the proforma defendant. Ordinarily, such authority to designate an authorised signatory is a management activity which is entrusted to the board of directors of the company and the shareholders of the company, even all of them as a collective, cannot usurp such authority. Again, the plaintiffs claim that they held an extraordinary general meeting of the proforma defendant on December 22, 2009. However, ordinarily, general meetings of a company, including any extraordinary general meeting, is convened by the board of

directors of the company and not by its shareholders. Though the shareholders of any company can requisition a meeting and, subject to the articles of association of the relevant company and the provisions of the governing statute, the board of directors is obliged to convene an extraordinary general meeting upon a notice in such regard being issued by the requisite number of

shareholders, even an extraordinary general meeting cannot be directly called by the requisitioning shareholders in the absence of the board of directors failing to convene such requisitioned meeting within the statutorily ordained time.

38. On the most charitable reading of the plaint which is what is required of a court in seisin of an objection in the nature of demurrer – it discloses no semblance of any cause of action against any of the defendants whether in respect of the arbitral award of May 16, 2013 or otherwise. As noticed above, only the party aggrieved by an arbitral award may challenge the award; and the plaintiffs are not parties to the award of May 16, 2013. At any rate, no suit is maintainable to challenge an arbitral award, particularly since the Act of 1996 is the entire repository in respect of the arbitration law in the country and all matters pertaining to arbitration in this country are covered by such statute and the rights and remedies pertaining to arbitral references and arbitral awards are governed thereby. The Act of 1996 is, after all, an amending and consolidating Act and unless other statutes provide for statutory arbitration and alternative mechanisms for challenge

(for example, the Micro, Small and Medium Enterprises Development Act, 2006, the National Highways Act, 1956 and the West Bengal Co-operative Societies Act, 2006), it is only the Act of 1996 that may be looked into in respect of any matter pertaining

to arbitration in this country and any remedy in respect thereof. It is utterly puerile to suggest that since there is no express provision in any statute prohibiting the challenge to an arbitral award by way of a civil suit, Section 9 of the Code permits such a challenge. The authority of a court to receive and try a suit of a civil nature under Section 9 of the Code is tempered by the caveat in its last limb, "excepting suits of which their cognizance is either expressly or impliedly barred." In the remedy against an arbitral award being exclusively covered by the Act of 1996, which is the complete Code as regards arbitration law in this country, a challenge to an arbitral award de hors the Act of 1996 has to be regarded as impliedly barred within the meaning of the relevant expression in Section 9 of the Code.

39. In the light of the above discussion, it is completely unnecessary in the present context to embark on an exercise to discover whether it is permissible to partially reject the plaint. The plaint in this case cries out to be rejected in its entirety as being an animal that is not known to legal science. Whatever other remedy may be available to the plaintiffs against the defendants, the plaintiffs are not entitled to any of the reliefs claimed in the present suit even if all the allegations in the plaint are accepted at

face value. Expressed in another way, the plaint plainly does not disclose any modicum of cause of action. If the plaintiffs are not

legally entitled to canvass any of the reliefs claimed, the plaint is liable to be rejected the rejection here is of the plaint as a whole."

53. From the above, we see that the earlier Division Bench found that the suit is impliedly barred by the provisions of the Arbitration and Conciliation Act, 1996. An arbitral award could only be challenged in accordance with the provisions of the 1996 Act. A Civil Court in a suit could not entertain nor had the authority to entertain a challenge to an arbitral award. In other words, the Civil Court had no jurisdiction to entertain the suit that was filed by the appellants herein.

54. The question is, having so held, could it be in the same breath, held that the suit is also not maintainable because the plaint of the suit disclosed no cause of action or the plaintiffs had no cause of action against the defendants? Learned Senior Counsel for the appellants vociferously argued that once a court finds that it lacks jurisdiction to entertain a proceeding, it must put an end to the proceeding on that ground alone. Any finding touching the merits of the case or any other point that may be involved, would be a nullity and non-est in the eye of law. This is because, once the court finds that it has no jurisdiction to entertain the proceeding, it has no authority to make pronouncement on any other aspect of the proceeding.

55. In my view, the contention of learned Senior Counsel for the appellants has considerable force. There are authorities legion to the effect that if a court finds a suit to be not maintainable because the court lacks jurisdiction to entertain it, that must be the end of the matter. Any

observation or finding on any other aspect of the suit would be without jurisdiction and null and void. This makes complete sense and is wholly logical. After all, how can a court which finds that it has no jurisdiction to entertain a suit, make any pronouncement on any other aspect of the suit including the merits of the disputes between the parties as projected in the suit?

56. In this connection one may refer to the following decisions:

(i) Sri Athmanathaswami Devasthanam v. K. Gopalaswami Ayyangar, (Supra). At paragraph 14 of the reported judgment, a three Judge bench of the Hon'ble Supreme Court held that when the court had no jurisdiction over the subject matter of the suit it cannot decide any question on merits. It can simply decide on the question of jurisdiction and coming to the conclusion that it had no jurisdiction over the matter had to return the plaint.

(ii)Phonographic Performance Ltd. & Ors v. Union of India & Ors, (Supra). A division bench of the Delhi High Court held that it is a settled principle of law that any finding on merits in a proceeding which is ultimately dismissed on the ground of being not maintainable, would not constitute res-judicata.

(iii) In Karnail Singh v. Bhajan Singh, (Supra), the Punjab and Haryana High Court, relying on the decision of the Hon'ble Supreme Court in Ganesh Prasad Badrinarayan Lahoti v. Sanjeev Prasad Jamnaprasad Chourasiya and Anr, (Supra), held that when the concerned petition was held to be not maintainable, any findings

recorded on merits of the controversy cannot have any binding force and in any case cannot be res-judicata.

(iv) In Ravi Singhal and Ors v. Rajeev Goyal and Ors, (Supra), a division bench of the Allahabad High Court relied on earlier authorities and held as follows at paragraphs 6 to 10 of the judgment.

> "6. Learned Counsel for appellants submitted that once the Court finds that it has no jurisdiction to try the suit, it should have returned plaint and had no jurisdiction to dismiss the suit or proceed to decide the suit on merits and to that extent, judgment of Court below is nullity and without jurisdiction. He placed reliance on Supreme Court decision in R.S.D.V. Finance Co. (P) Ltd. v. Shree Vallabh Glass Works Ltd., (1993) 2 SCC 130, a Single Judge judgment of this Court in Ram Swaroop v. Kalicharan., 1995 (2) ARC 370, and Bombay High Court's decision in Shreyans Industries v. State of U.P., 2004 (2) ICC 773.
>
> 7. The Apex Court in R.S.D.V. Finance Co. Pvt. Ltd. v. Shree Vallabh Class Works Ltd., (supra) has observed in para 7 as under:
>
> > "The Division Bench was totally wrong in passing an order of dismissal of the suit itself when it had arrived at the conclusion that the High Court had no jurisdiction to try the suit. The only course to be adopted in such circumstances was to return the plaint for presentation to the proper Court and not to dismiss the suit."

8. Similarly, in Ram Swaroop v. Kalicharan (supra), the Court held:
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"Obviously, once it is found by the Appellate Court that the Trial Court lacked jurisdiction to entertain the suit any further adjudication upon merit of other issues by it would be without jurisdiction and nullity. The lower Appellate Court has categorically found that the Revenue Court alone had jurisdiction to take cognizance of the suit and it was not cognizable by the Trial Court, namely, the Court of Munsif. After this finding and conclusion, only course open to the lower Appellate Court was to direct, after setting aside the decree and judgment of the Trial Court, the return of the plaint for presentation to the Revenue Court. It acted illegally in adjudicating upon other issues on merit and dismissing the suit."

(Emphasis added)

9. Similar view was taken in Shreyans Industries v. State of U.P. (supra), observing:

"Once the Court comes to the conclusion that it has no jurisdiction to entertain the suit, the only course open to the Court is to return the plaint to the plaintiff to be presented in the competent Court and any finding recorded on merits of the matter would be of no consequence. If plaint is returned for want of jurisdiction and the same Court also records

findings on merits, such findings are without jurisdiction and null and void."

10. In view of above exposition of law and considering the fact that Court below has correctly came to the conclusion that in respect to orders passed under the provisions of Act, 1972, Civil Court in a suit under section 9, C.P.C., has no jurisdiction to declare orders passed by competent authority under Act, 1972 illegal, it had not authority to proceed to decide other issues on merits. In our view, the Court below has rightly held that it had no jurisdiction to try the suit. In these circumstances, the only way open to it was to return the plaint instead of proceeding to decide other issues on merits and dismiss the suit."

57. We have to keep in mind that rejection of a plaint does not bar a fresh suit on the self-same cause of action. Order VII Rule 13 of the Code of Civil Procedure provides that rejection of the plaint on any of the grounds mentioned in Rule 11 of Order VII shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action. In this connection we may also notice the observations of a Division Bench of this Court in the case of Allahabad Bank v. Shanks Steel Fab (P) Ltd., (Supra). Paragraph 9 of the reported judgment may be noticed, which reads as follows:

"9. After hearing Mr. Basu appearing on behalf of the appellant and after going through the provisions contained in Order VII Rule

10 and Order VII Rule 11 of the Code of Civil Procedure, we find that Rule 10 authorises the court to return the plaint at any stage of the suit for presentation before the appropriate court once it comes to the conclusion that it has no jurisdiction to entertain

such suit. Rule 11, on the other hand, prescribes the situations in which the court shall reject a plaint. At this stage, we cannot lose sight of the fact that rejection of a plaint does not amount to dismissal of the suit. If a suit is dismissed, a fresh suit will be barred by the principles of res-judicata; whereas in the case of rejection of a plaint, a fresh suit is maintainable and the previous order of rejection of plaint will not be an impediment in filing the second suit after removal of defect which was the cause of rejection of the plaint."

58. The argument of the learned Senior Counsel for Jagrati is that the finding of the earlier Division Bench that the suit was not maintainable at the instance of the present appellants who were the plaintiffs therein, not having been interfered with by the Hon'ble Supreme Court, was binding on the learned Single Judge in the present round of litigation. We are not impressed with this argument. Dismissal of a Special Leave Petition at the threshold only means that the Hon'ble Supreme Court has not found it fit to exercise jurisdiction under Article 136 of the Constitution of India to grant leave to the petitioner to prefer appeal against the order impugned. It does not put any kind of imprimatur on the order impugned. The question of

merger does not arise. In this connection, one may refer to the observations of the Hon'ble Supreme Court in paragraphs 13–21 of the decision in Kunhayammed and Ors v. State of Kerala and Anr, (Supra). The said paragraphs are reproduced hereunder:

"Stage of SLP and post-leave stage

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13. The appellate jurisdiction exercised by the Supreme Court is conferred by Article 132 to 136 of the Constitution. Articles 132, 133 and 134 provide when an appeal thereunder would lie and when not. Article 136 of the Constitution is a special jurisdiction conferred on the Supreme Court which is sweeping in its nature. It is a residuary power in the sense that it confers an appellate jurisdiction on the Supreme Court subject to the special leave being granted in such matters as may not be covered by the preceding articles. It is an overriding provision conferring a special jurisdiction providing for invoking of the appellate jurisdiction of Supreme Court not fettered by the sweep of preceding articles. Article 136 opens with a non-obstante clause and conveys a message that even in the field covered by the preceding articles, jurisdiction conferred by Article 136 is available to be exercised in an appropriate case. It is an untrammelled reservoir of power incapable of being confined to definitional bounds; the discretion conferred on the Supreme Court being subjected to only one

limitation, that is, the wisdom and good sense or sense of justice of the Judges. No right of appeal is conferred upon any party; only a discretion is vested in the Supreme Court to interfere by granting leave to an applicant to enter in its appellate jurisdiction not open otherwise and as of right.

14. The exercise of jurisdiction conferred on this Court by Article 136 of the Constitution consists of two steps: (i) granting special leave to appeal; and (ii) hearing the appeal. This distinction is

clearly demonstrated by the provisions of Order 16 of the Supreme Court Rules framed in exercise of the power conferred by Article 145 of the Constitution. Under Rule 4, the petition seeking special leave to appeal filed before the Supreme Court under Article 136 of the Constitution shall be in Form No. 28. No separate application for interim relief need be filed, which can be incorporated in the petition itself. If notice is ordered on the special leave petition, the petitioner should take steps to serve the notice on the respondent. The petition shall be accompanied by a certified copy of the judgment or order appealed from and an affidavit in support of the statement of facts contained in the petition. Under Rule 10 the petition for grant of special leave shall be put up for hearing ex parte unless there be a caveat. The court if it thinks fit, may direct issue of notice to the respondent and adjourn the hearing of the petition. Under Rule 13, the respondent to whom a notice in

special leave petition is issued or who had filed a caveat, shall be entitled to oppose the grant of leave or interim orders without filing any written objections. He shall also be at liberty to file his objections only by setting out the grounds in opposition to the questions of law or grounds set out in the SLP. On hearing, the Court may refuse the leave and dismiss the petition for seeking special leave to appeal either ex parte or after issuing notice to the opposite party. Under Rule 11, on the grant of special leave, the petition for special leave shall, subject to the payment of additional court fee, if any, be treated as the petition of appeal and it shall be

registered and numbered as such. The appeal shall then be set down for hearing in accordance with the procedure laid down thereafter. Thus, a petition seeking grant of special leave to appeal and the appeal itself, though both dealt with by Article 136 of the Constitution, are two clearly distinct stages. In our opinion, the legal position which emerges is as under:

(1) While hearing the petition for special leave to appeal, the Court is called upon to see whether the petitioner should be granted such leave or not. While hearing such petition, the Court is not exercising its appellate jurisdiction; it is merely exercising its discretionary jurisdiction to grant or not to grant leave to appeal. The petitioner is still outside the gate of entry though aspiring to enter the appellate arena of the

Supreme Court. Whether he enters or not would depend on the fate of his petition for special leave;

(2) If the petition seeking grant of leave to appeal is dismissed, it is an expression of opinion by the Court that a case for invoking appellate jurisdiction of the Court was not made out;

(3) If leave to appeal is granted the appellate jurisdiction of the Court stands invoked; the gate for entry in the appellate arena is opened. The petitioner is in and the respondent may also be called upon to face him, though in an appropriate case, in spite of having granted leave to appeal, the Court may dismiss the appeal without noticing the respondent.

(4) In spite of a petition for special leave to appeal having been filed, the judgment, decree or order against which leave to appeal has been sought for, continues to be final, effective and binding as between the parties. Once leave to appeal has been granted, the finality of the judgment, decree or order appealed against is put in jeopardy though it continues to be binding and effective between the parties unless it is a nullity or unless the Court may pass a specific order staying or suspending the operation or execution of the judgment, decree or order under challenge.

Dismissal at stage of special leave -- without reasons -- no res judicata, no merger

15. Having so analysed and defined the two stages of the jurisdiction conferred by Article 136, now we proceed to deal with a number of decisions cited at the Bar during the course of hearing and dealing with the legal tenor of an order of the Supreme Court dismissing a special leave petition. In Workmen v. Board of Trustees of the Cochin Port Trust [(1978) 3 SCC 119 : 1978 SCC (L&S) 438] a three-Judge Bench of this Court has held that dismissal of special leave petition by the Supreme Court by a non-speaking order of dismissal where no reasons were given does not constitute res judicata. All that can be said to have been decided by the Court is that it was not a fit case where special leave should be granted. That may be due to various reasons. During the course of the judgment, their Lordships have observed that dismissal of a

special leave petition under Article 136 against the order of a tribunal did not necessarily bar the entertainment of a writ petition under Article 226 against the order of the tribunal. The decision of the Madras High Court in Western India Match Co. Ltd. v. Industrial Tribunal [AIR 1958 Mad 398, 403 : (1958) 2 MLJ 74 : (1958) 2 LLJ 315] was cited before their Lordships. The High Court had taken the view that the right to apply for leave to appeal to the Supreme Court under Article 136, if it could be called a "right" at all, cannot be equated to a right to appeal and that a High Court could not refuse to entertain an application under Article 226 of

the Constitution on the ground that the aggrieved party could move the Supreme Court under Article 136 of the Constitution. Their Lordships observed that such a broad statement of law is not quite accurate, although substantially it is correct.

16. In Indian Oil Corpn. Ltd. v. State of Bihar [(1986) 4 SCC 146 : 1986 SCC (L&S) 740 : AIR 1986 SC 1780] there was a labour dispute adjudicated upon by an award made by the Labour Court. The employer moved the Supreme Court by filing a special leave petition against the award which was dismissed by a non-speaking order in the following terms:

> "The special leave petition is dismissed."

17. Thereafter the employer approached the High Court by preferring a petition under Article 226 of the Constitution seeking quashing of the award of the Labour Court. On behalf of the employee the principal contention raised was that in view of the

order of the Supreme Court dismissing the special leave petition preferred against the award of the Labour Court it was not legally open to the employer to approach the High Court under Article 226 of the Constitution challenging the very same award. The plea prevailed with the High Court forming an opinion that the doctrine of election was applicable and the employer having chosen the remedy of approaching a superior court and having failed therein he could not thereafter resort to the alternative remedy of

approaching the High Court. This decision of the High Court was put in issue before the Supreme Court. This Court held that the view taken by the High Court was not right and that the High Court should have gone into the merits of the writ petition. Referring to two earlier decisions of this Court, it was further held: (SCC pp. 148-50, paras 6 & 8)

> "[T]he effect of a non-speaking order of dismissal of a special leave petition without anything more indicating the grounds or reasons of its dismissal must, by necessary implication, be taken to be that this Court had decided only that it was not a fit case where special leave should be granted. This conclusion may have been reached by this Court due to several reasons. When the order passed by this Court was not a speaking one, it is not correct to assume that this Court had necessarily decided implicitly all the questions in relation to the merits of the award, which was under challenge before this Court in the special leave petition. A writ proceeding is a wholly

different and distinct proceeding. Questions which can be said to have been decided by this Court expressly, implicitly or even constructively while dismissing the special leave petition cannot, of course, be reopened in a subsequent writ proceeding before the High Court. But neither on the principle of res judicata nor on any principle of public policy analogous

thereto, would the order of this Court dismissing the special leave petition operate to bar the trial of identical issues in a separate proceeding namely, the writ proceeding before the High Court merely on the basis of an uncertain assumption that the issues must have been decided by this Court at least by implication. It is not correct or safe to extend the principle of res judicata or constructive res judicata to such an extent so as to found it on mere guesswork.

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It is not the policy of this Court to entertain special leave petitions and grant leave under Article 136 of the Constitution save in those cases where some substantial question of law of general or public importance is involved or there is manifest injustice resulting from the impugned order or judgment. The dismissal of a special leave petition in limine by a non- speaking order does not therefore justify any inference that by necessary implication the contentions raised in the special leave petition on the merits of the case have been rejected by this Court. It may also be observed that having regard to the 55 very heavy backlog of work in this Court and the necessity to restrict the intake of fresh cases by strictly following the criteria aforementioned, it has very often been the practice of this Court to grant special leave in cases where the party cannot claim effective relief by approaching the High Court concerned under Article 226 of the Constitution. In such cases also the special leave petitions are quite often dismissed only by passing a non-speaking order especially in view of the rulings already given by this Court in the two decisions aforecited, that such dismissal of the special leave petition will not preclude the party from moving the High Court for seeking relief under Article 226 of the Constitution. In such cases it would work extreme hardship and injustice if the High Court were to close its doors to the petitioner and refuse him relief under Article 226 of the Constitution on the sole ground of dismissal of the special leave petition."

(emphasis supplied)

18. In our opinion what has been stated by this Court applies also to a case where a special leave petition having been dismissed by a non-speaking order, the applicant approaches the High Court by moving a petition for review. May be that the Supreme Court was not inclined to exercise its discretionary jurisdiction under Article 136 probably because it felt that it was open to the applicant to move the High Court itself. As nothing has been said specifically in the order dismissing the special leave petition one is left merely 56 guessing. We do not think it would be just to deprive the aggrieved person of the statutory right of seeking relief in review jurisdiction of the High Court if a case for relief in that jurisdiction could be made out merely because a special leave petition under Article 136 of the Constitution had already stood rejected by the Supreme Court by a non-speaking order.

19. In Rup Diamonds v. Union of India [(1989) 2 SCC 356 : AIR 1989 SC 674] the law declared by this Court is that it cannot be said that the mere rejection of special leave petition could, by itself, be

construed as the imprimatur of this Court on the correctness of the decision sought to be appealed against.

20. In Wilson v. Colchester Justices [(1985) 2 All ER 97 (HL)] the House of Lords stated:

> "There are a multitude of reasons why, in a particular case, leave to appeal may be refused by an Appeal Committee. I shall not attempt to embark on an exhaustive list for it would be impossible to do so. One reason may be that the particular case raises no question of general principle but turns on its own facts. Another may be that the facts of the particular case are not suitable as a foundation for determining some question of general principle.
>
> ... Conversely the fact that leave to appeal is given is not of itself an indication that the judgments below are thought to be wrong. It may well be that leave is given in order that the relevant law may be authoritatively restated in clearer terms." 57

21. In Supreme Court Employees' Welfare Assn. v. Union of India [(1989) 4 SCC 187 : 1989 SCC (L&S) 569] and Yogendra Narayan Chowdhury v. Union of India [(1996) 7 SCC 1 : 1996 SCC (L&S) 362] both decisions by two-Judge Benches, this Court has held that a non-speaking order of dismissal of a special leave petition cannot lead to the assumption that it had necessarily decided by implication the correctness of the decision under challenge."

59. What therefore emerges from the aforesaid discussion is that firstly, the earlier Division Bench did not decide the issue of Jagrati having fraudulently obtained an arbitral award in collusion with the directors of Augustus, making Augustus the respondent in the arbitration, as was alleged by the plaintiffs (present appellants) in the earlier suit. The earlier Division Bench came to a conclusion that the suit was impliedly barred by law and the Civil Court had no jurisdiction to entertain such a suit challenging the validity of an arbitral award. The Division Bench also held that the plaint did not disclose any cause of action as against the defendants. As we have discussed above, rejection of a plaint on the ground of non-disclosure of cause of action or on the ground of the suit being barred by any law, would not operate as res-judicata and would not preclude the plaintiffs in that suit to agitate the same point in a subsequent proceeding, subject of course to the question of limitation.

60. The learned Single Judge therefore fell in error in holding that the issues involved in the application filed by the appellants under Order XXI Rule 58 and Section 151 of the Code of Civil Procedure, read with Section 36 of the Arbitration and Conciliation Act, 1996, is barred by res-judicata on 58 the ground that the issues involved in the application were decided on merits by the earlier Division Bench while rejecting the plaint of the earlier suit filed by the appellants. Evidently there is no such decision of the earlier Division Bench on the merits of the case which was run in the plaint of the earlier suit and which was also agitated before the learned Single Judge in the present round of litigation.

61. We refrain from dealing with the other case laws cited by learned Senior Counsel for the appellants since the same is unnecessary in view of our opinion expressed above. We have not touched the merits of the case since the learned Single Judge also did not decide the application of the appellants on merits. We are of the view that ends of justice will be served if the matter is remanded to the learned Single Judge having determination to hear the matter for fresh consideration in the light of the observations made in this judgment and order.

62. Accordingly, we set aside the judgment and order under appeal. The appellants' application under Order XXI Rule 58 and Section 151 of the Code of Civil Procedure read with Section 36 of the

Arbitration and Conciliation Act 1996, revives and is remanded to the learned Single Judge having determination to hear and decide the matter afresh.

63. We make it clear that we have not touched the merits of the appellants' challenge to the arbitral award. All questions are left open including the question of maintainability of the said application on other grounds. However, the issue of res-judicata stands decided by this judgment subject of course, to interdiction by a higher forum. 59

64. The appeal being AO-COM/2/2026 and the connected application stand disposed of accordingly.

65. Urgent certified photocopy of this judgment and order, if applied for, be given to the parties upon compliance of necessary formalities.

I agree.

(Apurba Sinha Ray, J.) (Arijit Banerjee, J.)