IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL No. 331 of 2012
IN
ARBITRATION PETITION (L) No. 398 of 2012

Godrej Industries Limited
having its office at Phirojsha
Nagar, Eastern Express Highway
Vikhroli, Mumbai 400 079 ... Appellant.
(Original
Respondent no.6)

Versus

1. Colin Mario Rebello
501 and 502, Joanna Premises
Co-op Hsg Society,
10, Manual Gonsalves Road,
Bandra, Mumbai 400 050. ... Original
Petitioner.

2. Jer Rutton Kavasmaneck
(alias Jer Jawahar
Thadani, residing at 193,
Jupiter Apartment,
Cuffe Parade, Mumbai 400 005.

3. Darius Rutton Kavasmaneck,
residing at 626, Parsi Colony,
Dadar, Mumbai 400 014.

4. Maharukh Murad Oomarigar,
residing at T/176, AA Palm Beach,
Juhu Tara Road,Juhu,
Mumbai 400 049.

5. Percy Rutton Kavasmaneck,
residing at C/o N.A. Pochee, Turel
Terrace 628, Parsi
Colony, Dadar Mumbai 400 014.

6. Aban Percy Kavasmaneck,
residing at C/o N.A. Pochee,
Turel Terrace 628, Parsi
Colony, Dadar, Mumbai 400 014.

7. Conrad Anthony Rebello,
residing at Kostka House,
St Peters Co-operative Hsg.
Society, 31, Manual Gonsalves Road,
Bandra, Mumbai 400 050. ... Respondents.

WITH
APPEAL No. 332 of 2012
IN
ARBITRATION PETITION No. 444 of 2012

Godrej Industries Limited
having its office at Phirojsha
Nagar, Eastern Express Highway
Vikhroli, Mumbai 400 079 ... Appellant.
(Original
Respondent No.6)

Versus

1. Jer Rutton Kavasmaneck
(alias Jer Jawahar
Thadani, residing at 193,
Jupiter Apartment,
Cuffe Parade, Mumbai 400 005.

2. Darius Rutton Kavasmaneck,
residing at 626, Parsi Colony,
Dadar, Mumbai 400 014. ... Original
Petitioners.

3. Maharukh Murad Oomarigar,
residing at T/176, AA Palm Beach,
Juhu Tara Road,Juhu,
Mumbai 400 049.

4. Percy Rutton Kavasmaneck,
residing at C/o N.A. Pochee,
Turel Terrace 628, Parsi
Colony, Dadar Mumbai 400 014.

5. Aban Percy Kavasmaneck,
residing at C/o N.A. Pochee,
Turel Terrace 62, Parsi
Colony, Dadar, Mumbai -400 014.

6. Colin Mario Rebello
501 and 502, Joanna Premises
Co-op Hsg Society,
10, Manual Gonsalves Road,
Bandra, Mumbai 400 050.

7. Conrad Anthony Rebello,
residing at Kostka House,
St Peters Co-operative Hsg.
Society, 31, Manual Gonsalves Road,
Bandra, Mumbai 400 050. ... Respondents.

WITH

APPEAL (Lodging) No. 497 of 2012.
IN
ARBITRATION PETITION No. 444 of 2012.

1. Percy Rutton Kavasmaneck,
residing at C/o N.A. Pochee,
Turel Terrace 628, Parsi
Colony, Dadar Mumbai 400 014.

2. Aban Percy Kavasmaneck, ... Appellants.
residing at C/o N.A. Pochee, (Original

Turel Terrace 62, Parsi Colony, Dadar, Mumbai - 400 014. Respondent Nos. 2 and 3)

Versus.

1. Jer Rutton Kavasmaneck
(alias Jer Jawahar
Thadani, residing at 193, Jupiter
Apartment,
Cuffe Parade, Mumbai 400 005.

2. Darius Rutton Kavasmaneck, residing at 626, Parsi Colony, Dadar, Mumbai 400 014. Respondents. ..(Original Petitioners).

3. Maharukh Murad Oomarigar,
residing at T/176, AA Palm Beach,
Juhu Tara Road,Juhu,
Mumbai 400 049.

4. Colin Mario Rebello
501 and 502, Joanna Premises
Co-op Hsg Society,
10, Manual Gonsalves Road,
Bandra, Mumbai 400 050.

5. Conrad Anthony Rebello,
residing at Kostka House,
St Peters Co-operative Hsg.
Society, 31, Manual
Gonsalves Road,
Bandra, Mumbai 400 050.

6. Godrej Industries Limited
having its office at Phirojsha

Nagar, Eastern Express Highway
Vikhroli, Mumbai 400 079 ... Respondents.

WITH
APPEAL (LODGING) No.498/2012
IN
ARBITRATION PETITION (LODGING) No. 398 of 2012.

1. Percy Rutton Kavasmaneck,
residing at C/o N.A. Pochee,
Turel Terrace 628, Parsi
Colony, Dadar Mumbai 400 014.

2. Aban Percy Kavasmaneck,
residing at C/o N.A. Pochee, ... Appellants.
Turel Terrace 62, Parsi (Original Respondent
Colony, Dadar, Mumbai - 400 014. Nos. 4 and 5)

Versus.

1. Colin Mario Rebello
501 and 502, Joanna Premises
Co-op Hsg Society,
10, Manual Gonsalves Road,
Bandra, Mumbai 400 050. ... Original
Petitioner.

2. Jer Rutton Kavasmaneck
(alias Jer Jawahar
Thadani, residing at 193,
Jupiter Apartment,
Cuffe Parade, Mumbai 400 005.

3. Darius Rutton Kavasmaneck,
residing at 626, Parsi Colony,
Dadar, Mumbai 400 014.

4. Maharukh Murad Oomarigar,
residing at T/176, AA Palm Beach,
Juhu Tara Road,Juhu,
Mumbai 400 049.

5. Godrej Industries Limited
having its office at Phirojsha
Nagar, Eastern Express Highway
Vikhroli, Mumbai 400 079

6. Conrad Anthony Rebello,
residing at Kostka House,
St Peters Co-operative Hsg.
Society, 31, Manual Gonsalves
Road, Bandra, Mumbai 400 050. ... Respondents.

WITH
ARBITRATION APPLICATION No. 220 of 2012.

Colin Mario Rebello
residing at Flats 501 and 502
Joanna Premises C. H. S. Ltd.,
10, Manuel Gonsalves Marg
Bandra (West), Mumbai 400 050. ... Applicant

Versus

1. Jer Rutton Kavasmaneck
alias Jer Jawhar Thadani
residing at 193, Jupiter Apartment
Cuffe Parade, Mumbai 400 005.

2. Darius Rutton Kavasmaneck
residing at 626, Parsi Colony
Dadar, Mumbai 400 014.

3. Maharukh Murad Oomrigar
residing at T/176, AA Palm Beach
Juhu Tara Road, Juhu
Mumbai 400 049.

4. Percy Rutton Kavasmaneck,
residing at 134, Olivera Way,
Palm Beach Gardens, Florida -33418,
United States of America.

5. Aban Rutton Kavasmaneck,
residing at 134, Olivera Way,
Palm Beach Gardens, Florida -33418,
United States of America.

6. Godrej Industries Limited
formerly [Godrej Soaps Ltd.,]
having its office at Firojshanagar,
Eastern Express Highway,
Vikhroli, Mumbai 400 079

7. Conrad Anthony Rebello,
residing at Kostka House,
St Peters C. H. S.
31, Manual Gonsalves Road,
Bandra, Mumbai 400 050. ... Respondents.

WITH

ARBITRATION APPLICATION No. 219 of 2012.

1. Jer Rutton Kavasmaneck
alias Jer Jawhar Thadani
residing at 193, Jupiter Apartment
Cuffe Parade, Mumbai 400 005.

2. Darius Rutton Kavasmaneck
residing at 626, Parsi Colony
Dadar, Mumbai 400 014. ... Applicants

Versus

1. Maharukh Murad Oomrigar
residing at T/176, AA Palm Beach
Juhu Tara Road, Juhu
Mumbai 400 049.

2. Percy Rutton Kavasmaneck,
residing at 134, Olivera Way,
Palm Beach Gardens, Florida -33418,
United States of America.

3. Aban Rutton Kavasmaneck,
residing at 134, Olivera Way,
Palm Beach Gardens, Florida -33418,
United States of America.

4. Colin Mario Rebello of Mumbai,
Indian Christian, residing at Flats 501
and 502, Joanna Premises Co-operative
Housing Society Ltd., 10,
Manuel Gonsalves Road,
Bandra, Mumbai 400 050.

5. Conrad Anthony Rebello,
residing at Kostka House,
St Peters Co-op. Hsg. Society
31, Manuel Gonsalves Road,
Bandra, Mumbai 400 050.

6 Godrej Industries Limited
formerly [Godrej Soaps Ltd.,]
having its office at Pirojshanagar,
Eastern Express Highway,
Vikhroli, Mumbai 400 079 ... Respondents

Mr.Anil Divan, Senior advocate, Mr. V. Dhond Senior advocate and Mr. Anil Jamsandekar i/b. Little & Co., for appellant in Appeal No.331 of 2012.
Mr.Rohit Kapadia, Senior advocate, Mr. Pravin Samdani, Senior advocate with Mr. Snehal Shah, Mr. Shriraj Dhruv, Khyati Pandit and Manish Acharya i/b. Dhru & Co., for respondent Nos. 2 and 3.
Mr. Simil Purohit i/b. Mustafa Kachwala for respondent No.1and for respondent No.6 in Appeal No.331 of 2012.
Mr. R.M. Kadam, Senior Advocate with Ankita Singhania i/b. D.H. Law Associates for respondent Nos.5 and 6 & appellants in Appeal Lodging No.497 of 2012 and 498 of 2012.
Mr. Saurabh Gadkari with Mr. Ranjit Shetty i/b. Juris Corp. for respondent No.3.

Mr. Anil Divan, Senior advocate with Mr. V. Dhond, Senior advocate and Mr. Anil Jamsandekar i/b. Little & Co., for appellant in Appeal No.332 of 2012.
Mr.Rohit Kapadia, Senior advocate, Mr. Pravin Samdani, Senior Advocate with Mr. Snehal Shah, Mr. Shriraj Dhruv, Khyati Pandit and Manish Acharya i/b. Dhru & Co., for respondent Nos. 1 and 2.
Mr. R.M. Kadam, Senior Advocate with Ankita Singhania i/b. D.H. Law Associates for respondent Nos.4 and 5 and appellants in Appeal Lodging No.497 of 2012 and Appeal Lodging No.498 of 2012.
Mr. Saurabh Gadkari with Mr. Ranjit Shetty i/b. Juris Corp. for respondent No.4.

Mr.Pravin Samdani, Senior advocate, Snehal Shah a/w Shriraj Dhruv, Khyati Ghevaria and Manish Acharya i/by Dhru & Co. for applicants in Arbitration Application Nos.220 and 219 of 212.
Shri Venkatesh Dhond, Senior advocate i/b Little & Co., for respondent No.6 in Arbitration Application Nos.220 and 219 of 212.

CORAM :- MOHIT S. SHAH, C J
AND N.M. JAMDAR, J.

RESERVED ON :- 17 August, 2012.
PRONOUNCED ON :- 18 September, 2012

JUDGMENT :- (Per:- N.M. JAMDAR, J)

1. These four appeals arise from the orders passed in two Arbitration Petitions, which were heard together by the learned single Judge. By the impugned order dated 11 May 2012, the learned single Judge has allowed the arbitration petitions and has restrained the appellants from in any manner dealing with certain shares of Gharda Chemicals Ltd. The issues raised in

these appeals being common, they are heard together and disposed of by this common judgment.

2. Arbitration Petition No.444 of 2012 was filed by Jer Rutton Kavasmaneck and Darius Rutton Kavasmaneck. Arbitration Petition (L) No.398 of 2012 was filed by Colin Rebello. Godrej Industries and Aban and Percy Kavasmaneck were contesting respondents in the petitions. These two sets of respondents in the arbitration petitions have filed the present four appeals. Along with the appeals we have also taken up two Arbitration Applications filed by Jer and Darius Kavasmanecks, and Colin Rebello under section 11 of the Arbitration & Conciliation Act, 1996 (the Act) for appointment of arbitrator.

3. Some of the parties are related. Jer is the mother of Darius and Percy. Percy and Aban are husband and wife. Maharukh is the sister of Darius and Percy. Colin and Conrad Rebello are not part of the Kavasmaneck family and they are espousing their cause alongside Jer and Darius. When five parties -viz. Jer, Darius, Percy, Aban and Maharukh are together they are referred to as 'Kavasmanecks'. Colin and Conrad Rebellos together are referred to as 'Rebellos'. When Kavasmaneks and Rebellos were together, they are referred to as 'minority shareholders'. The parties who filed the arbitration petitions are referred to as 'petitioners'. Godrej Industries is referred to as 'Godrej'. Gharda Chemicals Ltd. is referred to as 'the Company'.

4. In the dispute before us, Godrej, Aban and Percy Kavasmaneck are together on one side. Jer and Darius Kavasmaneck, Colin and Conrad Rebello together on the other

side. Maharukh Oomarigar has neither appeared nor filed a say, in the petitions.

5. The shareholding pattern of the parties is of importance. The following table will show the approximate shareholdings of the parties.

Sr.No.	Name	Number of shares	Percentage (approx)
1	Jer and Darius Kavesmaneck	10516	17%
2	Percy, Aban Kavasmaneck and Maharukh Oomarigar	8115	13%
3	Colin and Conrad Rebello	2640	4%

Total : - 34% (approx)

Minority shareholders together hold about 34% equity share capital of the Company. Majority share holding is owned and controlled by Dr.Keki Hormusji Gharda. Thus, Kavasmanecks and Rebellos together constitute a sizable minority in the Company.

6. Gharda Chemicals Limited is a closely held Company belonging to Gharda and Kavasmaneck families. The Company was formed by taking over family partnership of M/s Gharda Chemicals Industries. The Company was incorporated as a Private Company, which later became a deemed public Company, by virtue of its turnover, under Section 43-A of the Companies Act, 1956. On 24 August 1989, Dr. Gharda issued a circular, informing the share holders that he has decided to transfer his share in the Company to Gharda Research Foundation. It was a Company incorporated under Section 25, held and controlled by Dr Gharda. The Circular requested other shareholders to donate

their shares to the foundation. This move was opposed by the Kavasmanecks. On 15 February 1990, Dr Gharda convened an Extraordinary General Meeting proposing a special resolution for deleting Article 57 of the Association of the Company which provided for pre-emptive rights in respect of the shares. The minority share holders filed Company Petition No.77 of 1990 in this Court, and this Court by its order dated 14 February 1990 restrained the Company from implementing the resolution, if any, passed in the Extraordinary General Meeting.

7. In view of these developments within the Company, the minority shareholders sought financial assistance from Godrej Industries, for purchase of shares to secure their position as significant minority. A memorandum of understanding (MoU) was executed on 3 June 1992 between minority shareholders on one hand and Godrej on the other hand. Under the MoU Godrej agreed that it would advance loan to the minority shareholders for purchase of shares of the Company which would be offered under Article 57 of the Articles of Association, on a condition that for every one share purchased, two equity shares of the Company would be kept as security with Godrej. There were several other complex covenants in the Agreement. The MoU was to continue till the Company became a Public Limited Company listed on Stock Exchange. As per the MoU, Godrej advanced loan from time to time and shares were offered as security by the minority shareholders. On the same day that is 3 June 1992, minority shareholders executed a separate MoU amongst themselves to bind each other to work towards the common goal.

8. In and around February 2005, Godrej lodged 3199 equity

shares with the Company for transfer, without intimating the minority shareholders. According to Godrej it was done to perfect their security. The Company refused to register the shares and returned them back to Godrej. The refusal was been challenged and the matter is pending. In view of the action of Godrej referred to above, the company alleged that the Minority Shareholders were acting against the interest of the Company, and the Company filed Suit No.1170/2005 challenging the Godrej MoU. The said Suit is pending.

9. In and around May, 2009, some TV Channels carried a news report suggesting that Dr Gharda was offering to sell 75% equity shares of the Company for a value of Rs.1600 Crores. Dr Gharda denied the news. The Minority shareholders also confirmed that they were not intending to sell their shares. However, in view of these news reports, Godrej filed Arbitration Petition No.346 of 2009 in this Court. By an order dated 12 March 2009, this Court restrained the minority shareholders from selling, transferring and/or in any manner whatsoever dealing with the shares owned by them in the Company. On 6 October 2009, Arbitration Petition No. 346 of 2009 was finally disposed of and the injunction was continued till the constitution of the Arbitral Tribunal and six weeks thereafter. By an order dated 12 March 2011, a sole Arbitrator came to be appointed and the Godrej filed an application under Section 17 of the Arbitration Act before the Arbitrator. The Arbitral Tribunal continued the injunction granted against the minority shareholders restraining them from dealing with the shares. Thus all the minority shareholders were restrained from selling the shares. However,

to the surprise of the petitioners, Godrej suddenly sought to withdraw the Arbitral proceedings and prayed that the interim injunction granted by Arbitral Tribunal should be vacated. This appeared to have been done since there was a split in the minority shareholders with Percy and Aban Kavasmanecks deciding to side with Godrej. The learned Arbitrator reserved the order on the application for withdrawal, till the next day i.e. 14 March 2012.

10. Alarmed by this sudden move by Godrej and split in the minority shareholders, on the next day itself, i.e. 14 March 2012, Conrad Rebello filed the present Arbitration Petition (Lodging) No.390/2008 and sought urgent ad-interim orders restraining Godrej and Percy, Aban and Maharukh from disposing of the shares in any manner. Ad-interim order was granted on 14 March 2012. In the arbitration proceedings of Godrej, on 14 March 2012, the learned Arbitrator pronounced the order which was reserved and permitted Godrej to withdraw its proceedings, and ad-interim order was vacated. However by that time Conrad Rebello had obtained an order of injunction against all in respect of transfer of shares. Thereafter, Jer and Darius also filed their Arbitration petition i.e. No.444 of 2012.

11. In the meanwhile, in a parallel proceeding before the Company Law Board, the Company Law Board by an order dated 14 May 2010 in Company Petition No.139 of 2009 held that the Company has become a Public Limited Company and Article 57 was invalid. An appeal came to be filed by Jer and Darius Kavasmaneck. The appeal was dismissed by an order dated 14 June 2011, but Dr.Gharda was restrained from dealing with

shares in the Company. Thereafter, the decision of this Court was challenged in Apex Court by way of S.L.P. No.1699/2011. By an order dated 22/27 July, 2011, the Apex Court continued the interim injunction restraining Dr Gharda dealing with the shares held by him in any manner, .

12. The present petitions were taken up for hearing by the learned single Judge. All parties were duly represented by their advocates. They produced documents in support of their contentions and filed replies and rejoinders. The petitioners i.e. Jer, Darius and Conrad Rebello contended that Maharukh Oomarigar, Percy and Aban have colluded with Godrej and Dr Gharda to dislodge the petitioners from the company and have committed breach of the MoU. They urged that as per the negative covenant stipulated under the MoU, the parties agreed not to sell or dispose of the shares till the shares of the Company are listed on any recognized Stock Exchange. Since this dispute arising under the MoU is sought to be referred for the Arbitration, and since the shares are irreplacable and have a special value, pending the Arbitration Proceedings, no party be permitted to dispose of or deal with these shares. Godrej opposed the petition contending that the petitioners have failed to repay the loan, and have committed several breaches of the MoU. Godrej contended that the MoU is being misinterpreted and the petitioners not acting as per MoU. On one hand petitioners are contending that the shares should not be dealt with till the Company becomes public while on the other hand are taking steps to oppose the Company going public. The negative covenant sought to be relied upon does not bind Godrej. In fact the covenant is incorporated

to safeguard the interest of Godrej. On behalf of Percy and Aban it was contended that there is no arbitration agreement amongst the Minority shareholders and, therefore, there is no question of granting any relief under Section 9 of the Arbitration Act. They urged that in fact the minority shareholders inter-se are governed by a separate MoU and significantly that separate MoU does not contain any Arbitration clause.

13. After hearing the arguments, the learned single Judge came to the conclusion that the petitioners were entitled to the relief of injunction under section 9 of the Act. Learned Judge found that the clauses of the MoU indicate that till the shares are listed on the Stock Exchange, no signatory to the MoU can be permitted to dispose of and/or deal with the shares. Learned Judge held that whether the MoU is breached or not will be subject matter of the Arbitration Petition and in the meanwhile if the shares are allowed to be sold, disposed of or dealt with in any manner, irreparable loss would be caused to the petitioners, as these shares are not ordinary articles of commerce. The learned Judge held that the argument of Percy and Aban regarding the arbitration clause not governing the minority shareholders inter-se will have to be decided by the Arbitrator. The learned Judge took note of the fact that in the arbitration petition filed by Godrej an injunction was granted on 12 March 2009 by which shares could not be disposed off. Learned Judge found that continuation of the same position which prevailed from March 2009 till the disposal of proposed arbitration, was in the interest of justice. The learned Single Judge accordingly by an order dated 11 May 2012 allowed Arbitration Petitions in terms of prayer clause (a) which is as

under-

> '(a) Pending the hearing and final disposal of the proposed arbitration proceedings, the Respondents by themselves and/or through their servants and/or agents and/or in any manner whatsoever be restrained by a temporary order of injunction from in any manner directly or indirectly, dealing, selling, offering for sale, transferring, parting with possession of, alienating, encumbering, pledging or in any manner creating any third party rights in respect of the shares of GCL owned by the respondents or in which the respondents have a beneficial interest.'

14. Godrej, Aban and Percy Kavasmaneck are thus in appeal before us. We have heard learned counsel appearing for the parties. Since the High Court rules permit a matter that is to be heard by single Judge, to be heard by a Division Bench, considering the composition of this Bench, and since the facts and argument will be common, we have taken up the Arbitration applications filed under section 11 of the Act by the petitioners, along with the present appeals, by consent of all the parties.

15. For appellants, Shri Anil B. Divan and Shri V.R.Dhond, learned Senior advocates appeared on behalf of Godrej. Shri R.M.Kadam, learned Senior advocate appeared on behalf of Percy and Aban Kavasmaneck. For respondents, Shri Rohit Kapadia, and Shri Pravin Samdani, learned Senior advocates appeared on behalf of Jer and Darius Kavasmaneck. Shri Simil Purohit, learned advocate appeared on behalf of the Rebellos. No appearance was entered on behalf of Maharukh Oomarigar.

16. On behalf of Godrej, Shri Divan and Shri Dhond, learned

Senior advocates submitted :-

(a) While granting order under Section 9 of the Act, principles which govern the grant of injunction have to be kept in mind namely : prima facie case; balance of convenience and conduct of the parties. On all these counts the petitioners have failed to make out any case.

(b) Apart from the MoU, the Kavasmanecks have executed loan-cum-pledge agreement and power of attornies which give absolute right to Godrej to deal with the shares.

(c) Petitioners- Jer and Darius Kavasmaneck have suppressed loan pledge agreement and power of attornies and this conduct alone disentitles these petitioners from any equitable relief. These documents have direct bearing on the controversy as all the rights of the concerned petitioners in respect of the shares vest in Godrej. Thus, this is a clear suppression of material facts and documents.

(d) Jer and Darius Kavesmanecks have also suppressed letter written by Darius Kavasmaneck on 14 March 2005 in which he accepted right of Godrej in respect of transfer of shares by Godrej.

(e) In the decisions of the Apex Court in the case of **S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. And others**[1], **K.D.Sharma v. Steel Authority of India Limited and others**[2], **Dalip Singh v. State of Uttar Pradesh and others**[3], it is laid down that the party seeking an equitable relief has to approach the court with clean hands.

(f) The loan-cum-pledge agreements and power of attorneys are irrevocable and all the rights of the concerned petitioners are to be exercised by Godrej and in view of this clear empowerment in favour of Godrej, no injunction can be issued against Godrej from perfecting their security.

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1 =(1994) 1 SCC 1.

2 =(2008) 12 SCC 481

3 =(2010) 2 SCC 114

(g) Clause 16 of the Godrej Industries MoU which is sought to be enforced as a negative covenant against Godrej, is only for protection of Godrej and it is not meant to be enforced against it. The embargo placed in respect of the transfer of the shares is only against the minority shareholders and not against Godrej.

(h) The shares which were lodged for transfer by Godrej Industries were admittedly pledged to Godrej Industries by the minority shareholders and they cannot oppose the perfecting of security by Godrej and as the minority shareholders have failed to repay loan and have committed breaches of the MoU.

(i) The petitioners are, on one hand seeking enforcement of Clause 16 of the MoU on the other hand are acting contrary to the other Clauses of the MoU. Clause 16 is to operate till the Company was listed as Public Company and the petitioners are under obligation to work towards this goal but they are litigating and opposing the status of the Company as a Public Limited Company.

(j) The petitioners are opposing registration, transfer of shares in favour of Godrej. They are also not paying dividends on the shares as they are obliged to do under the MoU, and thus are in breach of the MoU. Once they are in breach of the MoU they cannot seek any benefit from it as held in the judgment of the House of Lords in the case of **Alghussein Establishment v Eton College**[4]

(k) The shares having been pledged, the loan having not been repaid, the respondents committing breaches of the MoU, Godrej Industries, was constrained to take steps to perfect its security and no injunction can be granted against the Godrej from doing so.

(l) Finding of the learned single Judge that since there was an interim injunction operating between the parties in the arbitration proceedings filed by Godrej Industries same should be continued in the present case also, is erroneous as the rights of Godrej and minority shareholders stand on different footing.

4 =[1991] 1 All ELR 267

(m) The grant of injunction by the learned Judge without considering that the respondents are opposing the status of the Company, as a public Company, has created a situation whereby Godrej will not be able to recover its monies in forseeable future.

(n) The MoU is impossible to be enforced since the respondents are in minority and cannot convert the Company into a Public Limited Company on the strength of the shares they hold.

(o) Godrej Industries is also fully entitled to deal with the shares as the MoU and agreement empowers them to do so. Thus the Godrej have a right over the shares.

17. On behalf of Percy and Aban Kavasmaneck, learned Senior Counsel Shri R.M. Kadam contended :-

(a) There is no arbitration agreement between the minority shareholders, and, therefore, there is no question of grant of any injunction in a petition Section 9 of the Act against these appellants.

(b) The recitals of the MoU indicate that the MoU was to operate between Minority Shareholders on one side and Godrej on the other. This MoU was not executed to govern the rights and obligations of minority shareholders interse.

(c) The wording of the arbitration clause in MoU does not constitute any agreement between minority shareholders to refer their interse disputes for Arbitration.

(d) In fact, on the same date, minority shareholders executed another MoU in respect of their interse rights and obligation, and in this MoU, an arbitration clause is conspicuously missing. This lends support to the argument that there is no arbitration agreement amongst minority shareholders.

(e) The learned single Judge has misconstrued the argument regarding non-existence of arbitration agreement as challenge to the clauses of the agreement. What was contended was complete lack of arbitration agreement. The

existence of an arbitration agreement goes to the root while deciding petition under section 9 of the Arbitration Act. The Apex Court in the case of **National Insurance Company Limited vs Boghara Polyfab Private Limited**[5] - has made this position amply clear.

18. On behalf of Jer and Darius Kavasmaneck, Mr Kapadia, and Mr Samdani, learned Senior advocates urged as under :-

(a) The appeal arises from order passed in a Petition under Section 9 of the Arbitration Act and a detailed inquiry regarding interpretation of documents which is within the jurisdiction of Arbitral Tribunal need not be carried out at this stage. Only question in this appeal is whether injunction, which is a discretionary relief, granted by the learned single Judge should be continued till the arbitration proceedings are concluded. The exercise of thorough examination of documents in detail which the Arbitrator is supposed to undertake need not be carried out in this appeal.

(b) There is no suppression of any material facts and documents. Godrej in their earlier arbitration petition and Company Petitions have referred to the documents alleged to be concealed and, therefore, there is no question of any suppression of any documents. Since the Godrej was fully aware of these documents and the interim order was being sought after notice to the Godrej, no benefit or advantage was tried to be obtained, or was obtained by not annexing these documents.

(c) The argument made on behalf of Godrej Industries that it is entitled to deal with shares in their own right is completely contrary to the stand taken by them in the pleadings whereby they have reiterated that the shares are only pledged with them. There is a variance in the argument of the Counsel appearing in two appeals, on this aspect.

(d) Till date, Godrej has never demanded repayment of loan and nor has it demanded payment of dividend. The

5 = (2009) 1 Supreme Court Cases 267

respondents are ready to repay the principal amount of loan to the Godrej and since the shares are only pledged, Godrej should return the shares back to them. In a letter written by Adi Godrej, dated 13 June 1992 which is suppressed by Godrej, interest is specifically not claimed.

(e) The interpretation of the MoU clearly shows that the MoU uses different expressions and proper construction shows that negative covenant in Clause (16) is for the benefit of all parties.

(f) There is no question of the petitioners, acting contrary to the MoU and preventing listing of the Company as Public Company, as in any case the Company is a deemed Public Limited Company. What is contemplated by the MoU is that the Company should be listed on the stock exchange and shares become freely tradeable.

(g) The contention by Percy and Aban that the MoU does not bind the minority shareholders interse is not correct as the reference to parties in the MoU would indicate otherwise. The Arbitration clause in the MoU refers to "parties hereto" which mean the parties who have signed the MoU in individual capacity also. Thus, there is no merit in the contention that the petition under section 9 is not maintainable against Percy and Aban.

19. On behalf of Rebellos, learned Advocate Shri Purohit, contended:

(a) There is no allegation against Rebellos regarding suppression of any documents nor there is any argument that the Rebellos have committed any breach of the MoU.

(b) Rebellos have abided by all the clauses of the MoU and they have not committed any breach thereof and, therefore, there is no question of vacating any interim protection that has been granted in their favour.

(c) Godrej filed and obtained relief in a Petition under section 9 based on the same MoU and shares were to be kept as they are till the disposal of the arbitration, there is no reason why when the other party under the same MoU

seeks similar relief, it should not be granted.

(d) In the affidavit-in-reply filed in the present Arbitration Petition, Godrej has reiterated that the MoU is valid, subsisting and binding on all the parties.

20. Before we proceed to discuss the rival contentions we make it clear that since the proceedings are under section 9 of the Act, the findings recorded hereafter are prima facie. To avoid repetition, we have not prefixed every finding with the phrase 'prima facie'.

21. Section 9 of the Act provides for an interim measure till the parties approach the Arbitrator. Grant of this interim measure is governed by the same principles which apply when interim orders are passed by the Courts. These factors being; prima facie case, balance of convenience and conduct of the parties.

22. The Apex Court in the case of **Adhunik Steels Ltd v. Orissa Manganese and Minerals Pvt Ltd**.[6] emphasized the above position by observing as under.

> "The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well known rules and it is difficult to imagine that the legislature while enacting S.9 intended to make a provision which was dehors the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver since the section itself brings in, the concept of 'just and convenient' while speaking of passing any interim measure of protection. The concluding words of the section, 'and the Court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it' also suggest that the normal rules that govern the Court

6 = AIR 2007 SC 2563

> in the grant of interim orders is not sought to be jettisoned by the provision. Moreover, when a party is given a right to approach an ordinary Court of the country without providing a special procedure or a special set of rules in that behalf, the ordinary rules followed by that Court would govern the exercise of power conferred by the Act. On that basis also, it is not possible to keep out the concept of balance of convenience, prima facie case, irreparable injury and the concept of just and convenient while passing interim measures under S.9". (emphasis supplied)

23. Thus, what we need to consider is, whether the petitioners had proved prima facie case, whether balance of convenience is in their favour, and whether they have disentitled themselves from praying for an equitable relief.

24. For assessing prima facie case in the matter at hand, examination of the clauses of MoU and other documents will be required. This examination however, need not be and cannot be as in depth as will be done at the time of main arbitration proceedings. Mr. Samdani, learned Senior Counsel relied upon the observations of the Apex Court in **Mcdermott International Inc v. Burn Standard Co.Ltd and others**[7]- where in the Apex Court has observed as under :-

> "112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct

7 = (2006)11 SCC 181

> of the parties. It is also trite that correspondence exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law." (see Pure Helium India (P) Ltd v. ONGC and D.D.Sharma v. Union of India.)

Reliance is also placed on the decision of the Supreme Court in **M.P. Housing Board v. Progressive Writers & Publishers**[8]**,** wherein it is held as under **:-**

> "Interpretation of a contract, it is trite, is a matter for the arbitrator to determine. Even in a case where the award contained reasons, the interference therewith would still be not available within the jurisdiction of the court unless, of course, the reasons are totally perverse or award is based on wrong proposition of law. An error apparent on the face of the records would not imply close scrutiny of the merits of documents and materials on record. "Once it is found that the view of the arbitrator is a plausible one, the court will refrain itself from interfering." [see Sudarshan Trading Co. v. Govt. of Kerala (1989) 2 SCC 38 and State of U.P. v. Allied Constructions (2003) 7 SCC 396].

In **M/s Sudarshan Trading Co. vs. The Govt. of Kerala and another**[9] Apex Court observed in paragraph 32 as follows-

> "The High Court in the judgment under appeal referred to the decision of the Division Bench of the Kerala High Court in State of Kerala v. Poulose, (1987-1 Ker LT 781) (supra). Our attention was also drawn to the said decision by the counsel for the respondents that if an arbitrator or the umpire travels beyond his jurisdiction and arrogates

8 = AIR 2009 SC 1585

9 = AIR 1989 SC 890,

> jurisdiction that does not vest in him, that would be a ground to impeach the award. If an arbitrator, even in a non-speaking award decides contrary to the basic features of the contract, that would vitiate the award, it was held. It may be mentioned that in so far as the decision given that it was possible for the court to construe the terms of the contract to come to a conclusion whether an award made by the arbitrator was possible to be made or not, in our opinion, this is not a correct proposition in law and the several decisions relied by the learned Judge in support of that proposition do not support this proposition. Once there is no dispute as to the contract, what is the interpretation of that contract, is a matter for the arbitrator and on which court cannot substitute its own decision."

25. It is no doubt true that these decisions refer to the scope of scrutiny at the stage of challenge to an arbitration award. What needs to be noticed however is that generally the courts have regarded detailed scrutiny and interpretation of documents as a matter within the domain of arbitrator. The scrutiny at the stage of Section 9 is to ascertain whether the petitioner has prima facie case so as to consider granting protection till the parties approach the Arbitrator. The enquiry at the stage of Section 9 of the Act is to ascertain whether the party approaching the Court has a triable dispute and if so how best the subject matter of the dispute is to be protected in the intervening period. An order passed under Section 9 is not an end in itself but is only a means to facilitate effective arbitration between the parties. The inquiry under Section 9 of the Act, is not meant to be as comprehensive as the main arbitral proceeding.

26. Keeping the above position in mind, we proceed to examine the MoU. Before we consider the clauses of the MoU, the background in which the MoU came to be executed needs to be

noticed. According to the petitioners, minority shareholders were victims of oppressive tactics adopted by Dr K.H.Gharda who holds the majority shares in the Company. The minority shareholders were in danger of being squeezed out. To save their existence in the Company, they turned to Godrej for financial help so that they could purchase shares of the Company and retain their hold. Godrej accordingly, lent certain monies and by the arrangement provided under the MoU certain shares were kept as security. The parties had also agreed that this arrangement will continue till the Company becomes a Public Company listed on the Stock Exchange. The possession of shares thus had two meanings for the minority shareholders, one is in terms of money and the other and more important, in terms of representation in the Company.

27. The dispute appears to be about the nature of interest of Godrej Industries in these shares. According to the petitioners, they have not given any cause to warrant appropriation of security by Godrej. The contention of Godrej is that the petitioners breached the MoU and thus the Godrej Industries is entitled to perfect their security. Thus, we will have to consider whether the interpretation of the MoU and the documents on record show that the petitioners have committed the breach of the MoU and have acted in such a manner that they are not entitled to the protection granted by single Judge before the dispute is adjudicated by the Arbitrator.

28. The MoU is a peculiarly complicated arrangement. The MoU is executed between Kavasmanecks, Oomarigar and Rebellos individually with Godrej, for finance. The MoU refers that the

Minority shareholders are entitled to pre-emption rights in respect of the shares of the Company and they had requested Godrej Industries to finance the acquisition of shares. The MoU records that Godrej Industries will make available finance available to purchase the shares that may be offered to the Minority shareholders. For that purpose certain modalities were laid down as under :-

(Party of the First Part = five shareholders in minority/ Party of the Other part =Godrej)

> "2. For the purpose of the purchase of shares aforesaid, the following modalities will be followed:-
>
> (i) the party of the First Part shall give to the party of the Other Part intimation of the shares available for sale and the price as mentioned in the notice offering the shares for sale.
>
> (ii) the party of the Other part shall deposit with M/s Federal & Rashmikant, Solicitors and Advocates the amounts mentioned in the notice offering shares for sale.
>
> (iii) the party of the First part shall ensure that M/s Federal & Rashmikant, Solicitors and Advocates get issued Cheques/Pay orders/Bank Drafts drawn in favour of the vendors of the shares as may be required for payment of the purchase price of the shares offered for sale to the party of the First Part and the cost of the transfer stamps.
>
> (iv) The party of the First Part will ensure that the share certificates duly having endorsed thereon the transfer of the said shares in their favour are obtained expeditiously and delivered to the party of the Other part within 7 days from the date of receipt thereof by the party of the first part.
>
> (v) The party of the First Part shall execute in favour of the party of the Other Part such writings as may

be required by the Party of the Other Part for its exercise of all rights, as may be exercisable in respect of the shares purchased with the finance made available by the party of the Other part including an irrevocable Power of Attorney in a form acceptable to the party of the Other part.

3(a). The party of the First Part shall pledge with the party of the Other Part two shares for every share purchased with the finance made available by the party of the Other Part along with :

(i) the share certificates;

(ii) Share Transfer Forms signed in blank;

(iii) Proxy Forms;

(iv) Irrevocable Power of Attorney in favour of the party of the Other Part in a form acceptable to the party of the Other Part.

The party of the Other Part agrees and confirm that on the party of the First Part handing over to the party of the Other Part the share certificates along with :-

(i) Share Transfer Forms signed in blank;

(ii) Proxy Forms;

(iii) Irrevocable Power of Attorney in favour of the party of the Other Part in respect of the shares purchased with the finance made available by the party of the Other Part, the party of the Other Part shall return to the party of the First Part equal number of shares of the party of the First Part pledged by them with the party of the Other Part in the first instance along with

(i) Share Transfer Forms signed in blank;

(ii) Proxy Forms;

(iii) Irrevocable Power of Attorney in favour of the

party of the Other Part in respect thereof

(b) In the event of the party of the Other Part requiring the party of the First Part to offer for sale any of the share purchased with the finance made available by the party of the Other Part, the party of the Other Part shall hand over to the party of the First Part such shares along with the documents mentioned hereinabove and shall receive from the party of the First Part in substitution of such shares equal number of its shares along with all the documents. The shares received as aforesaid shall be returned to the party of the First Part on receiving the sale proceeds of the shares required to be sold or on the party of the First Part executing the required transfer forms in favour of the party of the Other Part or its nominees on due compliance with the provisions of Article 57 of the Articles of Association of the Company.

(c) Further, on the party of the First Part duly complying with all the provisions of Articles 57 of the Articles of Association of the Company in respect of the shares purchased with the finance made available by the party of the Other Part and the party of the Other Part duly receiving the entire sale proceeds of the shares sold pursuant to the directions of the party of the First Part executing the required transfer forms in favour of the party of the Other Part or its nominees on due compliance with the provisions of Article 57 of the Articles of Association of the Company the party of the Other Part shall return to the party of the First Part the proportionate shares pledged along with the share transfer form and the proxy forms signed in blank, together with the irrevocable power of attorney as aforesaid".

29. The MoU also records that the minority share holders will take all necessary steps in accordance with Articles of Association and also that the parties agree and confirm that it is their intention to convert the Company into a Public Limited Company

listed on recognized Stock Exchange. It was also agreed that both, the Minority Shareholders and Godrej, would not directly or indirectly deal with other shareholders of the Company or the Company itself in respect of the shares. It was also provided that the MoU will continue in force till shares of the Company are listed on a recognized Stock Exchange.

30. As we have indicated earlier, a detailed interpretation of this MoU will be the subject matter of the Arbitration and we would leave the detailed scrutiny to the Arbitrator. Plain reading of the MoU reveals following broad features:

The agreement is between the Minority shareholders and Godrej for purchase of certain shares of the Company which the Minority Shareholders, for lack of finance, could not purchase on their own. The Minority Shareholders sought the shares so as to retain their status as sizable Minority in the Company. Godrej was to provide the finance and keep some shares, as indicated in the MoU, as a pledge. This Agreement was to continue till the Company was listed on Stock Exchange and the shares were freely tradeable. No signatory to the MoU were to act in the manner prejudicial to each other's interest. The parties agreed to work towards making the Company into a Public Limited Company listed a recognized Stock Exchange.

31. The petitioners filed the present petition under Section 9 of the Arbitration Act because the Godrej unilaterally tried to lodge shares of the petitioners with the Company and the Arbitration petition filed by Godrej was sought to be withdrawn by them and it came to light that Minority Shareholders were no longer

together, and the break away group was supporting Godrej. In the Arbitration Petition, the Petitioners enumerated their apprehension and the reason for moving an application under Section 9, in the following words-

> "6. In the circumstances, it is submitted that there is a valid and subsisting Memorandum of Understanding dated June 3, 1992 between the Petitioners and the Respondents. Under the Godrej MOU the parties thereto have undertaken that they shall not sell, alienate, dispose of or transfer the shares held by any one or more of them until the shares of GCL are listed on any recognised Stock Exchange. The Godrej MOU has been acted upon and implemented by the parties thereto and is binding on all parties and the covenants contained therein enure for the benefit of all parties equally. The 6th Respondent invoked the Godrej MOU and sought an injunction against the other parties from sellling, alienating, disposing of or transferring the shares held by them in GCL. This injunction has been in force since May 12, 2009. On March 13, 2012 the volte face of the 6th Respondent in seeking leave to withdraw the arbitral proceedings initiated by it and seek vacation of the interim protective order clearly reveals that a secret and clandestine arrangement has been arrived at between the 6th Respondent in collusion with the 1st to 3rd Respondents to deal with the shares of GCL in breach of the Godrej MOU. If the other parties to the said MOU are permitted to independently sell their shares, the Petitioners shareholding will be rendered valueless. Besides, such an action would be contrary to the fundamental understanding between the parties which required all of them to abide by the terms of the Godrej MOU till the ultimate objective of having the shares of GCL listed on the stock exchange is achieved. Furthermore, the 6th Respondent is in possession of valuable shares of the Petitioners accompanied with powers of attorney. These shares were pledged with the 6th Respondent. The value of these shares which are available with the 6th Respondent is far in excess of

the amounts financed by the 6th Respondent. The Petitioners apprehend that the 6th Respondent will deal with the Petitioners' shares that are lying with the 6th Respondent in a manner adverse to the Petitioners" interests and in a manner contrary to the Godrej MOU.

7. As stated above, the 1st to 3rd Respondent, have already evinced their desire to dishonour the Godrej MOU and to sell their shares independently. The 6th Respondent, by its act of withdrawing the arbitral proceedings, has clearly exposed its desire to act in a manner contrary to the Godrej MOU and in a manner adverse to the rights of the Petitioners. The Petitioners have reason to believe that the 1st to 3rd Respondent together with the 6th Respondent are trying to sell the shares of GCL in collusion with one another and in collusion with Dr.Gharda so as to cause valuable loss, damage and injury to the Petitioners and in breach of the terms and conditions of the Godrej MOU which is valid, binding and subsisting. If the parties are permitted to breach the terms of the Godrej MOU the loss caused to the Petitioners would be immense in as much as the value which the shareholding of the Petitioners would fetch in a listed company cannot be compared to the value of an unlisted company. Besides, the value of the Petitioners' shartes that are in custody of the 6th Respondent is far in excess of the amount financed by the 6th Respondent. It is significant that the 6th Respondent in Godrej's Arbitral Proceedings has stated that it has advanced an amount of Rs.10.34 Crores to the minority shareholders. It has, Godrej's Arbitral Proceedings also stated that it is in possession of 6221 equity shares. As per the news report relied upon by the 6th Respondent the value of GCL is in the region of Rs.2400 crores and consequently the value of the shares that the 6th Respondent holding on will be in the region of Rs.233 Crores. The Petitioners are always ready and willing to abide by and comply with and perform the Godrej MOU".

32. First question is whether the parties are still bound by the MoU. The petitioners have asserted that the MoU continues to

operate and is binding on all the parties. A reply has been filed on behalf of Godrej in which it is acknowledged and asserted that the MoU is subsisting and binding on all the parties. Thus we proceed on the premise that the MoU subsists and continues to bind the parties.

33. The petitioners have based their case on the negative covenant contained in Clause 16. It is the contention of Godrej Industries that Clause 16 does not operate against Godrej Industries, but it is for the benefit of Godrej. Clause 16 reads as under -

> (16). "The parties hereto agree and undertake that till the Company goes public and or its shares are listed in any recognized stock exchange, the parties shall not sell, alienate, dispose off or transfer or create any interest or right in a third party rights in any shares registered in their respective names or in which they have a beneficial interest. It is clarified that nothing herein will restrict the transfer among the designated nominees/limited nominees defined hereinabove".

Both sides have advanced argument as to the interpretation of the words "the Parties hereto" in the above clause. The "Parties hereto" in its plain meaning will mean all the parties to the agreement. The Agreement is signed by Godrej and the Minority Shareholders individually. The MoU uses different terms, such as, 'Party', 'Parties hereto', ' Party of the First Part' and 'Party of the Second Part'. Thus, different phrases are employed through the MoU. In Clause 16 the only phrase employed is "Parties hereto". We have adverted to this aspect in detail later in the judgment while construing clause 28 which also uses the same phraseology

i.e. 'parties hereto'. At this place we only refer to our conclusion on this aspect that 'parties hereto' means all parties, which includes Godrej as well. It cannot be said that Clause 16 is not meant to operate against Godrej. This Clause is wide enough to include the shares registered in the name of Godrej and the shares in which they claim beneficial interest. Clause 16 will operate as against all the signatories to the MoU including Godrej.

34. It was then contended on behalf of Godrej that even assuming Clause 16 is applicable to Godrej, the Clause cannot be read in isolation. Clause 16 need to be read with Clause 9 and Clause 21. These Clauses read as under :

Clause 9 :-

> "The party of the First Part hereby undertakes to take all necessary steps in accordance with the Articles of Association of the Company and to assist the party of the Other part in every way to have the transfer of the shares registered by the Company in the name of the party of the Other Part".

Clause 21 :-

> "Both parties agree, confirm and declare that it is their intention to convert the Company into a public limited Company listed with a recognized stock exchange as soon as possible.

35. It was contended that the petitioners have taken steps contrary to Clauses 9 and 21. The original petitioners have taken steps to ensure that the Company does not become public and have opposed the declaration of the Company becoming public. It was, contended that the Petitioners have opposed registration and

transfer of 3199 shares and also obstructed transfer of 461 shares. Furthermore the petitioners have not been paying dividends on the shares purchased from the loans advanced by Godrej. Reliance is placed on the judgment of the learned Company Judge of this Court in Company Appeal No.24/2010. In this appeal, the original petitioners contended that the Company is not a public Company. Thus, the original petitioners are creating a situation whereby Clause 16 will never come to an end and monies advanced by Godrej will continue to be locked up and if injunction is granted against Godrej from perfecting the security then the entire agreement will become unworkable. It was, therefore, contended that the petitioners acting in breach of obligation of the MoU are not entitled to protection under the other clauses of the MoU. Reliance is placed by Mr.Divan, learned Senior Counsel on the decision of the House of Lords in the case of **Alghussein Establishment**[4], wherein the House of Lords observed as under :-

> "The principle that in the absence of clear express provisions in a contract to the contrary it was not to be presumed that the parties intended that a party should be entitled to take advantage of his own breach as against the other party was not limited to cases where a party was relying on his own wrong to avoid his obligations under the contract but applied also where a party sought to obtain a benefit under a continuing contract on account of his breach."

On the other hand, it has been urged on behalf of the original

4-(1991) 1 ALL ER 267

petitioners that they have not committed any breach of the MoU. It is submitted that the contention of the petitioners was that though the Company has become deemed Public Company, it was entitled to retain Article 57. It was urged that in case of Public Company, which is not yet listed on the Stock Exchange, articles can provide for right of pre-emption. Petitioners contended that they never opposed listing of the Company on the stock market and they are always willing to do so.

36. We have gone through the judgment of the learned Company Judge referred to above. We do not find from the judgment or the contentions of the petitioners reproduced in the judgment that the petitioners were opposing the listing of the Company on the Stock Exchange. Reading of the MoU shows that the arrangement contemplated under the MoU was to continue till the shares of the Company are listed on the Stock Exchange and become freely tradeable. The apprehension of the petitioners was that Dr Gharda will dispense with the right of pre-emption creating a situation whereby Minority Shareholders will not be able to sell their shares in the open market and realize their market value but will be forced to sell their shares to Dr.Gharda at the price to be determined by him. Consequently the Minority Shareholders will be squeezed out. This would not be possible if the Company gets listed on registered Stock Exchange and shares become freely tradable. It is for this purpose, MoU was entered into and free marketibility of shares is the end situation the Minority Shareholders have been striving for. There is no question of opposing the status of the Company becoming a public company as the company any way by virtue of its turnover was

already a deemed public company. The MoU was not regarding the Company becoming Public Company alone, but making it's shares become fully tradable on the stock exchange. We have not been shown that the petitioners anytime opposed the listing of the shares on a recognised stock exchange. According to us therefore the petitioners have not committed breach of Clause 21 of the MoU. The attempt of the petitioners is only to ensure that the petitioners are not deprived of their shareholding before the shares become fully tradeable on the stock exchange.

37. The second breach of the MoU alleged was that the petitioners were opposing registration and transfer of 3199 shares and obstructing transfer of 461 shares. It is submitted on behalf of petitioners that as far as 461 shares are concerned they have never opposed are not opposing registration in the name of Godrej Industries if Godrej Industries adhere to negative covenants stipulated under the MoU. It has to be noted that before the dispute arose between the Parties, Godrej had assured the petitioners that shares were only being treated as pledge for the loan. However, now the petitioners apprehend that Godrej is trying to deal with the shares for the purpose of getting control of the Company along with Dr Gharda. Godrej Industries is now trying to deal with the shares so as to defeat the right of Minority Shareholders. These 3199 shares constitute approximately 5% shareholding of the Company. 5% becomes crucial when it is pooled together with shareholding of Dr Gharda and Percy, Aban Kavasmaneck and Oomrigar. This group will acquire special majority. Once special majority is reached the significant minority will be extinguished. We find merit in the contention that the

opposition by the petitioner in respect of 3199 shares being dealt with by Godrej Industries is because Godrej Industries is no longer trading the shares as means of recovering the loan but as means of getting control of the Company. Such action would, obviously, run against the spirit of MoU and frustrate the very purpose for which it was entered into. We find that by opposing the transfer of 3199 shares to Godrej, in these changed equations, the petitioners did not commit any breach of Clause 9 of the MoU.

38. Third breach alleged to be committed by the petitioners is that under the MoU, the petitioners were required to pay dividends which they have failed to pay. It has been placed on record by the petitioners that Godrej never demanded dividends for the last 22 years. In fact, the non-payment of dividend was not even considered as a breach till 5 July, 2012 when Godrej filed further affidavit. It appears to us that in view of the change of intention by Godrej, even the issues which were never considered to be breaches are now sought to be raised against the petitioners. If for the last 22 years there has never been a demand for payment of dividend, it clearly means that Godrej never considered non-payment of dividend as a breach of the MoU. The argument of non-payment of dividend is advanced to some how create a case to restrain the petitioners from invoking a negative covenant stipulated under the MoU. Thus, three breaches of the MoU, which according to the Godrej disentitle the petitioners from relying on the MoU, do not constitute any breaches.

39. It was then urged on behalf of Godrej that the Clause 16 of the MoU cannot be pressed into service as it is inoperative on account of impossibility. It was urged that since the original

petitioners are in minority they do not have enough share holding to ensure that the Company is listed on a Stock Exchange. This argument has been countered by the petitioners by pointing out that Godrej Industries have taken contradictory stand in the Arbitration Petition filed by them and also that the collective share holding of the Minority Shareholders has, in fact, gone up from 26% to 33%. We have been shown averments made on behalf of the Godrej in the Arbitration Proceedings filed by Godrej. In those proceedings Godrej had categorically asserted that parties are bound by the MoU, which is valid and subsisting. It was also asserted that MoU is not impossible to be performed, and not void for uncertainty.

40. The argument of Godrej based on impossibility is thus contradictory to the stand taken on affidavit filed by it in the earlier arbitration petition. Apart from this position, petitioners have pointed out that when the MoU was entered into in the year 1992, the collective shareholding of the Minority Shareholders was 27%. Thus, both Godrej and Minority Shareholders believed that 27% share holding was sufficient to enable the parties to work towards the Company being listed on the Stock Exchange. At that time, no apprehension was raised by Godrej in respect of lack of share holding of the minority shareholding to achieve this object. If the parties found 27% shareholder was then sufficient to achieve the object of MoU, one fails to understand how an argument based on an impossibility can be advanced when the shareholding has now increased from 27% to 34%(approx). We thus do not find any substance in this argument.

41. Thus, the negative covenant binds Godrej as well and the

argument that the petitioners have committed breaches of the MoU do not impress us. In any case, all these points will be gone into in detail during the arbitration proceedings. Thus, we are in agreement with the learned single Judge that the petitioners had established that they had a prima facie case based on the MoU and that there is enough prima facie material to show that the negative covenant regarding dealing with the shares till the Company is registered or the Company is listed on the Stock Exchange is applicable to all the signatories to the MoU.

42. Now we consider the argument advanced by Godrej that the petitioners are not entitled to any relief on the ground of suppression of material facts. It was vehemently contended on behalf of the Godrej Industries that Jer, Darius Kavasmaneck suppressed the loan-cum pledge agreement and power of attorney which were executed subsequently to the MoU dated 3 June 1992. A letter written by Darius Kavasmaneck on 14 March 2005 to the Godrej Industries in which Darius Kavasmaneck accepted the transfer and lodging of the shares was also alleged to have been suppressed. It was contended that these two documents are of vital importance and since Jer and Darius Kavasmaneck did not file them along with the Arbitration Petition, they cannot be granted any relief. Counsel for Godrej relied upon the decision in the case of **S.P.Chengalvaraya Naidu**[1] in particular the following observations in paragraphs 5 and 6 of the decision -

> "5. ..... One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-

1 = (1994) 1 SCC 1

> grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation.
>
> 6. …… Non-production and even non-mentioning of the release deed at the trial is tantamount to playing fraud on the court. We do not agree with the observations of the High Court that the appellants-defendants could have easily produced the certified registered copy of Ex.B-15 and non-suited the plaintiff. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party".

In **K.D.Sharma's** case [2] (supra) in paragraph 27 the Apex Court observed as under :

> "The Court defined "fraud" as an act of deliberate deception with the design of securing something by taking unfair advantage of another. In fraud one gains at the loss and cost of another. Even the most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam".

In **Dalip Singh** [3] (supra), the Apex Court in paragraph 2 observed as under :-

> "2. In the last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They

2 = (2008) 12 SCC 481
3 = (2010) 2 SCC 114

> shamelessly resort to falsehood and unethical means for achieving their goals. In order to material facts, his application is liable to be dismissed. We accordingly dismiss the special leave petitions."

43. The position of law enunciated in the cases above is unequivocal that the party who seeks equitable relief, must approach the Court with clean hands and shall not suppress any material documents to gain an unfair advantage. It is however urged on behalf of the petitioners – Jer and Darius, that they are not guilty of any suppression. It was further urged that the principles laid down in the above judgments would apply to cases where the document favourable to the other side is concealed from the Court and order is obtained without notice to the other side. It is in such cases, where a litigant dishonestly tries to obtain an exparte order from the Court by concealing crucial material, he may be disentitled to any equitable relief. It was urged that such is not the case in the present matter. The documents are in full knowledge of the Godrej Industries. In fact, the Power of Attornees and agreements have been referred to in the Arbitration proceedings filed by Godrej earlier.

44. Application for ad-interim relief was moved by the petitioners with notice to the Godrej Industries. There is reference to the pledge-cum-loan agreement and power of attorney in the arbitration petition. The impugned order came to be passed after both the parties had full opportunity of producing documents on record. The said MoU and power of attorney were available on the record of the learned single Judge. It cannot be said that the petitioners' conduct is of such a grave nature that the injunction

granted in their favour should be vacated on the ground of suppression of documents when the MoU and the arbitration petition itself refers to execution of loan cum pledge agreement and power of attorney. It has been pointed out that Mr.Adi Godrej had agreed by letter dated 13 June 1992 not to claim interest or recall loans under these pledge agreements and power of attorneys. These documents were thus not the principal documents on which relief was being sought. These documents were the part of defence of Godrej, which had full opportunity to defend the application. Matter was fully heard by the learned Judge and then impugned relief was granted. In view of these circumstances, we do not find that the conduct of Jer, Darius Kavasmaneck was blameworthy, as alleged. On the other hand, the conduct of Godrej Industries in not placing on record letter dated 13 June 1992 wherein Mr Adi Godrej reiterated that notwithstanding the loan-cum-pledge agreement, Godrej Industries will not enforce loans or claim interest, needs to be noticed. In any case, no such allegation can be made and has not been made against Rebellos that they have suppressed any documents.

45. We now turn to the principal argument on behalf of Percy and Aban Kavasmanecks that the Clause 28 of the MoU does not provide for arbitration between the minority shareholders. Clause 28 reads as under :

> "Any dispute or difference between the parties hereto including in respect of any breach or alleged breach hereof, shall be referred to the sole arbitration of a person to be mutually agreed upon by the parties hereto. The sole arbitrator shall have summary powers and the Arbitrator

shall not be required to give reasons for his award. The place for arbitration shall be at Bombay".

It was contended that the MoU is executed between 'party of the First part' i.e. the Minority shareholders and 'party of the Second Part' i.e Godrej. The agreement is only between these two parties and thus it was never contemplated that dispute between minority members interse will be referred for Arbitration.

It was urged that 'Parties hereto' referred in clause 28 above means only "party of First Part" and "party of Second Part". It was also urged that the Minority shareholders entered into a separate MoU on the same day and that MoU does not contain any clause for arbitration. Relying on the interpretation of the various terms included in the MoU and the supplementary MoU amongst the minority shareholders, it was contended that there was no agreement for arbitration between the minority shareholders and, therefore, a petition under Section 9 of the Act was not maintainable. It was further contended that the absence of arbitration agreement goes to the root of the matter and this issue has to be considered in the proceedings under section 9 of the Act. It was urged that learned single Judge misconstrued the argument to mean that it was regarding non-arbitrability of the dispute. Reliance was placed on the decision of the Apex Court in **National Insurance Co. vs. Boghara**[5] (supra).

46. We have gone through the decision of the Apex Court in the case of **National Insurance Co. Ltd**[5](supra). The decision was

5 = (2009) 1 SCC 267

rendered in the context of the inquiry under Section 11 of the Act and not under Section 9 of the Act. Be that it as it may, we will proceed to consider whether clause 28 excluded the other signatories from its operation. Firstly, the MoU will have to be read, as a whole, to understand the meaning and purport of the phrases employed in it. In **Odgers' Construction of Deeds and Statutes, Fifth Edition Chapter 13 Page-237,** the author refers to general rule of construction of a document. The passage reads as under **:-**

> **"1.** Generally same rule as in document.
>
> It has been said that no further rules of construction should be placed upon statutes than upon any other legal document, and Bowen L.J. Said : "The rules for the construction of statues are very like those which apply to the construction of other documents, especially with regard to one crucial rule, viz., that, if possible, the words of an Act of Parliament must be construed so as to give a sensible meaning to them. The words ought to be construed ut res magis valeat quam pereat." " It is said that the court draws no distinction between statues and other written documents. I am not prepared to say that this is true to the full extent." 1. *[Curtis v. Stovin (1989) 22 Q.B.D. 512 at p.517: see also Conadian Pacific Steamships Ltd v. Bryers [1958] A.C. 485 p. 501 per Viscount Kilmuir. 2. Camden (Marquis) v. I.R.C. [1914] 1 K.B. 641 at p. 648 per Cozens-Hardy M.R.]*

47. There is no absolute bar in employing the rules relating to interpretation of statutes, for the purpose of interpretation of deeds and documents, in a given case. One of the settled principles of interpretation of statutes is, when in relation to the same subject matter different words are used in the same instrument, presumption arises that they are used not in the

sense, but carry different meanings. This principle can be borrowed for the construction of the present MoU. The MoU refers to the parties in several ways. The parties are referred to as 'parties', ' parties of the first part' and 'parties hereto', 'both parties'. It is significant to note that the expression 'parties hereto' appears both in Clause 16 of the MoU and Clause 28 of the MoU, which are the most material clauses in the present case. In many paragraphs the reference is to 'party of the first part' and 'party of the second part'. In some paragraph, such as paragraph 15, there is reference to 'either of the parties'. In paragraph 21 reference is made to 'both parties'. However, the two clauses i.e. 16 and 28 which are subject-matter of the debate, have used the phrase the “parties hereto”. What we find clinching is that immediately after clause 28, which is the last clause which employ the phrase 'parties hereto', concluding recitals and names of all the signatories and their signatures appear. It reads as under :

> “Clause 28
>
> Any dispute or difference between the parties hereto including in respect of any breach or alleged breach hereof, shall be referred to the sole arbitration of a person to be mutually agreed upon by the parties hereto. The sole arbitrator shall have summary powers and the Arbitrator shall not be required to give reasons for his award. The place for arbitration shall be at Bombay”.
>
> “IN WITNESS WHEREOF, the parties hereto have signed this agreement on the date and at the places set forth below:
>
> “Signed and delivered by the
>
> within named

Jer Rutton Kavasmaneck) Sd/-

Darius Rutton Kavasmaneck) Sd/-

Maharukh Murad Oomrigar) Sd/-

Percy Rutton Kavasmaneck) Sd/-

Aban Percy Kavasmaneck) Sd/-

Colin Mario Rebello) Sd/-

Conrad Anthony Rebello) Sd/-

In the presence of

Sd/-

Sam Nariman Polishwala

Victoria Building, S.A.Brelvi Road

Bombay – 400 001.

Signed and delivered)

by the within-named Godrej Soaps)

Limited, by the hands of Mr A.B.)

Godrej, Managing Director)

of Godrej Soaps Limited.)Sd/-

In the presence of

Sd/-" (emphasis supplied)

48. The concluding recitals throw light on the meaning of the phrase "parties hereto" employed in the MoU. The phrase ' parties hereto ' employed in clause 28 is followed by use of the same phrase in the concluding recital which immediately followed by names of all the minority shareholders individually and Godrej

Industries indicates that 'parties hereto' means all the signatories to the MoU. If this is the position then on the plain reading of Clause 28, it cannot be said that the Arbitration Agreement provided therein, applies only to Minority Shareholders on one side and Godrej Industries on the other side. As noted earlier this reasoning will apply to interpretation of Clause 16 wherein also the phrase 'parties hereto' applies, to conclude that the negative covenant therein applies to Godrej also.

49. Apart from the language of this Clause, the surrounding circumstances indicate that the arbitration clause is to cover all the signatories to the MoU. The MoU came to be executed when minority shareholders were struggling against Dr.Gharda employing oppressive tactics to squeeze Minority Shareholders out of existence. It was crucial for the minority shareholders to stay together to remain as a significant minority. Individual holding of each of the Minority Shareholders had to be pooled together as it was vital for their collective shareholding. The position of the minority shareholding was so precarious that even if some of the Minority Shareholders were to part with their shares, minority shareholders together would cease to be a significant minority. It was, thus, absolutely essential that the minority shareholders stayed together and acted in one unit. Thus, the parties at the time of executing the MoU were aware that if any dispute arises, even between the Minority Shareholders, in respect of the shares, the object of all Minority Shareholders remaining together as the significant minority and getting the Company listed on a registered stock exchange would be lost. Thus, it cannot be said that dispute amongst the Minority

Shareholders was not contemplated when the MoU was executed with Clause 28 herein. The interpretation of Clause 28 and circumstances in which it was executed do, therefore, indicate that it was intended to cover all the signatories to the MoU. We, therefore, do not agree with the submission made on behalf of Percy and Darius Kavasmaneck that there is no arbitration agreement between them and the other parties.

50. The next ingredient for grant of injunction is balance of convenience. To put this balance in perspective, a brief repetition of the background is necessary. The MoU is in respect of the shares of the Company. There is dispute between the Minority Shareholders and Dr Gharda, the majority shareholder. It is alleged that Dr Gharda is trying to break up the minority shareholders. Minority Shareholders were struggling to retain their existence in the Company when they turned to Godrej Industries for financial assistance to purchase the shares. Godrej in their pleadings and in the correspondence has maintained that the shares were held by them as pledge for the loans advanced. These shares are not common commodities which can be just bought and sold, with no other value attached to it. It is clear that these shares are not to be computed merely in terms of money. They also denote tools for the control of the Company. The shares were not acquired for the purpose of investment or gaining dividends alone but to retain the status of the minority shareholders as a significant minority. If the shares are transferred or sold, not only there will be trading in terms of money but will tilt the precarious balance of shareholding in the Company. These shares are not to be treated as mere pledge, but

a device to gain control of the Company. The injunction sought is that the shares should remain as they are till the parties go for arbitration. The importance of this status quo till the dispute is resolved by the Arbitrator, is immense for the petitioners, as otherwise they will lose their toe-hold in the Company. With Godrej allegedly siding with Dr Gharda and two Kavasmanecks going along with them, the petitioners will be reduced to a non-significant minority. Once this takes place before the Company is listed on registered Stock Exchange, position of the petitioners will be gravely prejudiced. The position will become irreparable once a significant majority is reached in favour of Dr.Gharda taking his shareholding closer to 75%. Important decisions in the Company will be taken swiftly and any opposition of the petitioners will be crushed. If that happens, the whole purpose of the MoU will be defeated.

51. Inspite of the detailed arguments made on behalf of the Godrej, no special reason why shares cannot remain in the same position till the arbitration proceedings is shown except the argument that Godrej cannot be stopped from perfecting their security. As noted above, the Godrej had in their letter dated 13 June 1992, immediately after execution of the MoU on 3 June 1992, had indicated that they will not enforce loans or claim interest notwithstanding the agreement. The tussle is not for the monetary value of the shares, but what the shares represent. The dispute is no longer for money but for the control of the Company. Once this fact is established before us, it will be too naïve to assume that Godrej is only looking at the shares as a monetary investment. This was evident during the course of the hearing

when an offer was made on behalf of the petitioners to return the amount of loan in return of shares from Godrej, there was no response of that offer from Godrej. The petitioners while making the offer of payment of principal amount drew our attention to the letter of Mr Adi Godrej dated 13 June 1992, wherein it was stated that Godrej is not claiming any interest on the loan amount. Though on record Godrej keeps asserting that the shares are merely pledged, it's actions, the surrounding circumstances and the arguments advanced show that Godrej is trying to deal with the shares, prima facie, in furtherance of its intention to side with Dr Gharda and to extinguish the opposition of Minority Shareholders. This being the postion, the balance of convenience clearly lies in favour of the petitioners. The shares in question need to be kept as they are till the parties approach the Arbitrator. The true purport of the negative covenant can be decided by the Arbitrator.

52. Therefore, we find that the petitioners have made out a strong prima facie case and balance of convenience is in their favour. The submissions of the appellants that the petitioners do not deserve any equitable relief and that there was no arbitration clause between the Minority Shareholders interse is without any substance. The learned single Judge has considered all the aspects of the case and has found that the Arbitration Petition requires to be made absolute. There is no reason to take a different view in the matter. Accordingly, all the appeals are dismissed.

In view of our finding recorded above, we will also have to allow the arbitration applications filed by the petitioners under

Section 11 of the Act for appointment of Arbitrator.

Arbitration Application Nos.219 and 220 of 2012 are accordingly allowed, with name of the Arbitrator indicated in a separate order passed in these applications.

CHIEF JUSTICE

N.M.JAMDAR, J.